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IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
STEPHEN G. BELL,	)	**Supreme Court #SC97682**
#2 778 Windberry Ct.	)	
St. Louis, MO 63122-6578	)	
	)	
Missouri Bar No. 30286	)	
	)	
Respondent.	)	

INFORMANT'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 Mo. Rev. Stat. § 484.040 (2000).

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STATEMENT OF FACTS

I. INTRODUCTION

This case is before the Court following Informant's rejection of the recommendation of the disciplinary hearing panel ("DHP") that Respondent be suspended indefinitely from the practice of law with no leave to apply for reinstatement until after six months; suspension to be stayed and Respondent placed on probation for six months.

The DHP properly found the Respondent in violation of Rules 4-1.7(a)(2), 4-1.8(j), and 4-8.4(d) for engaging in sexual relations with his dissolution client when no sexual relationship existed between them when the client-lawyer relationship commenced.

Informant agrees that a six-month suspension from the practice of law is appropriate but strongly disputes Respondent is eligible for probation under Rule 5.225(a)(2).

II. DETAILED FACTUAL STATEMENT

Stephen G. Bell ("Respondent") was licensed as a lawyer in Missouri on September 18, 1982. His bar number is 30286. The address Respondent designated in his most recent registration with The Missouri Bar is: #2 778 Windberry Ct., St. Louis, MO 63122. **App. 363**.[1]

[1]The facts contained herein are drawn from the record of the disciplinary proceeding, the testimony at the hearing, and the exhibits received. Citations are denoted by the appropriate Appendix page, for example "**A __**".

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Jane Doe[2] would become Respondent's client for the dissolution of her marriage. **App. 363**.

Jane Doe became a board-certified nurse practitioner in 2002. **App. 55**. She met a doctor, 19 years her senior, and they were married in 2004. Her husband was married previously and has two children. **App. 59**. Doe described her husband as generous, warm, and quiet, where she was more outgoing. **App. 57-58**. They have two children, a son (now 12), and a daughter (now 9). **App. 58.**

Doe described their financial life as comfortable, although her husband "would say half of his take-home pay went to his ex-wife." **App. 60**. Doe stayed home and raised their children. She stated she was fortunate to stay home because "our son had some disabilities when he was younger." **App. 60**. Doe was able to be sure her son received speech therapy, occupational therapy, physical therapy, [applied behavior therapy], and equine therapy. "It was a full-time job." **App. 60-61**. In addition to her husband's salary, they had some bank stock which produced supplemental income. **App. 61**.

Sometime in 2012, Doe noticed her husband "started getting skinny." **App. 62.** Doe thought it was due to aging, and she trusted her husband because he was a physician. **App. 63**.

In 2014, Doe's husband called her from work and acknowledged he had become addicted to pain pills, which was why he was losing weight. **App. 63**. Doe was upset and angry he hid his problem from her. **App. 63**. Initially, their priest referred Doe's husband

[2] Jane Doe is a pseudonym for the complainant pursuant to this Court's protective order.

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to Catholic Family Services, but Doe was concerned her husband was not receiving the necessary counseling. **App. 64**. At Doe's insistence, her husband reported his problem to the medical board, which recommended outpatient counseling. **App. 65**. Her husband refused counseling, insisting he was clean. **App. 65**. Her husband was upset with Doe for making him report to the medical board because the board said if he did not go through the counseling, everything he and the board discussed would be admissible in court if he had a problem down the road. **App. 64-65**. He told Doe it was "[her] fault… if something were to happen and his job were to be in jeopardy." **App. 65**.

Doe later discovered her husband was still using. **App. 66**. In March 2015, her husband fell off a ladder at home and broke two ribs. He was wanting more and more pain pills, and Doe discovered he would take pills while consuming alcohol. He started forging scripts under family members' names and picking them up at the pharmacy. The DEA commenced an investigation, and her husband was arrested in December 2015. **App. 68-69**.

Doe's husband went into an out-of-town rehab program for physicians from December through the beginning of February 2016. When he returned, he was emotionally unavailable to Doe. **App. 71**. He had lost his job. Doe was sad and frustrated, as she was trying to keep everything together. "I'd try to tend to the kids, try to dig out from this mess." **App. 71**. Her "mind was just spinning." She was unemployed at the time. "I mean I hadn't worked for 10 years." She decided to consult a lawyer. **App. 72**.

Based on a referral from a close friend, Doe met with Respondent for 1.7 hours at his office in Kirkwood in March 2016 to consider her options. Doe testified she was an

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"emotional wreck" at the initial meeting. She "sat there and I cried, and I cried, and I cried, and I was a wreck. And I looked a wreck after it." **App. 74**. She felt humiliated and sad, embarrassed and ashamed. Respondent disputes that Doe was upset during the initial meeting, testifying he believes she was just "mad." **App. 170; 202-203.**

On April 4, 2016, Doe emailed Respondent: "Hi, Steve, it was so great to meet you a few weeks ago, but I do not want to get a divorce at this time." **App. 77**. Doe felt she should give things more time. She still loved her husband and wanted to make things work. **App. 75-77**.

In mid-June 2016, a criminal felony information was filed against Doe's husband. **App. 457**.

On June 28, 2016, Doe emailed Respondent stating she was "overwhelmed" and asking if she could get "full custody" of her children because they were "most important" to her. **App. 78**. The next day, she asked Respondent to email her the divorce papers. **App. 80**.

Doe met with Respondent a second time on July 18, 2016. Doe testified that during the meeting Respondent told her she was an "8 1/2," while her husband was only a "4," a comment Doe understood as an indication of Respondent's personal interest in her: "And I remember him saying, 'the guy's a loser'. He just threw away this young wife, two kids, house, his practice. So, when he said that to me, I thought he was interested in me. That's nothing that – I was married for 10 years. It's not commonplace for someone to say something like that to me. So, I thought this man [Respondent] was – developed an interest in me and liked me." **App. 81-82**. Respondent does not recall making the statement but

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testifies using number ratings is a common way divorce lawyers refer to clients. **App. 232-233; 271-272.**

Following their meeting, Doe and Respondent began social texting and telephoning frequently, sometime for two hours a night, which Doe believed was the beginning of a relationship with Respondent:

> Steve and I texted and talked on the phone a lot, sometime a couple hours each night. We'd talk about life, previous relationships, marriage, hopes, dreams, what we wanted. We just got to know each other. It was a huge distraction for me from my divorce at hand and from making thinks okay with my husband. **App. 82**.

According to Doe: "The text messages were flirty. The text messages were personal." **App. 83**.

Respondent admitted he and Doe "talked and communicated electronically during the representation." **App. 308**:

> We developed a friendship that I believed was productive as we tackled the issues arising in Ms. Doe's divorce. In my opinion, our friendship ultimately headed in the wrong direction (toward an intimate relationship) at the wrong time (when I was still Ms. Doe's counsel), so I abruptly stopped the direction our relationship was developing. **App. 308-309**.

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On July 26, 2016, Doe again asked Respondent about full custody of the children. **App. 90**. That day, Respondent sent Doe an e-mail outlining divorce considerations, specifically:

1. There is no end in sight to her husband's ex-wife's modification proceedings which she already filed. The marital estate will shrink to the extent his ex-wife garnishes his income and assets;
2. The marital estate will continue to shrink due to general financial obligations of the household;
3. St. Louis is better than St. Charles for filing for divorce because St. Louis County judges are more likely to award maintenance and the marital assets are frozen upon filing under local rule;
4. Doe would likely not get maintenance but should "seek a disproportionate award of marital property because of her [Husband's] marital fault."
5. There is no "winner on the horizon, so this may be a matter of damage control." **App. 338**.

Doe was scared about the many issues Respondent raised. **App. 84-89; 333.**

On July 29, 2016, Doe told Respondent she would like to file for divorce. **App. 338.**

On July 30, 2016, Doe complained to Respondent that her husband was dropping by our "marriage house at his leisure and saying that it is his house too." **App. 340**.

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On August 1, 2016, Respondent filed Doe's petition for dissolution.

Soon after filing, however, Doe again experienced doubts about whether getting a divorce was the right thing. She told Respondent to "please press pause on the divorce proceeding." She wanted to try and "make things work" with her husband. **App. 91-92**. She went on a date night with her husband and another couple, which she described as "awkward." The next morning, she discovered a note in her garage from her husband indicating that their focus should just be on "co-parenting" for now. **App. 92-93**. She then instructed Respondent to move forward with her dissolution. **App. 93**.

The personal texting and telephone calls between Doe and Respondent continued, and Doe invited Respondent to meet her for a drink at a local wine bar. Doe understood that Respondent wanted to be careful who would see him in public because his practice was nearby. They each had one or two glasses of wine and shared an appetizer. **App. 94**.

Respondent and Doe then went to Respondent's house. Respondent showed her a bottle of Bailey's, "which he knew was my favorite drink. So, we had a drink." **App. 94**. They kissed and touched each other but did not engage in intercourse or oral sex. **App. 95; 239.**

Doe believed she and Respondent "were already in a relationship because we texted and talked for hours and hours. And I knew this man. And I thought he was funny. And this man was attracted to me and I was scared. I was desperate. I was so alone. And he knew my whole story. He knew [my husband's] story of what I told him. And he accepted me, in spite of all that. So, you know, I felt that we were in a relationship." **App. 95**.

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Doe visited Respondent at his office on September 14, 2016, taking lunch there and kissing. **App. 96**.

On September 21, 2016, Doe's husband was sentenced for his felony conviction. **App. 97**.

On September 22, 2016, Doe met with her priest who advised her to see if she should still "try" to make it work with her husband. She would call her husband a time or two after that, but he was emotionally despondent, and it didn't work out. **App. 98**.

On September 23, 2016, Doe went out for drinks and dancing to a downtown nightclub with her friends. Respondent was at his local high school reunion. She texted Respondent asking if he wanted her to come over. He said, "yes," and she arrived at about 1:30 a.m. on September 24. Doe said they drank Bailey's again. She said she had too much to drink already before she got there. She and Respondent were sexually intimate. He fondled her sexually, and she gave him oral sex. **App. 99**.

Afterward, Respondent retrieved one of his button-down t-shirts from his dryer in the family room, and Doe put it on. They stayed on the couch talking, and she left around 6:00 or 7:00 a.m. **App. 99**. Doe liked Respondent. She thought he was funny and that "he was going to fix everything for me." **App. 100-101**.

Doe believed she and Respondent were still in a relationship until, after the September 24 encounter, he stopped texting, accepting her invitations, and making late night phone calls:

> When Steve would not text me back or I'd say let's, you know, go out again and he was busy, or he couldn't, or he just

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> wouldn't respond. So, several weeks at least later, if not a month, until it finally dawned on me that oh, he's not interested. I felt terrible. I was starting over again. I had my previous set of problems with my ex-husband. And now I had a whole new set with what I did with this attorney. And he's still my attorney. And how's the job going to get done? And I mean, I was humiliated and ashamed. **App. 102-103**.

Doe testified there was little activity on her divorce by Respondent after that. **App. 103**. The method and regularity of Respondent's communication with Doe changed. On December 7 and 19, Doe received by mail Respondent's "check the box" cover memos, each indicating "I will call you" to discuss your case. **App. 103-104; 437-438**.

Although Respondent had confirmed in an email to Doe months before that they had discussed filing a PDL[3] "in the next 7-14 days," Respondent never did. **App. 342**.

In November 2016, Doe discussed with her priest her relationship with Respondent, because she felt guilty. **App. 144**.

Doe terminated Respondent as her lawyer on or about December 16, 2016 and received professional advice that Respondent's activities with Doe were an ethics violation. **App. 106-107**. Doe did not terminate Respondent earlier because she was "scared" he might tell her husband or husband's lawyer. **App. 134**.

[3] Motion *Pendente Lite*

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Doe's second lawyer filed Doe's PDL motion, which was granted on April 5, 2017. **App. 319**.

Doe filed her Complaint with the OCDC on July 27, 2017 upon completion of the divorce proceeding, waiting until then because she was afraid it could affect her divorce proceeding. **App. 148-149; 300-301.**

At the end of her direct examination, Doe addressed the DHP:

> I am beyond saddened and disgusted that all of this had happened. When [my husband] told me that the DEA was in his office at seven o'clock the night of December 22, 2015, and that he had been abusing drugs again, I was beside myself. I remember literally hitting my head against my bathroom wall to wake myself up from the terrible nightmare. But it wasn't a dream. It was my reality. Life as I knew it had just imploded. I tried to be strong and hold my family together. I tried to be strong and keep my kids safe and happy. I tried to be strong and hold myself together and do the right things. I never imagined that obtaining Steve Bell for my attorney would have gone wrong like this.
>
> After our second meeting together, I was under the impression that he liked me. He was interested in me. He was going to fix things. I wouldn't be sad or scared anymore because he was going to be there for me. I was wrong.

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After our relationship ended, I was more a wreck than when I started. I was depressed and scared. Scared that he would sabotage my divorce proceedings if I went and talked to him about seeking new counsel. Scared this man who found me so convenient and disposable, this man who knew everything about me, including my address, my Social Security number, my monetary worth, would do something in retaliation.

I had new problems on my plate now, along with all of the old ones. And yet, through it all, I was not only afraid, but I was embarrassed, ashamed, and humiliated. I felt such a burden of responsibility that I was still married, but had a romantic relationship during it, that maybe this was my fault, that I was a terrible person. How could I have let this happen[?] And I can go on and on.

I carried the shame, tension, guilt, and anxiety for the last two plus years. The stress, depression, increased headaches, loss of sleep, were outward signs. And as I read Steve's responses in deposition, he didn't carry any of this weight that I did. He is unremorseful, unapologetic, and downright considers himself unresponsible for this.

His comments are all about him. How it will hurt his income, his family, his career, his reputation. Not once did he

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> comment on how I might have been hurt. He was never sorry and never took accountability. What about me? This ruined me. Maybe if he was to have encouraged counseling, therapy, et cetera, to stick it out with my husband who was only clean for about six months. If he had not pursued me. If he had not had me over to his house. All of those maybes and what ifs that I will never know the answer to.
>
> . . .
>
> In telling my relationship with my attorney to coworkers, friends, et cetera, so often I hear, that stuff happens all the time. Really? I sure hope it doesn't. And if it does, I hope more and more people report it.
>
> So this is why an attorney should not have anything other than a professional relationship with his or her client, and to follow the rule regarding it, especially in divorce law. It is confusing. It is overwhelming. It is not right, no matter how you look at it. It is wrong. Steve Bell was wrong. My story's proof of that and my life is proof of that. And I will have to live with his forever. Thank you for listening. **App. 108-111**.

Respondent testified at his disciplinary hearing. His relevant testimony is as follows:

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1. Respondent has handled more than one hundred dissolution cases in more than thirty-five years of practice. **App. 166**.
2. Respondent admitted he engaged in sexual relations with Doe. **App. 174**.
3. Respondent enjoyed the sexual relations with Doe. **App. 182.**
4. Respondent described the sexual encounter as follows: "What was done, you know, was, you know, it wasn't like it was not any fun. You know what I'm saying? And then it became more of that night, it was all about sex. After that, it became much more about the relationship stuff, you know?" **App. 184**.
5. Doe had on "a very provocative dress" and was "very frisky." **App. 242-243**.
6. Doe is "kind of a party girl." **App. 246**.
7. Respondent initially believed he had complied with the Rule and was "high-fiving" himself for not having had intercourse. **App. 248**.
8. Respondent has had other situations where he felt a client liked him, but there is a "big difference when they cross that line." **App. 255; 279.**
9. Doe wanted him "to party at her house" and was in a "fast group." **App. 257**.
10. There would never have been a second encounter without Doe's urging. **App. 263**.
11. Doe's complaint is really about the money Respondent charged for his legal fees, not sexual relations. **App. 268**.
12. Respondent has a severely disabled 34-year-old son, who lives with him half the time and half with his ex-wife, to whom he pays maintenance. **App. 192**.
13. Respondent believes he engaged in a single instance of voluntary, consensual "non-coital" intimacy with Doe. **App. 217; 362-367.**

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14. Doe pursued him and was the clear instigator and, until the hearing, saw no problem in continuing to represent Doe. **App. 275-279**.

15. Respondent admits his misconduct but is "looking for … some perspective in what happened in five minutes." **App. 216**.

Respondent made the following statements under oath prior to learning Informant was recommending suspension as discipline:

1. The disciplinary process is a "bad, bad, bad devastating horrible thing for me." **App. 409.**
2. "I really don't think in my heart I did something wrong …" **App. 431**, "although it might be a technical violation." **App. 432**; and
3. I am "… disappointed I have to go through this." **App. 431**.

On July 2, 2018, Informant filed the Information against Respondent charging Rules 4-1.7(a)(2), 4-1.8(j), and 4-8.4(d) for engaging in a *per se* improper relationship with a client. **App. 3-19**.

At the November 8, 2018 disciplinary hearing, the DHP heard from two witnesses: Doe and Respondent. No character evidence was admitted.

III. THE DISCIPLINARY HEARING PANEL'S DECISION

The DHP filed its decision on January 15, 2019. **App. 456**.

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A. Findings of Fact

The DHP's findings of fact are consistent with Informant's Detailed Factual Statement. *Supra*. The DHP determined that Respondent engaged in improper sexual relations with Doe, his dissolution client, at Respondent's house, and that the misconduct was done knowingly and prejudiced Doe financially and emotionally. Although Respondent conceded a technical violation, he made excuses and statements indicating Doe was to blame for his predicament. **App. 456-462.**

B. Conclusions of Law

The DHP found Respondent guilty of violating Rule 4-1.7(a)(2) by engaging in a personal conflict of interest by:

1. engaging in sexual relations with his client, Doe, during their client-lawyer relationship; and
2. creating a significant risk that his representation of Doe would be materially limited by his personal interest in the non-professional relationship with Doe. **App. 462.**

The DHP found Respondent guilty of violating Rule 4-1.8(j) by having sexual relations with his client, Doe, during their client-lawyer relationship when a sexual relationship did not exist between Doe and Respondent prior to the commencement of the legal representation. **App. 462**.

The DHP found Respondent guilty of violating Rule 4-8.4(d) by engaging in conduct prejudicial to the administration of justice by having sexual relations with his client, Doe, during their client-lawyer relationship. **App. 462**.

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C. Recommendation

The DHP recommended that Respondent be suspended indefinitely, with no leave to apply for reinstatement for six months; the suspension to be stayed and Respondent placed on probation for six months.

In support of recommending the suspension, the DHP addressed Respondent's arguments directly:

The DHP disputed Respondent's characterization of the facts as a "five-minute technical violation" caused by the pursuit and initiation of his client: "[Respondent] appears to principally regret the effect on him." **App. 463**.

The DHP confirmed that the Rule 4-1.8(j) prohibition on sexual relations applies regardless of consent or absence of prejudice to the client. The DHP stressed the Comment which "states that because the client's own emotional involvement renders it unlikely the client could give informed consent; sexual relations are prohibited even if consensual and regardless of absence of prejudice to the client." **App. 464**.

With respect to the emotional harm Respondent caused Doe, the DHP found that "[Doe] credibly testified to her distress about her divorce and its underlying facts and to her distress, humiliation, embarrassment and guilt following the "relationship" she believes she had with Respondent." Doe "sought out her priest and worried, if known, it could affect her divorce." Doe even asked Respondent, "am I not attractive?" **App. 464**.

With respect to financial harm Respondent caused Doe, the DHP referenced the failure of Respondent to file the PDL. **App. 465**.

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According to the DHP, the ABA Standards suggest a suspension when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect and harm to the client. **App. 465**.

As for aggravating factors, the DHP emphasized Respondent's refusal to fully accept responsibility for something he only viewed as a technical violation. **App. 465**.

As for mitigating factors, the DHP listed: Respondent has no prior disciplinary history; he is a solo practitioner with substantial financial responsibilities, including for his severely disabled son; he voluntary submitted to a pre-hearing deposition; he acknowledged that he should have withdrawn from representation of Doe; and he made a credible statement that he would not again engage in this misconduct. **App. 466**.

The DHP cited specific cases supporting a suspension: *In re Lewis*, 415 S.E.2d 173 (Ga. 1992) (three-year suspension after admission of sexual intercourse with client and knew extramarital relationship can jeopardize every aspect of client's matrimonial case); *Drucker's Case*, 577 A.2d 1198 (N.H. 1990) (one-year suspension; lawyer terminated affair with client after filing for divorce and client felt rejected); *In re Littleton*, 719 S.W.2d 772 (Mo. banc 1986) (six-month suspension for inappropriate sexual advances toward his client, among other misconduct); and *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995) (six-month suspension for propositioning client for sex, among other misconduct), but ultimately settled on the unpublished decision: *In re Bergman*, SC 94689 (Mo. 2015) (stayed suspension with probation for sexual relations between a large law firm partner and representative of a corporate client) as the most "relevant." **App. 465**.

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The DHP recommended Respondent be placed on six-month's probation during his term of suspension. The DHP recommended that the terms and conditions of probation include the filing of an interim and final report regarding any arrests, criminal, civil, or ethics charges and that he not violate the Rules of Professional Conduct. **App. 465-467**.

The Informant formally rejected the recommendation, specifically that Respondent's suspension be stayed, and he be given probation. **App. 468**.

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POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE ENGAGED IN SEXUAL RELATIONS WITH HIS THEN CURRENT DISSOLUTION CLIENT WHEN NO SEXUAL RELATIONSHIP EXISTED BETWEEN THEM WHEN THE CLIENT-LAWYER RELATIONSHIP COMMENCED.

In re Gardner, 565 S.W.3d 670 (Mo. banc. 2019)

Supreme Court Rule 4-1.7(a)(2)

Supreme Court Rule 4-1.8(j)

Supreme Court Rule 4-8.4(d)

Michael P. Downey, *Law Practice* (November/December 2016)

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POINTS RELIED ON

II.

IN ORDER TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE PROFESSION, THIS COURT SHOULD REQUIRE RESPONDENT TO SERVE A SIX (6) MONTH SUSPENSION BECAUSE:

A. AN ACTUAL SUSPENSION IS THE BASELINE DISCIPLINE FOR A LAWYER ENGAGING IN SEXUAL RELATIONS WITH AN INDIVIDUAL CLIENT UNDER THE ABA STANDARDS AND MISSOURI LAW;

B. THE FINANCIAL AND EMOTIONAL VULNERABILITY OF A DISSOLUTION CLIENT IS A SIGNIFICANT AGGRAVATING FACTOR BOLSTERING THE APPROPRIATENESS OF AN ACTUAL SUSPENSION; AND

C. A LAWYER WHO ENGAGES IN SEXUAL RELATIONS WITH A DISSOLUTION CLIENT IS NOT ELIGIBLE FOR PROBATION (STAYED SUSPENSION) BECAUSE ALLOWING THE LAWYER TO PRACTICE LAW WILL CAUSE THE

COURTS AND PROFESSION TO FALL INTO DISREPUTE.

Atty. Griev. Comm'n of Md. v. Hall, 969 A.2d 953 (Md. App. 2009)

Drucker's Case, 577 A.2d 1198, 1199 (N.H. 1990)

In re Howard, 912 S.W.2d 61 (Mo banc. 1995)

In re Tsoutsouris, 748 N.E.2d 856 (Ind. 2001)

Mo. Ct. Rule 4-1.7(a)(2)

Mo. Ct. Rule 4-1.8(j)

Mo. Ct. Rule 4-8.4(d)

Mo. Ct. Rule 5.225(a)(2)

ABA Standards for Imposing Lawyer Sanctions (1991)

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ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE ENGAGED IN SEXUAL RELATIONS WITH HIS THEN CURRENT DISSOLUTION CLIENT WHEN NO SEXUAL RELATIONSHIP EXISTED BETWEEN THEM WHEN THE CLIENT-LAWYER RELATIONSHIP COMMENCED.

Standard of Review

"[The] Court has inherent authority to regulate the practice of law and administer attorney discipline. *See* Rule 5*; In re Zink*, 278 S.W.3d 166, 169 (Mo. banc 2009). The DHP findings of fact, conclusions of law, and recommendations are advisory. *In re Oberhellmann*, 873 S.W.2d 851, 852 (Mo. banc 1994). 'This Court [in a disciplinary proceeding] reviews the evidence *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence and draws its own conclusions of law.' *In re Snyder*, 35 S.W. 380, 382 (Mo. banc 2000) (Citations omitted)." *In re Gardner*, 565 S.W.3d 670, 675 (Mo. banc. 2019).

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Respondent violated Rules 4-1.7(a)(2), 4-1.8(j), and 4-8.4(d) by engaging in sexual relations with his client during his legal representation for her dissolution of marriage.

Effective July 1, 2007, Rule 4-1.7 Comment [12] and Rule 4-1.8(j), Missouri prohibits sexual relations between a lawyer and current client:[4]

> The [client-lawyer] relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since

[4] Rule 4-1.7 is concerned with the conflict of interest when a lawyer puts his or her personal interests above the client's. Rule 4-1.8 makes an exception if the sexual relations are consensual and the consensual sexual relationship existed when the client-lawyer representation commenced.

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> client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule 4-1.8(j) prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Rule 4-1.8(j) Comment [17].

Even if the client favors or initiates it, sexual relations between lawyer and client are inherently improper: Engaging in sexual relations with a client is a disqualifying, nonwaivable conflict of interest. Michael P. Downey, *Law Practice* (November/December 2016). **App. 536-540.**

The term "sexual relations" includes: "Physical sexual activity that does not necessarily culminate in intercourse. · Sexual relations usu. involve the touching of another's breast, vagina, penis, or anus. Both persons (the toucher and the person touched) are said to engage in sexual relations." *Black's Law Dictionary*, (9th ed.) 2009.

In the instant case, the evidence is undisputed that Respondent and his then current dissolution client, Jane Doe, engaged in sexual relations at Respondent's house on September 24, 2016. Doe's conduct was relevant to her legal effort to obtain custody of

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her children. Respondent's personal interest in Doe and his sexual activities with her conflicted with her best legal interests.

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ARGUMENT

II.

IN ORDER TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE PROFESSION, THIS COURT SHOULD REQUIRE RESPONDENT TO SERVE A SIX (6) MONTH SUSPENSION BECAUSE:

A. AN ACTUAL SUSPENSION IS THE BASELINE DISCIPLINE FOR A LAWYER ENGAGING IN SEXUAL RELATIONS WITH AN INDIVIDUAL CLIENT UNDER THE ABA STANDARDS AND MISSOURI LAW;

B. THE FINANCIAL AND EMOTIONAL VULNERABILITY OF A DISSOLUTION CLIENT IS A SIGNIFICANT AGGRAVATING FACTOR BOLSTERING THE APPROPRIATENESS OF AN ACTUAL SUSPENSION; AND

C. A LAWYER WHO ENGAGES IN SEXUAL RELATIONS WITH A DISSOLUTION CLIENT IS NOT ELIGIBLE FOR PROBATION (STAYED SUSPENSION) BECAUSE ALLOWING THE LAWYER TO PRACTICE LAW WILL CAUSE THE

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COURTS AND PROFESSION TO FALL INTO DISREPUTE.

A. <u>Baseline Suspension</u>

According to the *ABA/BNA Lawyer's Manual on Professional Conduct*, Conflicts of Interest: Sexual Relations (Jan. 30, 2019): "For lawyers who have sex with clients, suspension seems to be the usual sanction." (citations to 15 cases with imposed suspensions omitted). **App. 487-496**.

The presumptive discipline in Missouri for a lawyer who has engaged in sexual relations with his individual client is suspension. In *In re Howard*, 912 S.W.2d 61 (Mo banc. 1995), the Court suspended Howard for, in part, making sexual advances to his individual client. Despite Howard's emphasis of his thirty-three years of practice with no disciplinary violations and an exemplary record of public service, the Court imposed a six-month actual suspension.[5]

In *In re Discipline of Halverson*, 998 P.2d 833 (Wash. 2000), the Court held that Halverson violated disciplinary rules by engaging in a sexual relationship with a client without disclosing the risk that the relationship could adversely affect the client's ongoing divorce and child custody proceeding, and that a minimal suspension was not warranted.

[5] The Court only reprimands when the lawyer is merely negligent in determining whether representation may be materially affected by the lawyer's own interest and then causes injury or potential injury to the client. *Howard*, 912 S.W.2d at 64.

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The Court doubled the length of Halverson's suspension from the practice of law to one-year.

In *In re Tsoutsouris*, 748 N.E.2d 856 (Ind. 2001), the Court imposed a thirty-day actual suspension on Tsoutsouris for engaging in a sexual relationship with his client while he was representing her in a dissolution matter. *Also see, Drucker's Case and Lewis, Supra.*

ABA Standard 4.32 confirms that: "Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect of that conflict, and causes injury or potential injury to a client."

B. The Vulnerable Divorce Client

The vulnerability of a client undergoing a divorce is a significant aggravating factor. *In re Hoffmeyer*, 656 S.E.2d 376, 379-80 (S.C. 2008); *see*, ABA Standard 9.2(h).

"While there are situations, especially in the commercial business setting, in which the sophisticated corporate client representative has little or no sense of dependence,[6] there is also a broad range of situations in which the client, by virtue of his or her emotional state, educational level, age or social status, feels particularly dependent and disarmed vis-à-vis the attorney." *ABA Comm. On Ethics and Prof'l Responsibility*, Formal Op. 92-364 (July 6, 1992). **App. 497-506.**

"An individual client, in particular, is likely to have retained a lawyer at the time of a crisis." *ABA Formal Op.* 92-364. "The troubled client places a great deal of trust in the

[6] *See, e.g. In re Bergman*, SC 94689 (Mo. 2015).

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lawyer and rel[ies] heavily on his or her agreement to provide professional assistance." *Tsoutsouris*, 748 N.E.2d at 856. "The factors leading to the client's trust and reliance on the lawyer have the potential for placing the lawyer in a position of dominance and the client in a position of vulnerability." *ABA Formal Op.* 92-364. "[T]he more vulnerable the client, the heavier the obligation of the lawyer to avoid engaging in any relationship other that of attorney-client." *Id*.

Matrimonial clients are particularly vulnerable to the prejudice of sexual relations with their lawyer: "Every lawyer must know that an extramarital relationship can jeopardize every aspect of a client's matrimonial case – extending to forfeiture of alimony, loss of custody, and denial of attorney's fees." *In re Lewis*, 415 S.E.2d 173, 175 (Ga. 1992); *also see, In re DiSandro*, 680 A.2d 73, 74 (R.I. 1996) ("Any attorney who practices in the area of domestic relations must be aware that the conduct of the divorcing parties, even in a divorce based on irreconcilable differences (a so-called no-fault divorce) may have a significant impact on that client's ability to secure child custody and/or may materially affect the client's rights regarding distribution of marital assets. An attorney who engages in sexual relations with his or her divorce client places that client's rights in jeopardy."); *Matter of Raab*, 139 A.D.3d 116, 119 (N.Y. 2016) ("Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from entering into sexual relations with domestic clients during the course of representation

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even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent."[7]).

Missouri recognizes the financial risks faced by a dissolution client who engages in marital misconduct, such as an inappropriate relationship with another person. *Coleman v. Coleman*, 318 S.W.3d 715, 721 (Mo. App. 2010). Having an affair is a relevant factor when determining maintenance and disposition of property. Mo. Rev. Stat. § 452.335 (2000); Mo. Rev. Stat. § 452.330 (2000); *Coleman*, 318 S.W.3d at 721. Moreover, marital misconduct can place "[b]urdens on the [marital] relationship caus[ing] considerable stress and disappointment to the other party, not to mention the stress and insecurity often caused any children of the marriage, which in turn causes additional stress on the marriage partners." *Id.* at 721.

In particular, engaging in sexual relations can have devastating emotional consequences for the dissolution client. The client's vulnerability has been known to cause an infatuation with the lawyer, whom the client believes has special knowledge, skills and access to the courts to solve her problem. "All of the positive characteristics that the lawyer is encouraged to develop so that the client will feel confident that she is being well-served can reinforce a feeling of dependence." *ABA Formal Op.* 92-364. This can lead to the

[7] N.Y. Rule 1.8(j)(1)(iii) specifically forbids sexual relations with a client in domestic relations matters.

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"transference phenomenon."[8] "Transference in the attorney-client relationship can cause clients to see their lawyers as all-powerful, their saviors in a time of crisis. These feelings may translate into admiration, love, and sexual attraction. Thus, the client may be receptive to sexual advances by the lawyer or may make sexual advances of her own." Malinda L. Seymour, *Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 Yale J.L. & Feminism 175, 184 (2003) **App. 507-535**.

For example, in *Drucker's Case*, 577 A.2d 1198 (N.H. 1990), a lawyer abruptly terminated an affair with a client filing for a divorce. As a result, the client "felt that it was another rejection in her life but remained hopeful that [the lawyer's] feelings for her would change and that he would be attracted to her once again." *Id*. at 1199. There, the court found "the record clearly reflects the respondent failed to maintain a normal client-lawyer relationship, and as a result, he caused the client and her family mental anguish well beyond that normally associated with a difficult divorce." *Id*. at 1202.

[8] Missouri has recognized the transference phenomenon in the equally intense relationship between physician and patient. *Zipkin v. Freeman*, 436 S.W.2d 753, 761-62 (Mo. banc 1968) (Married patient fell in love with doctor during counseling sessions involving patient's coping with her failing marriage, which led to sexual relations. Civil judgment upheld against doctor for improper treatment because doctor failed to properly navigate the "transference phenomenon.").

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C. No Eligibility for Probation

According to Rule 5.225(a)(2), a lawyer is eligible for probation if the lawyer:

(A) Is unlikely to harm the public during the period of probation and can be adequately supervised;

(B) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and

(C) Has not committed acts warranting disbarment.

(emphasis added).

To allow a matrimonial lawyer who had sexual relations with a vulnerable dissolution client to practice law under a term of probation would cause the courts and legal profession to fall into disrepute.

Although Missouri has yet to interpret what would make the courts or profession fall into disrepute under Rule 5.225(a)(2), this Court has stated that "when there is any pollution whatever at any point in the process of the administration of justice or of government, the courts and the democratic processes then will 'fall into disrepute' deserving the condemnation of the profession and the contempt of the layman, and the judicial system as now known and recognized will head for oblivion." *Osborne v. Purdome*, 244 S.W.2d 1005, 1017 (Mo. banc 1951) (concurring opinion, Conkling, J.) (emphasis added).

In the context of lawyer discipline cases, other states have determined that a lawyer engaging in sexual relations with a divorce client causes the profession to "fall into disrepute." *See, Atty. Griev. Comm'n of Md. v. Hall*, 969 A.2d. 953, 968 (Md. App. 2009)

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("If attorneys take advantage of a client's emotional fragility, as the Respondent did here, by having a sexual relationship with that client, this Court will not hesitate to impose disciplinary sanctions. The respondent's conduct, without question, was prejudicial to the administration of justice and has brought "disrepute upon the integrity of the profession."); *In re Liebowitz*, 516 A.2d 246, 249 (N.J. 1985) (Respondent brought the *pro bono* matrimonial counsel program "into disrepute" by engaging in intimate touching with divorce client at lawyer's house.); *In re Hoffmeyer*, 656 S.E.2d 376, 379 (S.C. 2008) (A lawyer who exercised control over a stressed and sick divorce client, including engaging in sexual relations at the lawyer's house, "[brought] the legal profession into disrepute.").

In Order to Protect the Public and the Integrity of the Legal Profession, this Court Should Impose an Indefinite Suspension on Respondent with no Leave to Apply for Reinstatement for At Least Six Months.

The purpose of attorney disciplinary proceedings is to protect the public and maintain the integrity of the legal profession. Those twin purposes may be achieved directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct. *Gardner*, 565 S.W.3d at 675. In imposing discipline, the Court considers the ethical duty violated, the lawyer's mental state, the extent of actual or potential injury caused by the attorney's misconduct, and any aggravating or mitigating factors. *Id.* at 675. The Court looks to the American Bar Association Standards for Lawyer Sanctions (ABA Standards) and applies those standards and its prior cases to those facts. *Id.* at 675.

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Duty Violated

"The most important ethical duties are those obligations which a lawyer owes to clients." *In re McMillin*, 521 S.W.3d 604, 610 (Mo. banc 2017). "The relationship between lawyer and client is highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith on the attorney's part." *Howard*, 912 S.W.2d at 62 citing *In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956).

Respondent knew or should have known that engaging in sexual relations with Doe was prohibited under Rule 4-1.8(j), caused an unwaivable conflict of interest under Rule 4-1.7(a)(2), and prejudiced Doe's legal position in her dissolution proceeding under Rule 4-8.4(d).

State of Mind

"Intention" is defined as "the conscious objective or purpose to accomplish a particular result." "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. *Gardner*, 565 S.W.3d at 678 citing **ABA Standards,** Definitions, p. 17.

Respondent's conduct was part intentional and part knowing. Contrary to Respondent's tally of just "five minutes" of misconduct, Respondent spent weeks, including "hours and hours of texts and telephone calls," cultivating his personal relationship with Doe. The two were intimate (kissing and touching) twice, on Respondent's properties, before the "five-minute" sexual encounter he concedes. Respondent's "intention" was to build a personal relationship with Doe: "We developed a friendship that I believed was productive as we tackled the issues arising in Ms. Doe's

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divorce." **App. 308.** He then invited her to come over to his house, provided her more alcohol, and "intentionally" engaged with her in sexual relations.

Respondent may not have "intended" to prejudice Doe's dissolution by engaging in sexual relations, but as a veteran divorce lawyer, he certainly "knew" that a dissolution client's affair could be considered marital misconduct.

Once their sexual encounter was finished, Respondent was finished with their personal relationship. Respondent may not have "intended" to emotionally hurt Doe by his rejection, but he certainly "knew" she had personal feelings for him.

Client Injuries

Doe was prejudiced financially and suffered emotionally because of Respondent's misconduct. Also, ABA Sanction Standards would recognize the potential legal harm created by Doe's sexual relationship with her lawyer during her divorce case, especially when Respondent encouraged her conduct. **ABA Standards** 3.0 and 4.32.

Respondent put Doe's financial situation at risk by failing to file a PDL (which he recommended). Moreover, if Doe's husband had discovered her infidelity, he likely would have been upset, which could have affected the negotiations of a settlement. Her husband could have attempted to use her marital misconduct (affair with her lawyer) to affect child custody arrangements, maintenance, and division of property, just as Respondent was intending to use Doe's husband's marital misconduct (felony drug charges) to seek a disproportionate division of property. **App. 338.** In addition, Respondent and Doe's "pillow talk" would likely fall outside the attorney-client privilege and could have been discovered by her husband during the divorce battle: "The courts will not protect

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confidences given as part of a personal relationship; except for that of husband and wife, there is no privilege for lovers. A blurred line between any professional and personal relationship may make it difficult to predict to what extent client confidences will be protected." *ABA Formal Op.* 92-364; Rule 1.8(j) (Comment 17).

Emotionally, Doe was devastated by the whipsaw of going through her divorce, and devastated again when, after engaging in sexual relations with Respondent, Respondent rejected her. Doe felt humiliated and ashamed. She blamed herself for falling for Respondent: "I felt such a burden of responsibility that I was still married, but had a romantic relationship during it, that maybe this was my fault, that I was a terrible person. How could I have let this happen?" **App. 108-111.**

The last thing Doe needed was for an older man, who Doe believed would "fix everything," to show a personal interest in her.[9] Respondent should have shut down that development. Instead, Respondent exploited his professional relationship by encouraging the development of a personal relationship, which led to sexual relations at Respondent's house. Respondent's rebuff of Doe's desire to continue their personal relationship caused Doe additional stress on top of the overwhelming stress of her disintegrating marriage.

Aggravating Factors

Four aggravating factors apply to Respondent:

[9] Doe's husband was 19 years her senior, about the same difference in age between Respondent and Doe.

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The first is Respondent's substantial experience in the practice of law. At the time, Respondent had practiced over thirty-five years and handled over one hundred dissolution cases. There simply is no excuse for a veteran divorce lawyer to pursue a personal relationship and engage in sexual relations with a dissolution client.

The second is Respondent's selfish motive. Contrary to Respondent's accusations that Doe was the wily instigator, it was Respondent who first expressed his attraction to Doe and willfully engaged in their tête-à-têtes, encouraging their personal relationship to blossom and culminate in sexual relations.

The third is Respondent's failure to acknowledge the wrongful nature of his conduct. Although Respondent admitted a "technical violation" at his hearing, he also admitted he "high-fived" himself for not having intercourse. Respondent blamed Doe for his predicament: She wore a "very provocative dress," was "very frisky," and "kind of a party girl." He claims there would never have been a second encounter without her urging. **App. 263.**

The fourth, and most significant aggravating factor, was Doe's vulnerability. Doe was in crisis when she first met Respondent. "Life as I knew it had just imploded." Her physician husband of ten years, the sole provider, had lost his job due to drug addiction and was facing felony charges. Her husband's ex-wife had filed to modify her maintenance, threatening the corpus of the marital estate. Doe's "head was spinning." She vacillated between trying to make it work with her husband and pursuing a divorce, even consulting with her priest. She placed her trust in Respondent to help her navigate her difficult divorce decision and the consequent issues of child custody (two young children),

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child support, maintenance, and division of property. **App. 108-111.** Doe had revealed to Respondent personal details about herself which reinforced his dominant position and her vulnerability.

Actual Suspension Warranted

Respondent intentionally and knowingly engaged in *per se* prohibited misconduct with a dissolution client under aggravated circumstances. An actual suspension is clearly warranted. In *Howard*, 912 S.W.2d at 61, the Court suspended Howard for six months for, in part, making sexual advances to his individual client, despite Howard's emphasis of his thirty-three years of practice with no disciplinary violations and an exemplary record of public service.

This Court should discipline Respondent with an indefinite suspension from the practice of law with no leave to apply for reinstatement for six months.

Probation Ineligible

"An attorney is eligible for probation if the attorney: (1) is unlikely to harm the public during the probationary period and can be supervised adequately; (2) is able to perform legal services and practice law without causing the courts or profession to fall into disrepute; and (3) has not committed acts warranting disbarment. *In re Forck*, 418 S.W.3d 437, 443 (Mo. banc 2014) citing Rule 5.225(a)(2)(A-C).

Although the DHP found "credible" Respondent's statement that he would not again engage in this misconduct, and that Respondent's intent was "knowing" (i.e. supporting a suspension rather than disbarment) **App. 466**, it provided no analysis of the second

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prerequisite: whether Respondent was able to "practice law without causing the courts or profession to fall into disrepute.

Nothing could be more exploitative of Doe, a vulnerable dissolution client, than for Respondent to put his personal, sexual interests above her best interests during their client-lawyer relationship. Respondent's conduct "pollutes the administration of justice" by putting at risk Doe's rights regarding child custody arrangements, child support, maintenance, and property division under the laws of Missouri. *See Osborne*, 244 S.W.2d at 1017. Maryland, New Jersey, and South Carolina specifically found that a lawyer who engages in sexual relations with an individual client causes the profession to "fall into disrepute." *Supra.*

Furthermore, Respondent's misconduct was not due to his failure to understand matrimonial law. Consequently, Respondent has no need for probation to "receive education, monitoring, and support that will improve his law practice and better serve and protect his clients in the future." *Cf. Forck*, 418 S.W.3d at 444. It is telling that the DHP's terms of probation do not recommend law practice supervision or education.

Probation would serve no legitimate disciplinary purpose in this case.

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CONCLUSION

A clear preponderance of the evidence demonstrates that Respondent violated Rule 4-1.7(a)(2), Rule 4-1.8(j) and Rule 4-8.4(d) by engaging in sexual relations with a vulnerable dissolution client when no sexual relationship existed between them when the client-lawyer relationship commenced.

In order to protect the public and the integrity of the profession, Informant respectfully requests that this Court enter an order indefinitely suspending Respondent from the practice of law with no leave to apply for reinstatement until after six (6) months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2019, the Informant's Brief was sent through the Missouri Supreme Court e-filing system to Respondent's counsel:

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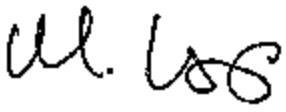

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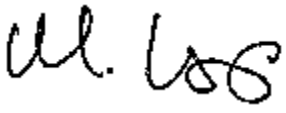
Marc A. Lapp

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. Was served on Respondent's counsel through the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 8,991 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



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Marc A. Lapp