

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

MICHAEL M. SPIEGEL

1600 Coronado Drive, Suite 232
Blue Springs, MO 64014

Missouri Bar No. 49658

Respondent.

Supreme Court No. SC98155

INFORMANT'S BRIEF

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INFORMANT

TABLE OF CONTENTS

COVER PAGE	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES.....	3
STATEMENT OF JURISDICTION	5
STATEMENT OF FACTS.....	6
INTRODUCTION.....	6
PROCEDURAL HISTORY	6
BACKGROUND INFORMATION.....	7
SEXUAL RELATIONS BETWEEN RESPONDENT AND HIS CLIENT	8
RESPONDENT’S TESTIMONY AND EVIDENCE BEFORE THE DHP	13
DISCIPLINARY HEARING PANEL DECISION.....	15
POINT RELIED ON	
I.....	17
II.....	18
ARGUMENT	
I.	19
II.....	30
CONCLUSION	38
CERTIFICATE OF SERVICE.....	39
CERTIFICATION OF COMPLIANCE: RULE 84.06(C).....	39

TABLE OF AUTHORITIES

CASES

<i>Atty. Griev. Comm’n of Md. v. Hall</i> , 969 A.2d. 953 (Md. App. 2009) -----	32
<i>Chief Disciplinary Counsel v. Zelotes</i> , 152 Conn. App. 380, 98 A.3d 852 (2014) -----	24
<i>Coleman v. Coleman</i> , 318 S.W.3d 715 (Mo. App. 2010) -----	28
<i>Druckers' Case</i> , 133 N.H. 326, 577 A.2d 1198 (1990)-----	23
<i>In re Application for Disciplinary Action Against Chinquist</i> , 2006 ND 107, ¶¶ 4-6, 714 N.W.2d 469 -----	23, 24
<i>In re DiSandro</i> , 680 A.2d 73 (R.I. 1996)-----	28
<i>In re Hoffmeyer</i> , 656 S.E.2d 376 (S.C. 2008)-----	33
<i>In re Howard</i> , 912 S.W.2d 61 (Mo. 1995) -----	17, 18, 22, 30, 31, 33
<i>In re Lewis</i> , 415 S.E.2d 173 (Ga. 1992) -----	28
<i>In re Liebowitz</i> , 516 A.2d 246 (N.J. 1985) -----	33
<i>In re Littleton</i> , 719 S.W.2d 772 (Mo. 1986) -----	17, 18, 22, 30, 32
<i>In re McMillin</i> , 521 S.W.3d 604 (Mo. banc 2017)-----	33
<i>In re Oliver</i> , 285 S.W.2d 648 (Mo. banc 1956) -----	33
<i>In re Tsoutsouris</i> , 748 N.E.2d at 856 (Ind. 2001) -----	23, 25
<i>Matter of DiPippo</i> , 678 A.2d 454 (R.I. 1996) -----	24
<i>Matter of Raab</i> , 139 A.D.3d 116 (N.Y. 2016)-----	28
<i>People v. Beecher</i> , 224 P.3d 442 (Colo.O.P.D.J.2009)-----	24

STATUTES

Mo. Rev. Stat. § 452.330 (2000)-----	28
Mo. Rev. Stat. § 452.335 (2000)-----	28

OTHER AUTHORITIES

ABA Standard for Imposing Lawyer Sanctions, Rule 3.0 -----	33, 36
ABA Standard for Imposing Lawyer Sanctions, Rule 4.32 -----	33, 36
ABA Standards for Imposing Lawyer Sanctions, Rule 4.33 (1986)-----	31
ABA Standard for Imposing Lawyer Sanctions, Rule 9.22 -----	36, 37
ABA Standard for Imposing Lawyer Sanctions, Rule 9.32 -----	37
ABA/BNA Lawyer's Manual on Professional Conduct-----	37
ABA/BNA Lawyer's Manual on Professional Conduct 51:416, at p. 262 (2006) -----	23

RULES

RULE 4-1.7 COMMENT 12 -----	19, 35
RULE 4-1.7 -----	17, 19, 21, 22, 23, 27, 31, 36, 38
RULE 4-1.8 -----	19, 20, 21, 23, 35, 38
RULE 4-1.8 COMMENT [17] -----	21, 24
RULE 4-2.1 -----	24
RULE 4-8.4 -----	17, 19, 29, 38
RULE 5.225 -----	18, 30, 32

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

INTRODUCTION

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

The Panel found that Respondent violated Rules 4-1.7(a)(2), 4-1.8(j), and 4-8.4(d) by engaging in sexual relations with his domestic relations client when no sexual relationship existed between them when the client-lawyer relationship commenced.

Informant agrees that an indefinite suspension from the practice of law is appropriate but disputes that Respondent is eligible for probation under Rule 5.225.

PROCEDURAL HISTORY

May 3, 2018	Information
May 17, 2018	Respondent's Application for Protective Order
May 25, 2018	Temporary & Permanent Protective Order
June 6, 2018	Respondent's Answer to Information
June 22, 2018	Appointment of Disciplinary Hearing Panel (DHP)
May 20, 2019	DHP Hearing
August 6, 2019	DHP Decision
August 21, 2019	Rejection of DHP decision by Informant
August 30, 2019	Acceptance of DHP decision by Respondent
October 15, 2019	Motion for Leave to File Documents under Seal

October 15, 2019 Motion for Leave to File Documents under Seal sustained
 October 15, 2019 Record Submitted

BACKGROUND INFORMATION

Respondent graduated from the University of Missouri – Kansas City law school and was licensed as a lawyer in Missouri in 2000. His bar number is 49658. He resides in Blue Springs, Missouri. **App. 238.**¹ Respondent is 44 years old. **App. 238.** He has no disciplinary history. **App. 5, 27.**

Following licensure, Respondent clerked for various judges in the 16th Judicial Circuit of Missouri. **App. 239.** He subsequently served as an assistant Jackson County prosecutor working the warrant desk, traffic dockets and ultimately domestic violence cases. **App. 239-240.** In or about October 2005, Respondent began work at the Jeter, Rains and Byrn law firm in Blue Springs, Missouri. **App. 240.** Beginning in 2008, the law firm operated as Rains and Spiegel. After attorney Rains retired in 2017, Respondent continued to operate the law firm as Spiegel Law practicing primarily in the area of domestic relations. **App. 241.** He also serves as the Assistant City Attorney and Prosecutor for the City of Buckner, Missouri. **App. 242.**

¹The 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 __”.

SEXUAL RELATIONS BETWEEN RESPONDENT AND HIS CLIENT

On March 9, 2011, the court entered a judgment establishing paternity, custody and support of the minor child belonging to CD² and JZ³, her ex-paramour and the father of her minor child. On or about November 29, 2012, the JZ filed a Motion to Modify Custody and Support. **App. 5-6, 27.**

In or about December 2012, CD was temporarily residing at Hope House, a battered women's shelter, after alleging that she had been mentally and physically abused by JZ. **App. 118-119, 6.** CD requested assistance from the staff at Hope House in retaining an attorney to represent her with regard to the Motion to Modify. A Hope House staff person referred CD to Respondent, who CD was told worked with Hope House a lot. **App. 118-119.**

CD first met with Respondent at his law office in Blue Springs on or about January 4, 2013 and brought him documents regarding the paternity case with JZ. CD also provided Respondent with videos, photographs and police reports documenting the physical abuse that CD had suffered at the hands of JZ. **App. 120-123.** Respondent recalled meeting CD in October 2009 at an American Royal barbeque event where CD was serving as a bartender. **App. 126.** However, CD and Respondent had not dated and had had no relationship prior to Respondent representing CD in January 2013. **App. 135.**

² Initials "CD" are used in lieu of the client's name for purposes of confidentiality.

³ Initials "JZ" are used in lieu of the father's name for purposes of confidentiality.

Respondent agreed to represent CD with regard to the Motion to Modify and CD paid Respondent a \$1,600 retainer. **App. 125.**

Within days of being retained, Respondent emailed CD at night regarding the case and CD responded. Respondent soon suggested that they start communicating via text message, that they “talk about something fun” and that Respondent “didn’t charge after ten o’clock at night”, when Respondent’s wife would go to bed. **App. 125, 127-128.**

On or about January 17, 2013, Respondent and CD appeared in court for a hearing regarding some issues that had arisen between CD and JZ. After the hearing, CD left the courthouse abruptly, upset after being harassed in the hallway by JZ. **App. 131-132.** Later that day, Respondent called CD, assured her that everything would be okay, and asked if he could stop by her house on the way out of town for a fishing trip to make sure that CD was okay. **App. 132.** CD consented because she wanted Respondent to see her home so that he would understand that she was a fit mother and not a danger to the minor child. **App. 132-133.**

Soon after arriving on the evening of January 17, Respondent told CD that her case was stressful and hard on him. He then began talking to CD about troubles in his own marriage and his relationship with his wife. **App. 133.** Respondent and CD engaged in sexual intercourse that evening at CD’s home. **App. 134.**

Respondent again had sexual intercourse with CD at her home on January 23, January 28 and January 31, 2013. **App. 134.** The sexual relationship as well as the nightly texting about personal matters between Respondent and CD continued for a period of four or five months. **App. 136.**

While not in a relationship, CD felt that Respondent was monopolizing her time. **App. 137.** Respondent would drive by CD's house on multiple occasions. Respondent cleared CD's driveway after a snowstorm in February 2013 while CD was in Arizona for a court hearing. **App. 137.** Respondent cut a tree down in CD's front yard. **App. 137.** Respondent came to CD's home to spend the evening with her on Valentine's Day 2013. **App. 137.**

CD became concerned that Respondent would not represent her zealously if she were to stop the personal relationship with him. **App. 137-138.**

Respondent and CD engaged in sexual intercourse again on February 5, 2013 at CD's home. **App. 138.** Prior to Respondent leaving that day, CD spoke to him about the domestic violence that she had previously gone through with JZ and how devastating it was to her and that her relationship with Respondent was beginning to feel the same way. **App. 138-139.** CD testified as follows to the Disciplinary Hearing Panel: "I felt suffocated. I felt completely out of control. I felt like I was being victimized all over again....I'm feeling like I am being victimized by my lawyer, and I feel like my time was begin monopolized by him in the morning, nights, nights that I could have spent with someone else that wasn't my attorney." **App. 139.**

On February 9, 2013, Respondent texted CD, stating that his wife was away for the day and that he was home alone not feeling well. Respondent and CD began a video chat, during which Respondent showed CD his erect penis. **App. 140.**

In or around May 2013, while Respondent was at CD's home, CD informed Respondent that she wanted to stop sleeping with him. **App. 142.** CD expected that

Respondent would continue to represent her “zealously” in the pending litigation with JZ. **App. 142-143.** CD subsequently concluded, however, that Respondent had lost interest in the case, stating:

“There was just multiple incidents that had occurred where I felt like he wasn’t responding to email or text situations that had come up with my ex. And he just seemed to have no interest, and anything that was going on at the time with my son or issues that I was having with his father.” **App. 143.**

Respondent admits that he had a sexual relationship with CD at her home that lasted for several months. **App. 245-246.** Acknowledging a violation of Rule 4-1.8(j), he testified to the Panel as follows:

“I did it. I’m here, I think every pleading that we’ve filed, every response we’ve done, we’ve admitted that I violated the rule. I’ve not hid behind that, I know that I’m in trouble for that. I know that there is going to be something that occurs as a result. I just don’t know what the outcome is yet, but I don’t have any excuse as to why that rule was violated. It was violated.” **App. 244.**

Respondent testified that within a couple of days of signing the representation agreement, CD sent him photos of herself in lingerie **App. 247.** As to the sexual relationship, Respondent testified to the Panel as follows:

“I wish I had a good answer at this point. I know that hindsight is 20/20. If I could go back and undo it, I would. It was the single stupidest thing that I think I’ve ever done in my life. I’m kind of that guy that I don’t ever get in

trouble for anything, I'm usually pretty straight forward, and I've not ever been in a situation like this. She was pretty, she was hitting on me, I fell into that trap, and I did it. I shouldn't have done it." **App. 248.**

On August 27 and 28, 2013, a hearing was held before the Honorable James F. Kanatzar in Jackson County Circuit Court on pending motions filed by both CD and JZ for temporary orders pertaining to parenting time. **App. 512 [Respondent's Exhibit 30 filed with the Court under seal].** Following the first hearing day, Respondent spoke to CD outside the courtroom and told CD that she had not been truthful in her testimony. **App. 262.** Prior to court the next day, Respondent told CD that she would either have to correct her testimony or that he could withdraw from her case so that CD could testify in the narrative. **App. 265.** CD directed Respondent to withdraw as her attorney from the case and Judge Kanatzar granted Respondent leave to withdraw. **App. 145, 265-266.**

In or about November 2013, CD sent a letter to Judge Kanatzar advising him that she had had a sexual relationship with Respondent and that she felt that the relationship was going to result in a "bad outcome" for her case. **App. 146, 151.** CD did so because she felt that she was up against a group of people, including the GAL that had been appointed in the litigation, that were looking out for Respondent's best interests rather than the best interests of the minor child. **App. 146.** Prior to a hearing in November, Judge Kanatzar returned the letter to CD, stating that "this isn't the way we do things in my court." **App. 151.**

CD believed that Respondent's representation of her in the litigation had a bearing on the fact that CD lost custody of the minor child from August 2013, when he withdrew

from CD's case, until December 2013. **App. 148-149.** CD testified, "I felt it was due to him getting us in front of this judge, him getting the guardian ad litem appointed that he did, him having this buddy system....I felt as though they were trying just to flip everything around and make it as though I had no credibility, that everything I was saying was false, that I was crazy, that I was all these things that I wasn't because of an allegation that I had made in regards to Mr. Spiegel." **App. 149-150.**

On or about March 13, 2014, CD filed a civil suit against Respondent seeking damages arising from Respondent's representation and the sexual relationship that Respondent engaged in with CD. **App. 151.** The lawsuit was resolved. **App. 152.**

RESPONDENT'S TESTIMONY AND EVIDENCE BEFORE THE DHP

Respondent testified at the hearing before the Disciplinary Hearing Panel that CD initiated the sexual relationship with him. **App. 247-248.** He stated, "She was pretty, she was hitting on me, I fell into that trap, and I did it." **App. 248.** Respondent also offered into evidence a series of emails from CD to Respondent intended to demonstrate that CD initiated the sexual relationship. **App. 316, 327, 331, 332, and 333 [Respondent's Exhibits 38, 42, 43, 44 and 45 filed with the Court under seal).**

Respondent testified at the hearing before the Disciplinary Hearing Panel that he continued to "work my tail off" on CD's case after the cessation of the sexual relationship with CD and that he would not have done anything differently in representing CD. **App. 248, 269.** He testified that CD "was her own worst enemy" and that rulings entered by the Court in the litigation that were adverse to CD resulted from CD's failure to follow court orders and because of untruthful testimony that she gave at the hearing on August 27, 2013,

App. 259, 262-264 [Respondent's Exhibit 20 filed with the Court under seal]. In this regard, Respondent's evidence included the following:

- Jennifer Oswald Brown, the guardian ad litem appointed in the litigation, testified that in March or May 2013, CD placed her then-four-year old minor child in Crittenton, a mental health in-patient facility for children because she needed child-care so that she could visit a friend in Denver, Colorado. **App. 216-217; 454-459 [Respondent's Exhibit 18 filed with the Court under seal].**
- Respondent testified an issue in the custody litigation concerned CD's assertion that JZ was a danger and should be deprived of custody. Yet, Respondent testified that he learned from opposing counsel just prior to a scheduled court hearing regarding custody that CD had dropped the minor child off with JZ so that she could go on a 3-week cruise. **App. 248-249.**
- Andrew Nantz, a lawyer in Kansas City, testified he has referred domestic relations clients to Respondent. **App. 127-128.** Mr. Nantz has heard "nothing but positive" feedback from the clients he has referred to Respondent. **App. 129.** He specifically testified regarding a male client involved in a protracted divorce that was aware of the current charge against Respondent based on a sexual relationship with a client and decided to continue to have Respondent represent him. **App. 130.** Mr. Nantz believes that Respondent works diligently for his clients. **App. 131.**

DISCIPLINARY HEARING PANEL DECISION

The Disciplinary Hearing Panel issued its decision on August 2, 2019. **App. 345-363.** Based on the record evidence as set forth above, the Panel found that Respondent violated:

- Rule 4-1.7(a)(2) by engaging in a sexual relationship with his client CD during the pendency of the attorney-client relationship and thereby creating a significant risk that his representation of CD would be materially limited by his person interests in a non-professional intimate relationship with her. **App. 349-350;**
- Rule 4-1.8(j) by having sexual relations with his client CD when a sexual relationship did not exist between the attorney and client prior to the commencement of the representation of CD. **App. 350;** and
- Rule 4-8.4(d) by engaging in conduct prejudicial to the administration of justice by having sexual relations with his client CD during the pendency of the attorney-client relationship, in that the sexual relationship did not predate the attorney-client relationship. **App. 350.**

Regarding Respondent's affirmative defenses based on the assertion that CD lost custody of her minor child for reasons other than the admittedly inappropriate conduct of Respondent, the Panel found that the Informant did not controvert the affirmative defenses and that the facts elicited at the hearing by the Respondent did not conflict in material respects from those affirmative defenses. The Panel accepted the factual statements based on the affirmative defenses, but not the legal conclusions alleged by Respondent to result

therefrom. The Panel specifically did **not** find that the facts contained in Respondent's affirmative defenses preclude any possibility that Respondent's conduct could have materially limited or adversely impacted the outcomes in CD's case. **App. 349.**

The Panel recommended that Respondent be suspended indefinitely with no leave to apply for reinstatement for a period of one year, that the suspension be stayed, and that Respondent be placed on probation for a period of one year. **App. 360.** The Panel found no aggravators or mitigators applicable to the Respondent's misconduct.

Informant rejected the Panel's decision and recommendation on August 21, 2019. **App. 364.** Respondent accepted the Panel's decision on August 30, 2019. **App. 365.**

POINT RELIED ON

I.

**RESPONDENT VIOLATED RULE 4-1.7(a), RULE 1.8(j) AND
RULE 4-8.4(d) BY ENGAGING IN A MONTHS-LONG SEXUAL
RELATIONSHIP WITH HIS CLIENT WHILE REPRESENTING
HER IN A LEGAL EFFORT TO MAINTAIN CUSTODY OF HER
CHILD.**

In re Bell, SC97925, September 12, 2019

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

In re Littleton, 719 S.W.2d 772 (Mo. 1986)

II.

RESPONDENT'S LICENSE SHOULD BE SUSPENDED.

PROBATION IS NOT APPROPRIATE BECAUSE:

**A. THIS COURT SUSPENDS LAWYERS WHO SELFISHLY
USE CLIENT RELATIONSHIPS FOR THEIR OWN
SEXUAL INTERESTS;**

**B. UPON CONSIDERATION OF RESPONDENT'S
FIDUCIARY DUTY TO HIS CLIENT, HIS REPEATED
DECISIONS TO VIOLATE THE RULES, HIS CLIENT'S
INJURIES, AND AGGRAVATING CIRCUMSTANCES,
THE ABA SANCTION STANDARDS SUPPORT AN
ACTUAL SUSPENSION;**

**C. A LESSER SANCTION WOULD CAUSE THE
PROFESSION TO FALL INTO DISREPUTE,
CONTRARY TO RULE 5.225'S DIRECTIVES.**

In re Bell, SC97925, September 12, 2019

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

In re Littleton, 719 S.W.2d 772 (Mo. 1986)

ARGUMENT

I.

RESPONDENT VIOLATED RULE 4-1.7(a), RULE 1.8(j) AND RULE 4-8.4(D) BY ENGAGING IN A MONTHS-LONG SEXUAL RELATIONSHIP WITH HIS CLIENT WHILE REPRESENTING HER IN A LEGAL EFFORT TO MAINTAIN CUSTODY OF HER CHILD.

Respondent admits he represented CD in her effort to maintain custody of her young child. He also admits that for four or five months, during his representation, he often went to CD's home, where they had sex. He admits the sexual relationship began during his representation. Finally, he admits that misconduct violated Rule 4-1.8(j). The hearing panel found that violation.

Respondent denies that the sexual and otherwise intimate relationship with his client violated the provision in Rule 4-1.7(a)(2). That rule prohibits lawyers from representing a client if there is a significant *risk* that the representation will be materially limited by the personal interests of the lawyer. Comment 12 to Rule 4-1.7 states the application of that rule in this context: "A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship." Comment 12 then refers to Rule 4-1.8(j), the rule Respondent admits violating. The panel found that Respondent violated Rule 4-1.7(a)(2) by:

- (a) Engaging in a sexual relationship with his client CD during the

pendency of the attorney-client relationship; and

- (b) Creating a significant risk that his representation of CD would be materially limited by his personal interests in a non-professional intimate relationship with her.

The rule Respondent admits violating, Rule 4-1.8(j), explicitly prohibits sex with clients, except in circumstances inapplicable here. The Court's relevant comment to that rule offers additional explanation and guidance:

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 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 Comment [17].

Respondent's argues that no Rule 4-1.7 conflict resulted because - in his view - his client's other behavior (not her sexual relationship with Respondent) ultimately caused her to lose custody of her child.

As noted, Rule 4-1.7 prohibits representations where there is a risk that the lawyer's personal interests will interfere with the attorney client relationship. Comment 17 to Rule 4-1.8(j) explains that risk by pointing out the dangers inherent with sexual and emotional involvement between attorneys and clients. So it is that an impermissible conflict occurs when the emotional and sexual relationship begins, if not before. Neither causation of harm to the client's case nor actual client harm itself is an element of a Rule 4-1.7 violation.

The lawyer's personal interests, whether sexual, financial or otherwise, create the conflict. This court and others have routinely found improper conflicts in similar circumstances, even where no sex occurred. In 1995, many years before adopting Rule 4-1.8(j), this court suspended a lawyer under Rule 4-1.7 for trying to grab and kiss one

client and offering to exchange sex for fees with another. That lawyer's misdirected focus on his own personal interests constituted a conflict. *In re Howard*, 912 S.W.2d 61, 62–63 (Mo. 1995). The *Howard* court relied on Comment 1 to Rule 4-1.7, noting:

The Rules are clear: “The lawyer's own interests should not be permitted to have adverse effect on representation of a client.” *Comment, Rule 1.7*. Howard's unwanted sexual advances undermined the client's faith in his service and interfered with his independent professional judgment. Both the complainants testified that rejecting Howard's advances adversely affected his representation.

In re Howard, 912 S.W.2d 61, 62 (Mo. 1995).

Nine years before the *Howard* decision, applying the conflict provisions of the former Code of Professional Responsibility, this court described clients' reasonable expectations for their lawyers:

“[The client] had a right to expect that respondent would conduct himself in that relationship in a manner consistent with the honorable tradition of the legal professional—a tradition founded on service, integrity, vigorous commitment to the client's best interests, and an allegiance to the rule of law. Instead of remaining true to that tradition, however, respondent chose to exploit it, seeking to turn the professional relationship into a personal one.” *In re Littleton*, 719 S.W.2d 772, 775–76 (Mo. 1986).

In September 2019, the Court found violations of Rule 4-1.7(a) and 4-1.8(j) upon evidence that a lawyer once encouraged his divorce client to engage in oral sex. *In re Bell*, SC97925 (September 12, 2019).

Other jurisdictions have also considered lawyers' arguments that consensual sexual relationships may not constitute inherent conflicts and that disciplinary counsel should have to prove that the relationship actually caused an adverse legal impact to the client's legal matter. The North Dakota court rejected a disciplinary panel's decision that an inappropriate relationship "did not arise to a conflict of interest since it did not affect [respondent's] ability to consider, recommend, or carry out a course of action on behalf of his client nor did it have the potential of adversely affecting [respondent's] responsibility with respect to his representation" of the woman. *In re Application for Disciplinary Action Against Chiquist*, 2006 ND 107, ¶¶ 4-6, 714 N.W.2d 469, 471. Pointing to numerous other jurisdictions' rulings and the ABA/BNA *Lawyer's Manual on Prof. Conduct* 51:416, at p. 262 (2006), North Dakota wrote:

"Courts have also rejected the argument that sexual relationships should be authorized unless there is evidence of impaired representation, because having consensual sexual relations with domestic relations clients serves the attorney's own interests and thereby threatens the representation. *Tsoutsouris*, 748 N.E.2d at 858, 860; *Berg*, 955 P.2d at 1251; *Druckers' Case*, 133 N.H. 326, 577 A.2d 1198, 1203 (1990). "The

lawyer's own interest in maintaining the sexual relationship creates an inherent conflict with the proper representation of the client.”

Citing Matter of DiPippo, 678 A.2d 454, 455 (R.I. 1996); *Chinquist*, 714 N.W.2d 469, 473–76.

Colorado found a Rule 1.7 violation upon evidence of a nonsexual intimate relationship between a lawyer and his divorce client. That decision concluded that the relationship compromised the lawyer’s responsibilities. *People v. Beecher*, 224 P.3d 442, 444 (Colo.O.P.D.J.2009).

Courts have identified another risk: Lawyer/client conversations ought to be protected by the attorney-client privilege. Pillow talk has no such protection. *Chief Disciplinary Counsel v. Zelotes*, 152 Conn. App. 380, 394, 98 A.3d 852, 864 (2014). (See also Comment 17 to Missouri Supreme Court Rule 4-.1.8, above).

Lawyers, perhaps especially those involved in dissolution and custody battles, should guide clients through very trying and emotional circumstances, while advising them on complex legal considerations. Rule 4-2.1. Most lawyers recognize that some emotional detachment protects their own emotional state. Most also appreciate that emotional detachment is in the client’s best legal interests.

In the context this type of case, lawyers genuinely harm their clients when, instead of maintaining detachment, they add unnecessary emotional drama and trauma to their already fragile clients. The Indiana Supreme Court put it this way:

“In their professional capacity, lawyers are expected to provide emotionally detached, objective analysis of legal problems and issues for clients who may be embroiled in sensitive or difficult matters. Clients, especially those who are troubled or emotionally fragile, often place a great deal of trust in the lawyer and rely heavily on his or her agreement to provide professional assistance. Unfortunately, the lawyer's position of trust may provide opportunity to manipulate the client for the lawyer's sexual benefit. Where a lawyer permits or encourages a sexual relationship to form with a client, that trust is betrayed and the stage is set for continued unfair exploitation of the lawyer's fiduciary position. Additionally, the lawyer's ability to represent effectively the client may be impaired. Objective detachment, essential for clear and reasoned analysis of issues and independent professional judgment, may be lost. *In re Tsoutsouris*, 748 N.E.2d 856, 859–60 (Ind. 2001).

At least two more legal risks occur when lawyers engage in sexual relations with clients in the midst of custody matters. First, as Respondent recognized by objecting to evidence offered about his client's lifestyle, a parent's behavior matters in custody cases. **App. 561, 564.** Clients seeking custody of a young child probably don't want opposing counsel, the court, or the public to learn that they were in sexual relationships with their lawyer. A parent's sexual relationship with his or her lawyer might become evidence about sound judgment. Clients fear disclosure of embarrassing behavior, even

if it might ultimately be ruled inadmissible. With the risk of embarrassment alone, a lawyer in a brief sexual relationship with a client necessarily harms the client's bargaining position. A married lawyer, like Respondent, who continues an affair with a family law client for four or five months, has personally created likely discoverable facts where disclosure could impact his client's legal interests, her emotional state, her reputation, his own legal and family interests, and his professional reputation. In the hearing in CD's case, Respondent and opposing counsel questioned JZ, the opposing party, about his drug use, his name-calling, his alcohol use, his travel outside the state, his probation violations, and his work hours. **App. 536, 546-547, 566.** His questions and objections in CD's case, along with his significant family law experience, indicate that he knew his client's social behavior might reduce her chances to gain custody of her child. The attorney-client relationship broke down halfway through a two day hearing. CD had to represent herself. She soon reported CD's behavior and the affair to the trial court. If she had access to detached professional advice, she might have avoided disclosure of her own role in the affair.

Second, Respondent made himself a potential witness in CD's case. Consider how his divided loyalties might play out if he had to testify in her custody dispute, or in his own marital dispute. Also, without suborning perjury, he could not allow his client to deny the affair if she is asked about it. Of course, she could be called as a witness, not only in her pending custody matter, but in his potential marital matter. The conflicts

were obvious and everywhere, but Respondent ignored them, because, he said: “she was pretty, she was hitting on me”.

The record shows another story. CD testified that Respondent was not a mere willing victim of her seduction. She portrays Respondent as an aggressor, who lost interest in her legal needs after she stopped the sexual relationship. He continued to seek a sexual relationship with her after she told him the relationship was upsetting her. Respondent argues he did not violate Rule 4-1.7 because – in his view - his affair did not cause CD to lose custody. No harm, so no foul. But Respondent consciously ignored CD’s obvious fragile and vulnerable state. Days after she told him that she felt Respondent was victimizing her, he sent her explicit video images of himself. He did not address the embarrassing and potential evidentiary risks to CD’s bargaining position and reputation, created by his sexual relationship with her. Respondent was asked whether he was concerned whether CD’s personal emails to him could have posed an issue, had they had become public, or if JZ’s attorney had learned of them. **App. 292-293.** Respondent simply told the Panel: “I don’t know if that – I couldn’t tell what would be important to the other side or not. This was an email between myself and my client and it wasn’t disclosed to anybody else.” **App. 293.**

Respondent’s claimed ignorance of the potential relevance of personal emails, is contradicted by common sense and his extensive family law experience, “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).

Also, recall Respondent's experience as a prosecutor of domestic violence cases. With experience as a domestic violence prosecutor and as a family court lawyer, he cannot credibly claim ignorance of the emotional impact of domestic violence. And, he cannot credibly claim ignorance that evidence of parent's behavior may impact custody litigation and negotiation.

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). Although the instant case involved custody and not divorce, affairs are relevant factors 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. More to the point in custody matters, 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. During Respondent’s affair with her, CD and JZ (the father of her child) were in an ongoing effort to arrange informal and court-approved visitation and custody. In particular, engaging in sexual relations can have devastating emotional consequences for the dissolution client.

The Information also alleged, and the Panel also found, that Respondent violated Rule 4-8.4(d) Rule 4-8.4(d) “by engaging in conduct prejudicial to the administration of justice by having sexual relations with his client CD during the pendency of the attorney-client relationship, in that the sexual relationship did not predate the attorney-client relationship”.

II.

RESPONDENT'S LICENSE SHOULD BE SUSPENDED.

PROBATION IS NOT APPROPRIATE BECAUSE:

**A. THIS COURT SUSPENDS LAWYERS WHO SELFISHLY
USE CLIENT RELATIONSHIPS FOR THEIR OWN
SEXUAL INTERESTS;**

**B. UPON CONSIDERATION OF RESPONDENT'S
FIDUCIARY DUTY TO HIS CLIENT, HIS REPEATED
DECISIONS TO VIOLATE THE RULES, HIS CLIENT'S
INJURIES, AND AGGRAVATING CIRCUMSTANCES,
THE ABA SANCTION STANDARDS SUPPORT AN
ACTUAL SUSPENSION;**

**C. A LESSER SANCTION WOULD CAUSE THE
PROFESSION TO FALL INTO DISREPUTE,
CONTRARY TO RULE 5.225'S DIRECTIVES.**

Missouri Cases Support an Actual Suspension

Two Missouri discipline opinions establish that the lawyers' sexual interest in clients interfere with the professional obligations required in attorney client relationships. The court suspended the lawyers in both cases. The suspensions were not stayed, but imposed. *In re Howard*, 912 S.W.2d 61 (Mo. 1995); *In re. Littleton*, 719 S.W.2d 772 (Mo. 1986). *In re Bell*, SC97925, September 12, 2019.

In 1995, this court suspended a lawyer under Rule 4-1.7 for trying to grab and kiss one client and offering to exchange sex for fees with another. That lawyer's misdirected focus on his own sexual interests constituted a conflict. *In re Howard*, 912 S.W.2d 61, 62–63 (Mo. 1995). Rejecting a lesser sanction, the court explained:

In conflict of interest cases, this Court reprimands only if the lawyer is merely negligent in determining whether representation may be materially affected by the lawyer's own interests and then causes injury or potential injury to a client. *ABA Standards for Imposing Lawyer Sanctions*, Rule 4.33 (1986). Because Howard's sexual misconduct was more than negligent, a public reprimand is not appropriate,

In re Howard, 912 S.W.2d 61, 64 (Mo. 1995).

In the instant case, Respondent made repeated conscious choices over four or five months to flirt with his client, to invite her to contact him at late hours - after his wife was asleep, to invite himself to her home at night, to send explicit and implicit emails and text messages to her, to request and send erotic video images, and to engage in sexual intercourse on numerous occasions. Despite his claims that he “worked his tail off” on CD’s case, and that the sexual affair didn’t ultimately harm her case, Respondent knew his conduct violated rules prohibiting sex with clients. He understood her vulnerable emotional condition, because she told him about it and because her behavior affirmed it - as he argued. As in Mr. Howard’s case, any claim of negligence would be absurd. In line with the *Howard* decision, an actual suspension is appropriate.

In 1986, the court also suspended Mr. Littleton indefinitely, with leave to apply for reinstatement after six months. That decision found significance in the attorney's repeated misconduct, explaining: "given the cumulative nature of respondent's transgressions, we believe that reprimand is not an appropriate sanction in this case." *In re Littleton*, 719 S.W.2d 772, 778 (Mo. 1986).

Rule 5.225 Does Not Allow Probation

Probation is not an appropriate disposition in this case. Rule 5.225 permits probation only if that sanction would not cause the profession to fall into disrepute. That standard, of course, has elements of "I'll know it when I see it." To seek probation in the context of his conduct, Respondent's argument must be that the rest of the legal profession is not - and should not be - embarrassed by his conduct. To justify probation under that provision, he must hope to persuade the court that Missourians who need legal services are not offended by a lawyer's use of an attorney-client relationship with an abuse victim for his own sexual benefit.

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) ("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.”).

ABA Sanction Guidelines Support and Actual Suspension

This court often relies on and refers to the ABA’s Sanction Standards. In this case, guidance can from both the key guidelines set forth in Standard 3.0 (referring to all violation types) in Standard 4.32 (commonly applied to similar misconduct) and in the Aggravating and Mitigating Circumstances.

Three elements are considered in each analysis conducted under the ABA Standards: (a) the duty violated; (b) the lawyer's mental state; and (c) the potential or actual injury caused by the lawyer's misconduct. **ABA Standard 3.0**

Duty: Respondent Breached a Fiduciary Duty Owed to his Client

The first of three key elements in determining a sanction involves ‘duty’. This court has declared: “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). In a case more similar to the instant case, the court wrote: “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).

Level of Intent: Respondent Acted With a Purpose to Benefit Himself

The second key element involves scienter. The court should consider: What was Respondent thinking when he decided to send solicitous texts, images and messages to his client who was then dealing with a custody matter? It seems obvious that his purpose had no relation to helping his client navigate through her case. He knew then, as all lawyers in family practice know, that he was personally creating potential evidence that could harm her case. Then, when he went to her home again and again, and had sex with her many times over four or five months, he understood that she was a recently battered partner. And yet his focus was neither on her best legal interests nor her emotional well-being, but remained on his own sexual desires. When determining Respondent's level of intent, recall that Respondent sent video images of his erect penis to his client within days after she told him that she already felt victimized by their sexual relationship.

Respondent had experience as a domestic violence prosecutor. In addition to his family law practice, his prosecutorial experience working with victims of domestic violence undoubtedly reinforced a common-sense awareness that such victims might be vulnerable.

Respondent decided, many times, that having sex with CD was more important to him than either her mental health or her hope to retain custody. He intended to – and did - use a relationship with a vulnerable client to fulfill his selfish sexual interests.

Injury: Respondent's Behavior Harmed his Client

The third key element in the ABA Sanction Standards relates to injury. As noted in Point I, Respondent argued that his affair with his didn't adversely CD's custody effort because he worked diligently on her behalf. He said he would not have handled her case differently if the sexual relationship had not occurred. **App. 269-270.** Actual harm to a client's legal matter is not an element of Rule 4-1.7. That rule prohibits both actual and potential conflicts. Respondent's violation is made clear by Comment 12 to Rule 4-1.7. Rule 4-1.8(j) presumes a violation in most cases involving sex with clients. Respondent admits violating that rule. The Hearing Panel found both violations.

Still, the ABA sanction standards do consider both actual injury and potential injury. Determining the extent of actual harm is part of the sanction analysis.

Point I addressed some serious risks associated with lawyers engaging in sex with clients, especially those family law clients. But Respondent's behavior created more than risk; he harmed CD. Respondent used her, and she told the Panel how that felt. He knew CD had proclivities that were likely to be – and were – used against her in her custody case. He could have created strategies to help her address the existing evidence or to direct her to address her condition. Instead, he used her condition for his own sexual interests.

Respondent worsened her case by soliciting her to engage in behavior that he knew would put her at risk of losing her child. He damaged her negotiating position. His decisions to start and continue a sexual relationship hurt her emotionally.

In addition to the overarching analysis set by Standard 3.0, Standard 4.32 (relating to conflicts), should be considered. Standard 4.32 suggests that suspension is “generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” ABA Sanction Standard 4.32.

In this case, Respondent makes no claim that he obtained informed consent from CD. Rule 4-1.7 would have required written consent, proof of which Respondent has not offered. As noted, Respondent had to know that his sexual interest and sexual relationship created potential injury to CD. First, he knew she was emotionally vulnerable yet he started and continued a sexual relationship while representing her in emotionally charged negotiation and litigation. He had to know that evidence of their affair could be adverse to her legal interests, in that it could be used to question her emotional stability and judgment. It could diminish her chances to retain custody of her child. Applying those standards, Respondent’s conduct was conscious, at the least. He intended to engage in the affair. He knew of the risks. He knew CD, and other domestic violence victims, could suffer greatly from continued exploitation. As described above, he intended to – and did - use a relationship with a vulnerable client to fulfill his selfish sexual interests.

Aggravating and Mitigating Circumstances Support an Actual Suspension

The following aggravating factors are applicable: Respondent’s motive was purely selfish. Std. 9.22(b). He engaged in an extended sexual relationship with his

client, which quickly became a routine, a pattern. Std. 9.22(c). Although apparently remorseful, it is troubling that Respondent denies a conflict of interest or that he harmed CD. He has failed to fully acknowledge the wrongfulness, selfishness, or hurtfulness of his behavior. Std. 9.22(g). He knew, and as would be expected in her situation, and as she frequently reminded him, Respondent's client was emotionally vulnerable. She had recently been a victim of domestic abuse and was in the midst of a custody battle for her young child. Std. 9.22(h). Respondent had been practicing for over twelve years. He had been handling domestic cases for over five years. Before that, he had prosecuted domestic violence cases. He had substantial relevant experience. Std. 9.32(i).

The following mitigating factors may be fairly credited to Respondent: He has not been previously disciplined. Std. 9.32(a). Despite misdirecting blame (pointing to his client as the sexual aggressor) he appears to be remorseful. Std. 9.32(l).

Looking to other jurisdictions can also be helpful. 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."

CONCLUSION

Respondent used his attorney-client relationship with an emotionally vulnerable client to satisfy his own sexual interests. His intentional and knowing behavior constitutes violations of Rule 4-1.7(a), Rule 4-1.8(j) and Rule 4-8.4(d).

Informant recommends that the Court suspend Respondent's license indefinitely. He should not be eligible for reinstatement for at least six months. Probation is not appropriate because: (a) probation would cause the profession to fall into disrepute; (b) an actual suspension is necessary to maintain the integrity of the profession; (c) Respondent's selfish, conscious, and intentional behavior created serious risks and resulted in actual harm to his client.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2019, the Informant's Brief was sent to Respondent's counsel via the Missouri Supreme Court e-filing system to:

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CERTIFICATION OF COMPLIANCE: 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. The brief 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 8,046 words, according to Microsoft Word, which is the word
processing system used to prepare this brief.



Alan D. Pratzel