

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

MICHAEL M. SPIEGEL,

Attorney-Respondent.

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Supreme Court No. SC98155

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

A. Respondent Maintained Independent Judgment And Is Not Responsible For CD Losing Custody Of Her Child.

1. In the underlying case, on March 9, 2011, a judgment was issued (**App. 172, Exhibit 11, App. 420-430**). At that time, CD¹ was pro se. CD and JZ² had joint legal and joint physical custody, and neither party was paying child support (**App. 172; Exhibit 11, App. 420-430**).

2. A Motion to Modify was filed November 2012. At the same time, a Family Access Motion was filed by JZ indicating there had been a change in circumstance because CD had been withholding parenting time (**App. 163 and 173; Exhibit 13, App. 431-435; Exhibit 41, App. 317-326**).

3. On January 2, 2013, CD retained Respondent (**App. 163; Exhibit 41, App. 317-326**). Respondent responded to the Motions, filed a Counterclaim, and filed a Motion to Appoint the Guardian Ad Litem on CD's behalf prior to the beginning of the sexual relationship, which was granted (**App. 173; App. 251; App. 297; and Exhibit 47, App. 596-603**). Respondent did not specifically request Attorney Jennifer Oswald-Brown to be the Guardian Ad Litem ("GAL"); she was court appointed (**App. 296**).

4. The consensual sexual relationship with CD did not affect Respondent's ability, his thinking, or his representation of CD (**App. 153, 258, 268**). Respondent spent numerous hours working on CD's case up to the August 2018 temporary hearing (**App.**

¹ Initials "CD" are used in lieu of the client's name for purposes of confidentiality.

² The initials "JZ" are used in lieu of the father's name for the purposes of confidentiality.

268). There was nothing Respondent would have done differently on the case had he not had the sexual relationship (**App. 163**).

5. Respondent came up with a game plan for CD's case early and stuck to that plan throughout his representation of CD (**App. 269**). There was nothing he would have done differently (**App. 269**). The difficulties he encountered in the case had nothing to do with the sexual relationship (**App. 269-270**).

6. The difficulties were CD acting on her own (App. 265-266). CD was making side deals with JZ regarding parenting time with CD, and had left N³, her four-year old child, in Crittenton, an in-patient mental health care facility, so the facility could watch the child while she visited a friend in Denver, Colorado (**App. 269-270; App. 216-217**), and just before the August 2013 hearing, CD had been on a 21-day swinger's cruise and left her child with JZ, even though she claimed that JZ was a danger to the child (**App. 217-218; App. 249-250**). CD testified that it was the trip of a lifetime paid for by a male, and she could not miss out on it (**App. 218**). Respondent only learned of the cruise when told by Petitioner JZ's counsel. (**App. 248-249; App. 561 pp. 195-196**)

7 Also, it seemed that every time CD had visitation or parenting time, there would be some sort of injury, or "something dramatic or catastrophic" would occur to the child (**App. 226-227**).

8. On April 19, 2013, the parties entered into a Stipulated Order agreeing to alternate parenting time on a week-to-week rotation, and CD was to receive \$900 per month

³ The initial "N" is used in lieu of CD and JZ's child's name for the purpose of confidentiality.

in child support (**App. 174; Exhibit 14, App. 436-444**). The order was to expire on August 16, 2013, before the August 28th hearing and before Respondent withdrew as CD's attorney (**App. 184; Exhibit 14, App. 436-444**). Additionally, with Respondent's assistance, the Family Access motion entitling JZ to compensation and attorneys' fees for CD 's misconduct was dismissed (**App. 174-175**).

9. Respondent counseled CD regarding her conduct and informed her that she was her own worst enemy in the process, and about withholding the child from JZ. For example, the parties would get an agreement in place and CD would do the exact opposite and withhold the child (**App. 257-259**).

10. Another example would be that on July 9, 2013, Respondent and CD exchanged correspondence. Respondent informed CD that JZ would be in Kansas City to make the exchange of the child so she did not have to drive to Sedalia, but her response was, "Please tell me this is some kind of stupid joke" (**Exhibit 111, App. 339-343**). Even though she did not want to drive to Sedalia and the parties were following the parenting plan, CD was very difficult (**App. 259-260**). The correspondence goes on into a number of other issues, and this is after May when the sexual relationship had ended (**App. 261**).

11. In the last paragraph of the July 9, 2013 correspondence, just prior to the August 28, 2013 hearing, CD tells Respondent that she "cannot express [her] appreciation enough for what [Respondent has] done" for her (**App. 261; Exhibit 111, App. 33-343 p. 340**).

12. CD refused to follow Respondent's advice, including the recommendation that she follow the GAL's, Jennifer Oswald-Brown, plan (**App. 263; Exhibit 63, App.**

336-338). Respondent and CD went back and forth regarding what she wanted to do on the case for weeks, and during that time, Respondent was not consistently having a sexual relationship with CD (**App. 289**).

13. At one point, on August 28, 2013, CD stated: “So do you not intend to fight to get me the plan I want. Respondent responded, “That’s not what I said, I will argue your plan, but I think it will be to your detriment to do so” (**App. 263-264; Exhibit 63, App. 326-338**).

14. However, on July 22, 2013, CD sent Respondent an email stating, “I am settling the case with JZ and giving him N.” (**App. 175-176; Exhibit 56, App. 334-335**). Further, JZ agreed to pay Respondent and the Guardian Ad Litem (**App. 172**). However, the settlement did not occur.

15. Respondent worked extremely hard to prepare for the August 27 and 28, 2013 hearing (**App. 268**).

16. Respondent fully advocated CD’s position in the case and also made multiple objections during the August 28, 2013 hearing while advocating for his client August 27, 2013), (**Exhibit 30, App. 512-595**). For example, Respondent objected in trying to keep CD’s swinger’s cruise paid for by Steve Gitt, which came into evidence over Respondent’s objections (**App. 218, 250-257; Exhibit 30, App. 561, pp. 194-197**).

17. Respondent also attempted to keep out the fact that CD had dropped her 4-year old child at Crittenton, a mental facility, and left town, leaving the child alone there (**App. 251**).

18. CD believes she received an email from Respondent stating he was going to withdraw at the end of the hearing the following day (August 29, 2013) because CD had provided false testimony and he was not able to cross examine her because she had been dishonest in her court testimony (**App. 144**). Respondent told her that if he stayed as her attorney, her testimony would have to be corrected, but if he withdrew, she could continue to testify in the narrative (**App. 178-179, 265**).

19. After the first day of the August 28, 2013 hearing, Respondent spoke with CD about her testimony being untruthful and indicated that both opposing counsel, Kelli Wulff, and Guardian Ad Litem, Jennifer Oswald-Brown, also knew that CD had not been truthful (**App. 262**).

20. At the hearing, Respondent had to withdraw from the representation of CD due to CD's dishonesty in the Court proceedings on August 28, 2013 or he would have been suborning perjury (**App. 144, 262**).

21. The decision to withdraw from representation was not made until that morning when CD told Respondent she wanted to testify in a narrative and released Respondent from his services (**App. 294-295**). Withdrawing from the case had nothing to do with his sexual relationship with CD because the relationship had ceased months before, though he is not exactly sure of the specific date (**App. 269**).

22. CD consented to Respondent withdrawing on the record and had discussions with the Court regarding her signing the consent (**App. 145, 179-180; Exhibit 30, App. 573**). After Respondent withdrew as CD's attorney, he offered CD her file in the courtroom which consisted of one or two boxes, but she declined (**App. 222**). After the hearing, CD

went to Respondent's office to obtain previously prepared discovery answers with instructions on how to serve them to the other side, along with her entire file (**App. 266-267**).

23. Respondent sent CD a bill for his fees on a monthly basis and again after he withdrew from the case, but she never paid the bill (**App. 177, 256**).

24. Respondent fully and zealously represented CD at all times both when he had sexual relationship with her and when the relationship had ended (**App. 294**).

25. Jennifer Brown-Oswald, the Court appointed Guardian Ad Litem and family law attorney, testified that Respondent fully advocated CD's position in the case and made multiple objections at the August 28, 2013 hearing (**App. 210-211, 218; Exhibit 30, App. 512-572**).

26. Respondent would not have done anything different on CD's case had he not engaged in the sexual relationship (**App. 270**).

27. After Respondent was left with no choice but to withdraw from CD's case due to her dishonest testimony, CD represented herself in the August 2013 hearings, and was allowed to sum up her case and permitted to say everything she wanted to tell the court (**App. 219**).

28. During Respondent's representation of CD⁴, CD gained more access to her son than she had prior to Respondent's involvement (**App. 172-174, 184; Exhibit 11, App.**

⁴ Initials "CD" are used in lieu of the client's name for purposes of confidentiality.

420-430; Exhibit 13, App. 431-435; Exhibit 14, App. 436-444; Exhibit 16, App. 445-453; and Exhibit 41, App. 317-326).

B. Respondent Was No Longer Involved In The Case For Over A Month When CD Lost Custody Of Her Child.

29. On September 6, 2013, after two days of hearings, the parties were to still share joint legal custody and split physical custody, and CD still had parenting time every other weekend, Wednesdays, and two weeks in the summer (**App. 182-183**). Further, all issues regarding child support were to be taken up at trial. (**App. 182-183; Exhibit 16, Temporary Order, p. 2, App. 445-453**).

30. On October 5, 2013, CD retained attorney R. Scott Richart and he entered his appearance in the case (**App. 188; Exhibit 19, ¶ 16j, App. 461-465**). CD hired Mr. Richart because her desire was to adopt JZ's parenting plan to have N every other weekend, every other Wednesday, and two weeks in the summer (**App. 189**). Mr. Richart had settled the case for CD (**App. 221**).

31. However, on November 6, 2013, the Guardian Ad Litem, acting in the best interest of her client, the child, filed for an Emergency Motion to Modify the Amended Temporary Order and a Motion for Emergency Temporary Hearing. (**App. 222; Exhibit 18, App. 454-460**). The emergency filing was required because CD had ceased following the Court's orders and her behavior continued to escalate since the last order, including making numerous medical appointments for the child. The GAL received calls from the Children's Division regarding this and the GAL was concerned for the child's safety and

wellbeing, including that CD may abscond with the child to outside the jurisdiction of the Court (**App. 222-223; Exhibit 18, App. 454-460**).

32. On November 6, 2013, the GAL filed an Emergency Motion to Modify the Amended Temporary Order requesting sole legal and sole physical custody be awarded to JZ based on CD's misconduct (**App. 190**). Additionally, it was maintained that unsupervised time with CD would likely jeopardize the child's emotional health and physical well-being (**App. 187-188; Exhibit 18, App. 454-460**).

33. Respondent did not know about the GAL's Emergency Motion to Modify filed in November 2013 because he no longer represented CD at that time and had withdrawn in August 2013 (**App. 144, 258**).

34. However, the GAL testified at Respondent's disciplinary hearing that it was CD's failure to follow the Court's orders that caused her harm, even after she retained other counsel on her behalf, that Respondent fully advocated CD's position in her case and left CD better off regarding the custody of her child and child support at the time he withdrew his representation based on his zealous advocacy and diligence, and that whether Respondent and CD were having a sexual relationship was not something she would want to know about (**App. 213-214, 218. 226, 230, 641-642**).

35. On November 7, 2013, acknowledging that she was in contempt of the Court's orders, CD filed a Motion to Dismiss because she wanted custody of the child every other weekend, every other Wednesday, and a couple weeks in the summer (**App. 188-189; Exhibit 19, ¶ 19, App. 461-465**).

36. At that time, CD also informed the Court that “circumstances that have arisen regarding the safety of the child make settlement negotiations impossible, therefore Mr. Richart had withdrawn” from representing her (**Exhibit 19, ¶17, App. 461-465**).

37. On November 8, 2013, the Court allowed CD’s attorney, R. Scott Richart, to withdraw as CD’s counsel for which CD consented, and the hearing on the emergency motion went forward (**App. 190; Exhibit 20, App. 466-472, ¶ 2**).

38. On November 13, 2013, based on the Guardian Ad Litem’s Motion for Emergency Modification, a Writ of Habeas Corpus, Motion for Temporary Restraining Order, and CD’s Motion to Dismiss, the trial court entered a Temporary Order and Judgment (**App. 190-191; Exhibit 20, App. 466-472**). The Court determined that “immediate and irreparable injury will result to the minor child if this Court does not restrain [CD’s] contact with the minor child” (**Exhibit 20, App. 466-472, p. 2 ¶ 8**). Further, “[CD] has willfully and contumaciously violated several provisions of the Court’s September 6th, 2013 Amended Temporary Order, including but not limited to refusing to return the minor child to the care, custody and control of [JZ] per said Order” (**Exhibit 20, App. 466-472, p. 3, ¶ 11**). Further, trial is set for December 1, 2, 3 and 4 on the Motion to Modify (**Exhibit 20, App. 466-472, p. 1, ¶ 1**).

39. Thereafter, CD was only allowed to see N in a supervised setting (**App. 193; Exhibit 20, App. 424-430, p. 6, ¶¶ 16-18**). The supervised visitation order was not in place until after CD was represented by her new counsel, Mr. Richart, and approximately two and a half months after Respondent had withdrawn from her case. That took place on or about August 28, 2013 (**App. 204**).

40. Additionally, CD's Motion to Dismiss did not argue Respondent caused her to lose custody (**App. 223**). As Ms. Oswald-Brown testified, every time they had a hearing, it was because CD had violated something regarding the Court's order (**App. 226**).

41. The trial on the Motion to Modify took place December 2, 3 and 4, 2013, after Mr. Richart had withdrawn as counsel for CD on November 8, 2013 (**App. 190**). CD had not yet retained other counsel, so she appeared at the December trial pro se (**App. 194**).

42. After trial, the Court's December 19, 2013 Judgement was entered (**App. 196; Exhibit 21, App. 473-488**). The Court imputed income to CD in the amount of \$3,000 per month (**App. 194-195**). Further, CD was ordered to pay \$457 a month to JZ for child support and the Court continued supervised visitation because CD had "repeatedly subjected the child to emotional distress by her deceptive attempts to establish that Petitioner is an unfit parent" (**App. 195; Exhibit 21, p. 3, ¶ 21 and p. 3, ¶ 2; App. 473-488**).

43. The Court further found that from "the evidence taken as a whole...[CD] lacks the ability and willingness to actively perform her function as a mother for the needs of the child." (**App. 195-196, Exhibit 21, App. 473-488, p. 3, ¶ 2**). The Court also found that:

- Any distress adjusting to the child's home, school and community has been caused by CD (**Exhibit 21, App. 473-488, p. 4, ¶ 5**).
- The GAL expressed concerns that CD may flee with the child (**Exhibit 21, App. App. 473-488, p. 5 ¶ 7**)

- Despite JZ's perpetration of domestic violence, the Court found in the best interest of the child to be placed in the sole legal and sole physical custody of JZ (**Exhibit 21, App. 473-488, p. 6 ¶ 8**).

44. CD then retained attorney Bryan Byrd to file a Motion to Modify the Judgment and Motion for Temporary Custody (**App. 196**). She also retained attorney Bill Quitmeier, and on October 17, 2014, CD's counsel filed a Motion to Set Aside the December 19, 2013 Judgment and for immediate temporary custody of her child, claiming JZ perpetrated a fraud on the Court (**App. 196-197; Motion, Exhibit 24, App. 489-494; Order, Exhibit 25, App. 495**).

45. CD's Motion to Set Aside the December 19, 2013 Judgment did not claim Respondent was the reason for the Judgment entered against her. Instead, the reasons argued to set aside the Judgment were based on JZ's "continued...pattern of violence." *Id* (**App. 196-197, Exhibits 24, App. 489-494, Exhibit 25, App. 495**).

46. In 2015, Bill Quitmeier and attorney Lynne Bratcher represented CD in connection with child custody modification issues because JZ violated his probation and went to jail in the summer of 2015 (**App. 199**). When JZ went to jail, CD then received custody of N (**App. 199**). CD's child support of \$457 per month, that she never appealed, was stayed while JZ was incarcerated (**App. 200; Exhibit 26, App. 496-508**).

47. Once JZ was out of jail, he again received sole legal and physical custody of the child. The Judgment was entered January 28, 2019, and filed February 26, 2019, when CD was represented by another attorney, Andrew Payeur (**App. 201; Exhibit 10, App. 408-419**). However, CD's child support was reduced to \$350 and she received unsupervised

visitation every other weekend, every other Wednesday, and uninterrupted visitation 21 days in the summer (**App. 201-202**).

C. CD's Background

48. It is undisputed that CD and JZ were never married (**Exhibit 13, App. 431-435, p.3**).

49. CD has other children with Stephen Pickell and they had a parenting plan in place from their dissolution case (**Exhibit 72, App. 608-640, pp. 38-41**) when she moved to Arizona in October 2012 to live with JZ leaving them in Missouri (**Exhibit 72, App. 608-640, p. 60**).

50. CD attended the University of Sedona to obtain a Master's Degree (**Exhibit 30, App. 512-595, p. 212**).

D. CD and Respondent's Relationship

51. On January 2, 2013, CD entered into the retainer agreement with Respondent and paid an initial retainer of \$1,600 (**App. 125; 161; Exhibit 41, App. 317-326**). The day after she signed the fee agreement, she sent Respondent an email (**Exhibit 36, App. 314**) since he was "off the clock," talking to him about various items, including, "I need a damn man" (**Exhibit 36, App. 164, 314**). CD never told Respondent not to email her at night (**App. 128**).

52. A couple of days after signing the representation agreement, CD sent inappropriate pictures of herself in various stages of undress (**App. 247**). CD knew Respondent was married (**App. 136**). CD also knew that she was not in a relationship with

Respondent, and instead was actively dating others and shared that information with Respondent (**App. 136**).

53. Although CD claims to have been a victim of domestic abuse, she has also been charged with domestic violence (**App. 154-155; Exhibit 37, App. 315**). JZ claimed being assaulted by CD (**App. 154**) when they were living the “lifestyle;” CD was arrested for assaulting JZ when they were living the “lifestyle” and had concerns about felony obtaining Missouri Social Services support (**App. 161; Exhibit 37, App. 315**). CD was a swinger in her lifestyle (**App. 250-251**). She and JZ engaged in the Swinger life style (**Exhibit 30, App. 512-595, pp.196-197**). However, CD worried about her behavior and that certain aspects of her past might hurt her case due to her underlying conviction (**App. 161-162**).

54. On January 6, 2013, CD sent an email to Respondent indicating that she “always has N, no free weekends, no child support, no help co-parenting, et cetera” (**App. 165**). CD informed Respondent that her boyfriend got there yesterday, January 5, 2013 (**App. 165, Exhibit 38, App. 316**). Additionally, on January 6, 2013, regarding a change of judge, CD writes to Respondent, “Would you seriously just find me a husband who is a lawyer? I would be a very good lawyer’s wife, I just know it” (**App. 169; Exhibit 43, App. 331**). Respondent writes back that she had a boyfriend and CD responds discussing her boyfriend (**App. 169; Exhibits 44, App. 332; Exhibit 45, App. 333**).

55. In Missouri, CD was also charged with a felony which was pleaded down to a misdemeanor (**App. 161**). However, she had indicated numerous times that she was not able to get employment because she had a felony hanging over her head (**App. 162**). She

pleaded guilty on October 4, 2013 for misappropriating property from the State of Missouri with the purpose of depriving the State by deceit in representing that she needed government assistance that she knew was false (**App. 162**).

56. During the time CD was represented by Respondent, CD was actively dating others (**App. 136, 293**) and did not believe she was in a relationship because CD knew Respondent was married.

57. Respondent was not bothered if CD went on a date with other men (**App. 293-294**).

58. Respondent has been involved in litigation for six years because after filing her Bar Complaint on March 13, 2014, CD filed a legal malpractice lawsuit against Respondent in the Circuit Court of Jackson County, Missouri, Case No. 1416-CV06028. This case was dismissed and refiled on September 13, 2016, Case No. 1616-CV22235, which was dismissed on August 2, 2017, after settlement (**App. 20-102, p. 11 and App. 273**).

59. Regarding her relationship with Respondent, CD then contacted The Pitch, a local Kansas City newspaper, to tell her story about this case. The articles that ran for two consecutive weeks as the cover story On November 24, 2015 and December 1, 2015 (**App. 203-204**). In 2018, CD also gave a radio podcast regarding the same issues involving Respondent (**App. 203**). CD again gave an interview with the Independence Examiner, that was published, regarding her relationship with Respondent (**App. 203**).

60. Counsel opposing Respondent in other cases printed copies of the Independence Examiner to distribute and it was the talk around the courthouse (**App. 272-**

273). All judges, opposing counsel, and the Bar in general are aware of CD and Respondent's sexual relationship because the publicity of it has been going on for over six years (**App. 273**). As CD's publications continued, Respondent did not provide a response (**Exhibit 112, R.App. 99**).

61. CD also filed Bar Complaints against Judge Kanatzar, the GAL Jennifer Oswald-Brown, and opposing counsel Kelli Wulff without a finding of wrongdoing (**App. 198-199**).

E. Respondent's Good Character

62. Missouri Attorney, Andrew Nantz, has known Respondent since law school through mutual friends and got to know him more after law school (**App. 234**). Mr. Nantz testified that it is important to find someone he can trust that would take care of his clients in areas of the law he does not practice (**App. 234**). Mr. Nantz has sent numerous cases to Respondent over the years and has heard nothing but positive reports (**App. 235**).

63. Mr. Nantz referred a client to Respondent involved in an antagonistic and drawn out four-year divorce and custody battle. Respondent told the client of his discipline issue and the client still wanted to stay with Respondent because he knew it was his best chance to get help on his divorce (**App. 235-236**).

64. As set forth in the character letter submitted by Mr. Nantz on behalf of Respondent, Respondent works very diligently for his clients (**App. 237**). If Respondent cannot continue to work for his clients, the clients will suffer (**App. 237**).

65. Not only did Mr. Nantz provide a Character Witness Letter, but 29 other prestigious former judges, members of the Bar and a client submit Character Witness Letters on Respondent's behalf (**Exhibit 112, R.App. 95-141**).

66. At this time, Respondent believes most lawyers in the Kansas City area know about Respondent's pending disciplinary proceeding and the sexual relationship he had with CD (**App. 236**).

67. Respondent is ashamed of the conduct and has been extremely remorseful (**App. 236**). If he could undo the lapse in judgment, he would (**App. 248**). Respondent admits it is the single worst thing he has ever done in his life (**App. 248**).

F. Respondent's Background

68. Respondent has been a Missouri practicing attorney since 2000 (**App. 238**). His primary practice is in domestic relations and criminal law (**App. 241**). In his 20 years of practice, he has tried numerous divorce or criminal cases (**Exhibit 12, R.App. 95-141**).

69. Respondent is a former law clerk for Judge Vernon E. Scoville, Judge Twila K. Rigby, Judge Robert L. Trout, and Judge Jeffrey L. Bushur (**App. 239**).

70. Respondent was an assistant Jackson County Prosecutor from 2000 until he opened his private practice in 2005 (**App. 239**).

71. At the time of the May 2019 disciplinary hearing, Respondent was the Assistant City Attorney for the City of Buckner and also the prosecutor for the City of Buckner (**App. 242**). He was also the interim prosecutor for the City of Blue Springs until CD published the article in the Independence Examiner (**App. 242**).

72. Respondent's partner was Mark Rains, who has retired, so the Rains Spiegel firm's name has changed to Spiegel Law (**App. 240-241**).

G. Respondent's Personal Life And The Aftermath

73. Respondent has no affiliation with the Hope House and is not on a referral list there (**App. 278-279**).

74. Because Respondent is married, he told his wife about this incident, the Bar Complaint, the lawsuit, and the publications (**App. 271**).

75. In October, three years ago, Respondent's wife had a stroke and she is now disabled, leaving Respondent as the sole provider for the home (**App. 271**).

76. Respondent also had to report himself to his partner, Mark Rains, who is like a second father to him and who is deeply rooted in religious beliefs (**App. 272**).

77. Respondent admits to violating Rule 4-1.8(j) (**App. 274**).

F. Character Witness Letters

78. Without making excuses for Respondent's misconduct, Mr. Nantz, as well as 30 other former judges, past Bar Presidents, attorneys in the community, both male and female, and a client wrote letters on behalf of Respondent based on his good character, including his professional reputation. The letters also expound upon the stellar, honest, diligent, skillful work ethic, and trustworthiness of Respondent (**App. 238; Exhibit 112, R.App. 95-141**). Many letters share the author's opinions, though making no excuses, of Respondent's remorsefulness, embarrassment, and humiliation he has shown, publicly and privately, and what a great disservice it would be to the legal community, Respondent's

clients, and the public to suspend Respondent's license to practice law (**Exhibit 112, R.App. 95-141**).

79. A few examples of the character witness letters are:

- R. Scott Richart is CD's former attorney who represented CD after Respondent's withdrawal as her attorney. Mr. Richart has known Respondent for 20 years. His letter sets forth his respect and explains the zealous advocacy Respondent has for his clients and that Respondent is consistently professional, well prepared, and extremely knowledgeable about the facts and applicable law. Further, the letter indicates that it would be a detriment to Respondent's current clients should his license to practice be negatively affected. Additionally, he states that "the bar as a whole is better with him as a practitioner" (**Exhibit 112, p. 123; R.App.95-141**);
- Former Jackson County Circuit Court Judge Robert M. Schieber wrote that he is honored and privileged to write a letter in support of Respondent, having known Respondent for over ten years. He had the good fortune to preside over several cases Respondent tried. It is Judge Schieber's opinion that as an attorney and friend, Respondent has a wonderful demeanor and zeal for trial. Further, Respondent is always well prepared and handles cases with "great skill, compassion, dedication, guts and enthusiasm," and is "a trial lawyer's trial lawyer" in effectiveness. Judge Schieber indicates new lawyers should strive

to become the same kind of litigator as Respondent, who is needed in the Circuit Court of Jackson County, since Respondent has such an impeccable reputation of integrity. Judge Schieber further illustrates that Respondent treats all he encounters with dignity, respect and humility, and that Respondent is the epitome of what a litigator should be (**Exhibit 112, pp. 125-126, R.App. 95-141**);

- Kendall R. Garten, who served as a Disciplinary Panel Hearing Officer for the Missouri Bar for ten years, stated in his letter, that Respondent is very competent and trustworthy, and that Respondent represents his clients well. Mr. Garten has recommended Respondent to represent clients “without reservation.” Mr. Garten stated that Respondent has a stellar, honest, and trustworthy reputation. Further, Mr. Garten is aware of the complaint based upon unrebutted characterizations of Respondent from social media published by CD. Mr. Garten believes the public would not be served should Respondent’s license be suspended (**Exhibit 112, p. 99, R.App. 95-141**);
- Jessica Holloway, sent a letter to Respondent thanking him for working on a case. Having an abusive father, Respondent saved the lives of her and her brothers based upon his work. She states that “[w]ords cannot even express the gratitude in my heart for what you did.” She was “overjoyed” to see that Respondent is practicing family

law, because of her experience, she feels whoever utilizes Respondent's services will have "quality representation" (**Exhibit 112, p. 103, R.App. 95-141**);

- Former Jackson County Circuit Court Judge Michael W. Manners, who has known Respondent since 2001, also submitted a character witness letter on Respondent's behalf. Presiding over hundreds of contested bench and jury trials, Judge Manners states that Respondent was a zealous advocate for his clients and his candor toward the court was refreshing. Further Respondent's ethical conduct was "exemplary and he poses no threat to his clients (**Exhibit 112, pp. 110-111, R.App. 95-141**);
- Former Jackson County Circuit Court Judge Stephen Nixon has known Respondent since 2000 and worked closely with him when Respondent was a law clerk for Judge Jeffrey Bushur. Judge Nixon is familiar with Respondent's work ethic and legal reasoning which were "exemplary". Respondent is considered a highly ethical attorney who demonstrated candor to the court as well as an attorney who was prepared on the law. Further, having taken responsibility for his poor choice and remorsefulness, Judge Nixon believes that Respondent should be allowed to continue in the profession (**Exhibit 112, pp. 115-116, R.App. 95-141**);

- Patrick Stark, who has been a lawyer since 1979, past President of the Missouri Bar Association and past President of the Missouri Bar Board of Governors, submitted a character letter that indicates that it would be a disservice should Respondent's license be suspended for any amount of time. Further, that should a sanction be required, the sanction of probation should be required. Mr. Stark has known Respondent since 1999 as well as Respondent's professionalism and competence as an attorney. He assures that Respondent is honest and trustworthy, well prepared attorney with a great reputation in the community and having good character. Mr. Stark has referred several clients to Respondent and will continue to do so. Mr. Stark is also proud to serve in the same professional community with Respondent **(Exhibit 112, pp. 129-130, R.App. 95-141);**
- Linda Diem Tran, a former police officer and now an attorney and former Rule 13 intern for Respondent, submitted a character letter. She does not know where she would be without Respondent's guidance, mentoring, and encouragement. He helped bridge the gap for her as a minority law student and opened opportunities for her. He assisted her father, a Vietnamese immigrant with various legal matter, always treating him with respect, and never making him feel inferior **(Exhibit 112, pp. 132-136, R.App. 95-141);**

- James A. Witteman, Jr., is an attorney who has known Respondent his entire legal career. Both Mr. Witteman and his law partner often consult with Respondent over complex cases. The letter states Respondent is very remorseful and Mr. Witteman believes a person should be judged on his long history of accomplishments “rather than one misstep” (**Exhibit 112, p. 141, R.App. 95-141**); and
- Finally, Mark Rains, Respondent’s former partner who has known Respondent since 2005, states that he can attest to how truly remorsefulness Respondent has been and that Respondent is aware of how significantly he disappointed Mr. Rains, Respondent’s family, and the community. Mr. Rains finds that Respondent’s commitment to law and justice is impeccable and believes that Respondent’s deserves to be judged by his lifetime of belief in justice and fairness rather than one foolish mistake and lapse of judgment which was an aberration. Mr. Rains adds that if given another chance, Respondent will not disappoint (**Exhibit 112, pp. 121-122, R.App. 95-141**).

POINTS RELIED ON

I.

RESPONDENT DID NOT VIOLATE RULE 4-1.7 NOR AUTOMATICALLY VIOLATE RULE 4-1.7 BY VIOLATING RULE 4-1.8(J), BECAUSE THERE WAS NO SIGNIFICANT RISK THAT RESPONDENT’S REPRESENTATION OF CD WOULD HAVE BEEN MATERIALLY LIMITED AS A RESULT OF THE SEXUAL RELATIONSHIP.

In re Ehler, 319 S.W.3d 442, 448 (Mo. 2010) (citing *In re Crews*, 159 S.W.3d 355, 358 (Mo. Banc 2005))

In re Brady, SC97859, March 15, 2019 (**R.App. 27-48**)

Iowa Supreme Court Atty. Disciplinary Bd. v. Waterman, 890 N.W.2d 327, 332 (Iowa 2017)

II.

SHOULD RESPONDENT’S LICENSE BE SUSPENDED, SUSPENSION SHOULD BE STAYED AND RESPONDENT PLACED ON FOR PROBATION BECAUSE:

- A. THIS COURT’S DECISIONS IN OTHER CASES INVOLVING LAWYERS WHO HAVE A SEXUAL RELATIONSHIP WITH A CLIENT SUPPORT PROBATION;**
- B. BASED UPON RESPONDENT’S DUTY TO CD, HIS MENTAL STATE, THE LACK OF HIS CLIENT’S INJURIES, AND MITIGATING CIRCUMSTANCES, THE ABA STANDARDS SUPPORT PROBATION;**

C. NEITHER RESPONDENT’S RULE VIOLATION NOR THE DISCIPLINARY HEARING PANEL’S RECOMMENDED DISCIPLINE WOULD CAUSE THE PROFESSION TO FALL INTO DISREPUTE, PURSUANT TO RULE 5.225’S DIRECTIVES.

In re Brady, SC97859, March 15, 2019 (**R.App. 27-48**)

In re Bergman, SC94683, May 26, 2015 (**R.App. 75-94**)

In re Gunter, SC96162, February 28, 2017 (**R.App. 49-74**)

ARGUMENT

STANDARD OF REVIEW

In professional misconduct cases, the Missouri Supreme Court reviews the evidence de novo, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). The Disciplinary Hearing Panel’s findings of fact, conclusions of law, and the recommendations are advisory, and this Court may reject any or all of the panel’s recommendations. *In re Coleman*, 295 S.W.3d 857, 863 (Mo. Banc 2009). “The purpose of imposing discipline is not to punish the attorney, but to protect the public and maintaining the integrity of the legal profession.” *In re Krigel*, 480 S.W.3d 294, 300 (Mo. 2016) (emphasis added).

I.

RESPONDENT DID NOT VIOLATE RULE 4-1.7 NOR AUTOMATICALLY VIOLATE RULE 4-1.7 BY VIOLATING RULE 4-1.8(J), BECAUSE THERE WAS NO SIGNIFICANT RISK THAT RESPONDENT’S REPRESENTATION OF CD WOULD HAVE BEEN MATERIALLY LIMITED AS A RESULT OF THE SEXUAL RELATIONSHIP.

A. Comment 26 To Rule 4-1.7 Provides The Relevant Instruction In Determining Whether There Was A Significant Risk That Materially Limited CD’s Representation.

A conflict is in violation of Rule 4-1.7(a)(2) “if there is a significant risk that the representation of one or more clients will be materially limited by ... the personal interest of the lawyer.” Rule 4-1.7(a)(2). Comment 12 to the Rule prohibits a lawyer from engaging in sexual relationships with a client. Rule 4-1.7, cmt. 12 (citing to Rule 4.-1.8(j)). Informant argues that because to the Rule prohibits a sexual relationship with a client, such

relationship is an automatic violation of Rule 4-1.7 (Comment 12 actually cites specifically to Rule 4-1.8(j)) (Informant’s Brief, p. 19-20). However, such interpretation misconstrues Comment 12 as the comment only provides instruction on “personal interest conflicts,” which on their own do not violate Rule 4-1.7.

The Informant must prove by a preponderance of evidence that Respondent violated Rule 4-1.7 before discipline will be imposed. *In re Ehler*, 319 S.W.3d 442, 448 (Mo. 2010) (citing *In re Crews*, 159 S.W.3d 355, 358 (Mo. Banc 2005)). In sum, the Informant must demonstrate by a preponderance of evidence that there was a “**significant** risk” that Respondent’s “ability to consider, recommend, or carry out an appropriate course of action” for CD would have been “**materially** limited as a result of” Respondent’s personal interest (his sexual relationship with CD). See Rule 4-1.7, cmt. 8 (emphasis added). There was no such significant risk for material limitation in the underlying case.

Comment 8 to Rule 4-1.7 provides that the critical question is whether Respondent’s personal interest would have “materially interfere[d] with [his] independent professional judgment in considering alternatives or foreclos[ing] courses of action that reasonably should be pursued on behalf of the client.” Rule 4-1.7[8]. Further instructive, Comment 26 to the Rule sets forth the relevant factors in determining whether there was a significant potential for material limitation:

1. Duration and intimacy of the lawyer’s relationship with the client;
2. Functions being performed by the lawyer;
3. Likelihood that disagreements would arise; and
4. Likely prejudice to the client from the conflict.

Rule 4-1.7[26]. An analysis of these factors would reveal no significant potential for material limitation by Respondent.

1. Duration and Intimacy of the Lawyer's Relationship With the Client:

Respondent's sexual relationship with CD occurred sporadically for a few months. It was not a consistent, day-to-day sexual relationship. Further, no intimacy was involved. Both parties admitted they were not in a relationship with one another (**App. 136, 289**). The relationship between Respondent and CD was only sexual in nature (**App. 294**). It was devoid of intimacy and any emotions that could have possibly impacted Respondent's representation of CD (**App. 293-294**). In fact, while Respondent and CD were sporadically engaging in sexual relations, CD was involved in multiple other relationships, and Respondent was married (**App. 136, 165**). In fact, CD specifically testified that she and Respondent were not in a relationship that she knew Respondent was married and that she actively dated others during that time (**App. 136**). Based on Respondent's sexual relationship with CD and the lack of intimacy involved, there was no significant risk for material limitation of CD's representation (**App. 294**). Moreover, the relationship had ceased in May before the August 28-29 hearing and before any request to withdraw (**App. 142**).

2. Functions Being Performed By the Lawyer:

Respondent is a very experienced attorney who has practiced law since 2000 (**App. 238**). Informant often misstates that Respondent's representation of CD was for a divorce action, however, Respondent represented CD only to seek to modify a custody order (**App. 163, 173**). CD was never married to the child's father (**App. 389-393, p.3**). Respondent

has significant experience in custody cases (**App. 241**). His primary practice of law involves family/domestic relations law (**App. 241**). There was no significant risk that Respondent's independent professional judgment would have materially limited his skills in considering alternatives or foreclosing courses of action that reasonably could have been pursued by CD because the modification of CD's custody order was uncomplicated. The functions being performed by Respondent were everyday functions lawyers perform, especially experienced litigators like Respondent. Therefore, there was no significant risk for material limitation of CD's representation.

3. Likelihood That Disagreements Would Arise:

As already stated, Respondent's sporadic sexual relationship with CD was not intimate nor emotionally charged, so it was unlikely that any disagreements would arise between the two as a result of the sexual relationship. At times, there were disagreements between the parties, based on CD acting against the advice of counsel while represented by Respondent but not as a component of the sexual relationship (**App. 269-270**).

Additionally, both parties knew they were not in a relationship and both parties knew the other was intimately involved with other individuals (**App. 136**). The main disagreement that arose in the underlying case was solely related to the custody case, specifically that Respondent refused to participate in allowing CD to lie under oath, which ultimately led to Respondent withdrawing from the case (**App. 129**).

CD acting independently outside the advice of counsel apparently continued while she was represented by her new attorney R. Scott Richart (**Exhibit 19, App. 461-465**). As the court appointed Guardian ad litem ("GAL") Jennifer Oswald-Brown testified, it was

CD's failure to follow the Court's Orders that caused her harm, even after she had retained other counsel on her behalf in the case (**App. 213-214, 218, 226, 230**). Because there was little or no likelihood that disagreements would have arisen between Respondent and CD as a result of their sexual relationship, there was no significant foreseeable or potential risk for material limitation of CD's representation.

4. Likely Prejudice to the Client From the Conflict:

Respondent was an experienced lawyer with a well-known reputation for being an aggressive, competent, and skillful advocate for his domestic relations clients, which occurred in this case (**App. 238, 241**). Respondent has tried numerous cases in his 20 years of experience as an attorney (**Exhibit 112, R.App. 95-141**). Since Respondent's relationship with CD was not emotionally charged, Respondent's independent professional judgment was not impacted as a result of the relationship. Therefore, there was little to no likelihood that CD would have been prejudiced as a result of the relationship. In fact, Respondent zealously represented CD throughout the entire custody case, which is evidenced by the GAL's testimony that CD was better off regarding custody and child support than prior to Respondent's representation (**App. 172-174, 184; Exhibit 41, App. 317-326; Exhibit 11, App. 420-430**).

CD appreciated Respondent's work and what he had done for her (**App. 261, 339-343, p. 340**). The custody and child support status obtained by Respondent remained the same until even after CD had retained new counsel, R. Scott Richart, who settled the case on behalf of CD (**App. 174-175, 184, 221; Exhibit 14, App. 436-444**). The Court's GAL,

whose duty is to act in the best interest of CD's child, testified that Respondent fully advocated for CD (**App. 210-211, 218**).

However, even after the case was "settled," CD had her new attorney, Mr. Richart, withdraw at the November 8, 2013 hearing at the same time CD acknowledged she was violating the Court's orders (**App. 188-190; Exhibit 19, App. 461-465**). The November 8, 2013 hearing was based on the GAL's Emergency Motion to Modify the Amended Temporary Order and Motion for Emergency Temporary Hearing based on CD's misconduct and failing to follow the Court's Orders. CD's consent to Mr. Richart's withdrawal meant she would appear at the hearing pro se (**App. 213-214, 218, 226, 230**).

Moreover, it is important to note that Mr. Richart, the attorney retained by CD after Respondent's withdrawal, provided a character letter on behalf of Respondent, regarding Respondent's impeccable reputation, trial skills and zealous advocacy for his clients (**Exhibit 112, R.App. 95-141**). Because there was no likelihood CD was prejudiced as a result of the consensual sexual relationship with Respondent, there was no significant risk of any material limitation of Respondent's representation of CD (**App. 153**).

As set forth by Missouri law regarding the relevant factors listed in Comment 26 to Rule 4-1.7, this Court should find that there was no **significant** risk for **material** limitation of CD's representation as a result of the sexual relationship with Respondent and find that Respondent did not violate Rule 4-1.7.

B. Informant's Reliance On The Comments To Rule 4-1.8(j) And Other Case Law Is Misplaced For A Finding Of An Automatic Violation of Rule 4-1.7.

A violation of Rule 4-1.8(j) is not an automatic violation of any other rule of professional conduct, including Rule 4-2.1, Rule 4-8.4 and Rule 4-1.7, as Informant suggests (**Informant's Brief 24, pp. 19, 29**). For example, a case on point is *In re Brady*, SC97859, March 15, 2019 (**R.App. 27-48**). In *Brady*, the Disciplinary Hearing Panel found that Ms. Brady had "repeatedly engaged in intimate and sexual relations with her client in the underlying divorce action." (**R.App. 41-48, p. 4**). However, the panel did not find Ms. Brady violated Rule 4-1.7(a) because the sexual relationship with the client did not materially limit her representation. *Id.* p. 4. Upon these findings on May 31, 2019, the Missouri Supreme Court found a violation only of Rule 4-1.8(j). Additionally, Informant fails to supply any legal support for a finding of Respondent's violation of Rule 4-8.4(d) or 4-2.1. Therefore, like in *Brady* an admitted violation of 4-1.8(j) should not be found to also be a violation of any other rules, including Rules 4-2.1, 4-8.4 or 4-1.7.

Informant relies on several comments to Rule 4-1.8 to support its claim that Respondent's 4-1.8(j) violation also occurred under Rule 4-1.7 (Informant's Brief, p. 20-21). However, Informant's reliance is misplaced because Rule 4-1.7 and Rule 4-1.8 are two separate and distinct rules. For instance, Informant relies on Comment 17 to Rule 4-1.8 and includes an excerpt regarding a client's danger of harm based on the client's emotions (Informant's Brief, p. 20-21). The last sentence of the excerpt states that "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” (Informant’s Brief, p. 20-21). Rule 4-1.8(j) does not require the client to be prejudiced as a result of the sexual relationship. However, under Comment 26 to Rule 4-1.7, a factor to consider in whether there was a violation of Rule 4-1.7 is, “the likely prejudice to the client from the conflict” (Rule 4-1.7[26]) which did not occur as set forth above. The comments and Rules clearly reference different elements, and, in doing so, demonstrate that the two rules are separate and distinct; and that a violation of Rule 4-1.8(j) does not automatically mean a violation of Rule 4-1.7, regardless of Informant’s interpretation otherwise.

Further, though Informant relies on certain “risks” associated with a lawyer having a sexual relationship with a client identified under Rule 4-1.8(j), Rule 4-1.7 states that there must be a **significant** risk for material limitation, not just any risk. See Rule 4-1.7. This difference also supports the fact that the two rules are separate and distinct because Rule 4-1.7 imposes a stricter standard than Rule 4-1.8, i.e., a “significant risk.”

Additionally, Informant’s reliance on the risks identified in Rule 4-1.8 are inapplicable to Respondent’s case because the blanket risks identified by Informant as “what ifs” in Informant’s Brief were not actual risks in Respondent’s case. Lawyer disciplinary proceedings are to be determined on a case-by-case basis. *Iowa Supreme Court Atty. Disciplinary Bd. v. Waterman*, 890 N.W.2d 327, 332 (Iowa 2017).

The evidence shows that based on the facts of the underlying case, CD was better off concerning the custody of her child and child support at the time Respondent withdrew from her case than she was before he was retained, which carried through to her new lawyer. From CD having Joint legal and physical custody and no child support and JZ

having a November 2012 Motion to Modify and family access motion pending, seeking sanctions, by April 2013, because of Respondent's excellent work, CD had an alternating week to week parenting time and \$900 in child support from JZ (**App. 163, 172-174, 251, 297; Exhibit 41, App. 317-326; Exhibit 11, App. 420-430; Exhibit 47, App. 596-603**). As such, the evidence shows that the sexual relationship did not materially limit Respondent's representation and there was no risk of such.

CD remained better off in her case until after her next attorney, R. Scott Richart, was retained and terminated and CD appeared pro se after violating the Court's orders. In early October 2013, CD retained her next lawyer, R. Scott Richart who was to settle the case (**App. 188-189, Exhibit 19, App. 461-465**). While still entered in the case, as set forth in the GAL's Emergency Motion filed on November 6, 2013, CD was in contempt of the Court's Orders and was jeopardizing the health and wellbeing of her child while he was in her custody (**App. 222, Exhibit 18, App. 454-460**). Appropriately, this Court should focus only on the **actual significant** risks, if any in Respondent's case and not on every overly broad possible risk identified in the comments to Rule 4-1.8 (Informant's Brief, p. 20-21). Further, not only must there be a significant risk involved, but there must be a significant risk for **material** limitation of Respondent's representation of CD. Rule 4-1.7[26]. Nonetheless, Informant spends significant briefing on risks that are not support by the record. Those risks include:

1. A Lawyer's Emotional Involvement Would Impair His Professional Judgment (Informant's Brief 21).

The key question regarding this risk is whether there was a significant risk that Respondent's emotional involvement would materially limit Respondent's representation of CD in her custody case. As already discussed, Respondent's consensual sexual relationship with CD occurred sporadically for a few months without intimacy (**App. 136, 153**). Both parties admitted they were not in an emotional relationship with one another (**App. 136, 292**). The intimate relationship between Respondent and CD was only sexual in nature (**App. 294**). It was devoid of intimacy and the emotions that could have possibly impacted Respondent's representation of CD. In fact, CD was involved in multiple other relationships actively dating others and shared that information with Respondent was married, was aware and had no feelings (**App. 136, 293**). Like *In Brady*, the sexual relationship with CD did not involve a **significant** risk that Respondent's emotions would materially limit his representation of CD in her custody case. *In re Brady*, SC97859 (**R.App. 27-48**).

2. The Lawyer May Become a Witness Based On Pillow Talk (Informant's Brief 24).

There is no evidence of attorney-client privilege pillow-talk by either Respondent or CD. The underlying matter was not a divorce case. As such, there was no **significant** risk that Respondent would have been called as a witness about his sexual relationship with CD that would have materially limited Respondent's representation of CD in her custody case, or injured CD's position in the matter.

Further, CD's lifestyle as a "swinger," and CD's sexual relationships with others (not Respondent) were already known to opposing counsel and, should the parties have learned of Respondent's sexual relationship with CD, would not have changed the opposing party's view of CD (**App. 250-251; Exhibit 30, App. 512-595, p. 197**). CD had traveled with men and dated others. *Id.* Therefore, there was no significant risk that Respondent would have been a potential witness, or that such risk would have materially limited Respondent's representation of CD in her custody case.

3. The Client May Be Too Emotional to Give Consent (Informant's Brief 24).

The key question regarding this risk is whether there was a significant risk that CD did not give consent and whether such risk would have materially limited Respondent's representation of CD in her custody case. CD testified that she and Respondent were in a consensual sexual relationship (**App. 153**). Further, CD never asked Respondent to stop emailing her at night (**App. 128**). As previously addressed above, neither the Respondent nor CD was emotionally involved in the sexual relationship. Additionally, CD had other children and had been through formal court custody proceedings prior to this case (**Exhibit 72, App. 608-640, pp. 38-41**). Further, CD pursued Respondent immediately after she retained him as her attorney by sending personal texts and sexual photos of herself (**App. 247**). Further, numerous times CD acted independently, without following the advice of her counsel (**App. 353-355**). Therefore, there was no significant risk that CD's emotions materially limited Respondent's representation of her in her custody case or her ability to give consent.

4. The Sexual Relationship Could Harm the Client By Adding Emotional Drama or Trauma (Informant's Brief 24).

Like in *Brady*, as set forth above, there was no **significant** risk that the relationship would have added unnecessary drama and/or trauma to have materially limited Respondent's representation of CD in her custody case because the parties were detached emotionally in their sexual relationship. See *In re Brady*, SC97859 (**R.App. 27-48**). Informant cites that "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)." (Informant's Brief, p. 25). However, in this case, there was no significant risk that such objective detachment would be lost because the sexual relationship was not emotionally charged and CD was also involved in other relationships, of which Respondent was aware as addressed more thoroughly above. CD never asked Respondent to stop sending emails at night (**App. 124**). Therefore, there was no significant risk that the sexual relationship would have added unnecessary drama and trauma that would have materially limited Respondent's representation of her in her custody case.

5. The Lawyer's Own Interest in Maintaining the Sexual Relationship Could Recreate an Inherent Conflict (Informant's Brief 26).

As more fully set forth above, Respondent worked diligently on CD's case and there was no significant risk that Respondent's interest in maintaining the sexual relationship would have created a conflict because neither Respondent nor CD was emotionally attached, and Respondent fully advocated for CD as the GAL testified to in the Disciplinary Hearing (**App. 210-211, 218**). Based upon Respondent's experience as a skilled, diligent and zealous advocate, Respondent left CD in a much better position regarding custody and

child support at the time he withdrew than she was in before he was retained (**App. 172-174, 184; Exhibit 14, App. 436-444; Exhibit 111, App. 339-343, p. 2; Exhibit 16, App. 445-453, p. 7**). Therefore, there was no **significant** risk that Respondent would have sought to maintain the sexual relationship that would have materially limited Respondent's representation of CD in her custody case.

6. A Parent's Sexual Relationship With Her Lawyer Could Become Evidence of the Parent's Counsel's Judgment (Informant's Brief 25).

Informant provided no legal support identifying CD's sexual relationship with Respondent as a significant risk about becoming evidence of CD's sound judgment as a parent. Further, there was no such risk because the case was not a dissolution case in which sexual relationships play an important role. CD was not married and free to sexually associate with whomever. CD was also a "swinger" and had sexual relationships with other men, as JZ and opposing counsel already knew (**App. 561, p. 195**). The issues in the case were not CD's sexual activities, but that she had left her child at Crittendon or with JZ to engage in such. CD's sexual relationship with her lawyer was never claimed to be around the child and would not have been. Therefore, it was not a **significant** risk that CD's relationship with Respondent would have become evidence about CD's sound judgment.

7. A Client May Face a Financial Risk in a Dissolution Matter When the Client Engages in Marital Misconduct With Another (Informant's Brief 28).

Informant's Brief cites that "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. *Coleman v. Coleman*, 318 S.W.3d 715, 721 (Mo. App. 2010)” (Informant’s Brief, p. 28-29). However, in Respondent’s case, CD was not married to the father of the child (**Exhibit 13, 431-435, p.3**). The case was not a divorce or dissolution matter. Therefore, there would not have been “marital misconduct” by having a sexual relationship with Respondent. This was a child custody modification case only. There is no evidence that her sexual relationships with her attorney or anyone else were consummated around her child. Therefore, there was no **significant** financial risk to CD that would have materially limited Respondent’s representation of CD in her custody case.

Further, Informant relies on several cases to support its argument that against Respondent violated Rule 4-1.7: *In re Howard*, 912 S.W.2d 61 (Mo. 1995); *In re Littleton*, 719 S.W.2d 772 (Mo. 1986); *In re Bell*, SC97682 (September 12, 2019); and *People v. Beecher*, 224 P.3d 442 (Colo.O.P.D.J. 2009). However, the cases are easily distinguished from this case.

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

Informant’s Brief cites that the “[C]ourt 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 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” (Informant’s Brief, p. 22). *In re Howard* can easily be distinguished from the Respondent’s case because in the

present case, there were no unwanted sexual advances and there was no evidence that the sexual relationship affected Respondent's representation of CD or CD's judgment. The relationship between CD and Respondent was consensual (**App. 153**). Howard's inability to accept rejection adversely impacted his ability to represent his clients. That did not happen in the present case.

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

Informant's reliance on *In re Littleton* is also misplaced because the facts can easily be distinguished from the present case. In *In re Littleton*, the lawyer agreed to procure the release of a client from jail (DUI) and failed to do so in a prompt manner, refused to return bail bond money obtained from client when it was not needed for bail, made late night visits to the client while she was incarcerated and made sexual advances, and sexually assaulted his client following release. *In re Littleton*, 719 S.W.2d at 774-75. The extreme facts of *In re Littleton* are far from the facts in Respondent's case - a mutual, consensual, non-intimate, sexual relationship that did not adversely impact Respondent's representation of CD (**App. 153**).

***In re Bell*, SC97682 (September 12, 2019):**

Informant's Brief cites that "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*, SC97682 (September 12, 2019)." (Informant's Brief, p. 23). Again, *In re Bell* can be distinguished from the present case. First, in *Bell*, the client was emotionally involved because of the vulnerability surrounding the dissolution matter. *Id.* She also believed that she was in a relationship with Bell. Bell also failed to file the client's

Motion Pendente Lite on behalf of the client. *Id.* The present case is not a dissolution matter which would make the client more vulnerable. Both Respondent and CD consented to the sexual relationship after CD initiated the relationship by sending sexually explicit photos of herself. Additionally, they both knew they were not in an intimate relationship and Respondent fully advocated for CD until it was required that he withdraw (**App. 136, 293-294**). Therefore, Respondent's representation of CD was not adversely affected as it was in *In re Bell*. Therefore, *In re Bell* is not persuasive to Respondent's case.

***People v. Beecher*, 224 P.3d 442 (Colo.O.P.D.J. 2009):**

Informant's Brief cites that "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." (Informant's Brief, p. 24). *Beecher* is also easily distinguished from Respondent's case because *Beecher* was a dissolution case involving the lawyer's former wife. *Beecher*, 224 P.3d. The relationship between *Beecher* and his former wife was emotionally charged and intimate. *Id.* The client's husband confronted *Beecher* regarding his relationship with the client. *Id.* Because of the intimacy of the relationship with *Beecher*'s former wife and the vulnerability surrounding the client due to the dissolution, the *Beecher* court concluded that *Beecher*'s representation of his former wife was compromised. *Id.* These facts are not present in this matter. As set forth above, this case is not a dissolution matter, Respondent zealously advocated on behalf of CD and Respondent's representation of CD was not adversely affected as it was *Beecher*. Therefore, *Beecher* is not persuasive to Respondent's case.

The respondents in each case, *Howard*, *Littleton*, and *Bell*, were the original aggressor and/or pursuer. That is not Respondent's case. The case at bar is more closely aligned to the Missouri case of *In re Brady*, SC97859, May 31, 2009 (**R.App. 27-48**).

***In re Brady*, SC97859, May 31, 2019 (R.App. 27-48):**

Although a Missouri case, this case was not discussed in Informant's Brief. *In re Brady*, a female lawyer engaged in a sexual relationship with her client, whom she represented in a dissolution case. *Id.* The Disciplinary Hearing Panel did not find that a Rule 4-1.7 violation occurred because the sexual relationship in connection with the dissolution case did not materially limit the lawyer's representation of the client, and no concurrent conflict of interest existed. *Id.* The facts in *Brady* are substantially similar to the facts in Respondent's case in that Respondent's representation was not materially limited by the sexual relationship with CD. This Court found that the lawyer only violated Rule 4-1.8(j) as a result of having a sexual relationship with her client. *Id.*

In sum and simply put by Comment 8 to Rule 4-1.7, Respondent's own interests should not have been permitted to have "an adverse effect on representation" of CD, which did not happen in the present case. Rule 4-1.7[8]. Therefore, Respondent did not violate Rule 4-1.7.

II.

SHOULD RESPONDENT'S LICENSE BE SUSPENDED, SUSPENSION SHOULD BE STAYED AND RESPONDENT PLACED ON PROBATION BECAUSE:

- A. THIS COURT'S DECISIONS IN OTHER CASES INVOLVING LAWYERS WHO HAVE A SEXUAL RELATIONSHIP WITH A CLIENT SUPPORT PROBATION;**
 - B. BASED UPON RESPONDENT'S DUTY TO CD, HIS MENTAL STATE, THE LACK OF HIS CLIENT'S INJURIES, AND MITIGATING CIRCUMSTANCES, THE ABA STANDARDS SUPPORT PROBATION;**
 - C. NEITHER RESPONDENT'S RULE VIOLATION NOR THE DISCIPLINARY HEARING PANEL'S RECOMMENDED DISCIPLINE WOULD CAUSE THE PROFESSION TO FALL INTO DISREPUTE, PURSUANT TO RULE 5.225'S DIRECTIVES.**
- A. This Court's Precedent Stays Suspension And Places On Probation Lawyers Who Have A Sexual Relationship With A Client.**

Informant's Brief relies on three Missouri cases to support its argument that this Court's precedent supports actual suspension for lawyers without probation who have sexual relationships with their client: *In re Howard*, 912 S.W.2d 61 (Mo. 1995); *In re Littleton*, 719 S.W.2d 772 (Mo. 1986); and *In re Bell*, SC97682, September 12, 2019. As previously stated, these three cases are distinguishable from Respondent's case. Informant fails to identify recent Missouri cases of lawyers having sex with their clients and receiving a stayed suspension for probation: like in *In re Brady*, SC97859, May 31, 2019 (**R.App. 27-48**); *In re Bergman*, SC94683, May 26, 2015 (**R.App. 75-84**); and *In re Gunter*, SC96162, February 28, 2017 (**R.App. 49-74**), which are more substantially similar to Respondent's case.

The present case is not a dissolution matter which generally makes the client more vulnerable. Additionally, both Respondent and CD consented to the sexual relationship and they both knew they were not in an emotionally charged relationship (**App. 136, 153**,

289, 293-294). Respondent was married and CD dated others (**App. 136**). Further, as the court appointed GAL testified, Respondent fully advocated CD's position in her case and left her better off regarding the custody of her child and child support at the time he withdrew his representation based on his zealous advocacy and diligence (**App. 213-214, 218, 226, 230**). Moreover, Respondent's representation of CD was not adversely affected as it was in *In re Bell*.

Further, *Howard* and *Littleton* are outdated cases, but the conduct by respondents in those cases like in *Bell*'s case was predatory toward their clients, unlike the present matter. In determining Respondent's discipline in the present matter, this Court should look to its more recent precedent in *Brady*, *Gunter* and *Bergman*, which supports Respondent's argument that the appropriate discipline is suspension with probation.

As set forth above, *In re Brady* was an underlying dissolution and custody case (**R.App. 27-48**). The lawyer and client repeatedly engaged in intimate and sexual relations with the client. *Id.* At one point during the representation, the lawyer was with the client when he criminally trespassed, in which the client was later charged and fined. *Id.* This Court found that the lawyer only violated Rule 4-1.8(j). *Id.* This Court suspended the lawyer indefinitely but stayed the imposition of the suspension and placed the lawyer on **probation** for one year. *Id.*

In *Gunter*, SC96162, February 28, 2017 (**R.App. 49-74**), the lawyer represented the client for a probate case, wrongful death case, and workers' compensation case. *Id.* A year thereafter, a sexual relationship with the client began. *Id.* The sexual relationship lasted for approximately one year, in which the lawyer often times told the client that he loved her.

Id. The lawyer and client also went on vacation together. *Id.* The lawyer failed to provide notice and an explanation to the client as to why it was necessary for him to withdraw from her case. *Id.* This Court found that the lawyer violated Rules 4-1.7(a)(2), 4-1.8(j), 4-1.16(a)(1), 4-1.16(d), 4-1.4(a)(3), and 4-1.4(b). *Id.* This Court suspended the lawyer for two years but stayed the imposition of the suspension and placed the lawyer on **probation** for two years. *Id.*

In *Bergman*, SC94683, May 26, 2015 (**R.App. 75-84**), the lawyer served as outside general counsel and began a sexual relationship with a contract employee, in which a serious conflict emerged when the lawyer was tasked with drafting a contract for the company that went against the contract employee's interest. *Id.* The lawyer failed to disclose the sexual relationship to the company's board. *Id.* The relationship between the lawyer and the employee lasted for ten years. *Id.* This Court found that the lawyer violated Rules 4-1.7, 4-1.8(j), 4-1.13(b), 4-1.13(d). *Id.* This Court suspended the lawyer indefinitely but stayed the imposition of the suspension and placed the lawyer on **probation** for two years. *Id.*

Therefore, because this Court's recent precedent is in favor of staying suspension and placing on probation lawyers who have a consensual sexual relationship with a client that did not harm the client's case, unlike in *Bell*, this Court should stay Respondent's suspension, should suspension be imposed, and place Respondent on probation.

B. Based Upon Respondent's Duty To CD, His Mental State, The Lack Of His Client's Injuries, And Mitigating Circumstances, The ABA Standards Support Probation.

Under the ABA Standards, there are four factors a court should consider in imposing discipline: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating and mitigating factors. ABA Standard for Imposing Lawyer Sanctions, Rule 3.0.

1. Respondent Maintained Objective Detachment While Representing CD:

As Informant cited in its Brief, "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). (Informant's Brief, p. 25). However, in this case, Respondent's mental state remained objective and detached from the sexual relationship with CD. Both parties admitted they were not in a relationship with one another (**App. 136**). Respondent was married and CD dated others during the time period she was represented by Respondent (**App. 136**). The relationship between Respondent and CD was only sexual in nature and devoid of intimacy and any emotions that impacted Respondent's representation of CD as set forth more thoroughly above (**App. 136, 293-294**). Because Respondent's mental state remained objective and detached from the sexual relationship, Respondent's representation of CD was not materially limited in her custody case. In fact, Respondent fully advocated for CD all the way through the case until the time he withdrew when CD was going to testify untruthfully (**App. 219**).

2. There Was No Potential or Actual Injury Caused by Respondent:

As set forth above, Respondent caused CD no harm. CD benefitted from Respondent's representation regarding custody and child support and appreciated his work (**App. 261; Exhibit 111, App. 339-343, p. 340**). Because of Respondent's representation, CD received more parenting time and child support than she had previously (**App. 174-175; Exhibit 14, App. 436-444**). It was CD's own misconduct, after she had retained new counsel, R. Scott Richart, that caused CD to lose custody of her child and to have to pay child support, as set forth in the court appointed GAL's testimony and Judge Kanatzar's Judgment of December 19, 2013 (**App. 213-214, 218, 226, 230; Exhibit 21, App. 473-488**). Respondent's interest in a sexual relationship and duty to his client were not adverse. Respondent performed his duty for CD diligently at all times.

3. Aggravating Factors:

Informant claims that the aggravating factors are selfishness, emotionally vulnerable client and Respondent's vast experience (Informant's Brief, pg. 36). However, when a selfish motive is an element of the underlying finding of misconduct, a court may rule that it cannot also be an aggravating factor in determining the appropriate sanction. *In re Disc. of Tanner*, 960 P.2d 399, 402, *n.1 (Utah 1998). A selfish motive is an element of a violation of 4-1.8(j) as Informant claims (Informant's Brief, p. 34). Therefore, the Court should not give selfish motive additional weight as an aggravating factor.

Informant also claims CD was an "emotionally vulnerable" client as a former victim of alleged domestic abuse (Informant's Brief, pg. 36). However, CD herself was arrested as the aggressor for domestic assault against JZ relating to their lifestyle as swingers (**App.**

161, 316, 250-251, 561, pp. 196-197). Additionally, CD was also charged with a felony which was pleaded down to a misdemeanor even though she had indicated numerous times that she claims that she was not able to get employment because she had a felony hanging over her head (**App. 158**). CD pleaded guilty on October 4, 2013, for misappropriating property from the State of Missouri with the purpose of depriving the State by deceit in representing that she needed government assistance that she knew was false. (**App. 162**). CD has been through a prior custody case having other children that did not live with her when she moved away from Missouri to live with JZ in Arizona, so this was not her first experience with the court system (**Exhibit 72, App. 608-640, pp. 38-41**).

CD was not emotionally vulnerable while represented by Respondent. Moreover, CD was aggressive in her pursuit of the sexual relationship by sending sexually inappropriate photos to Respondent immediately after hiring Respondent (**App. 247**). Dependence of a client on the lawyer's professional judgment and sexual relationship may well result from the lawyer's exploitation of the lawyer's dominate position, but not in this case. CD testified that it was a consensual sexual relationship she was in with Respondent (**App. 153**). Numerous times CD independently refused to accept or rely on the Respondent's experience as a practicing domestic relations lawyer and instead acted on her own showing the complete opposite emotion of being vulnerable at any time in the relationship (**App. 257-261**).

Additionally, because a client has to retain an attorney to promote a claim or to seek legal expertise and advice does not automatically make the client vulnerable and neither does hiring an attorney for the first time. *In re Disciplinary Proceeding Against Kagele*

149 Wn.2d 793, 814, 72 P.3d 1067 (2003). Further, although an aggravating factor generally is an attorney's substantial experience in the practice of the law, having sex with your client is a violation of Rule 4-1.8(j), no matter the attorney's experience. Importantly, Respondent zealously advocated for CD (**App. 210-211, 218, 270, 294; Exhibit 30, App. 412-595**). The court appointed GAL on the case testified that Respondent fully advocated for CD (**App. 210, 211, 218**). After CD retained counsel following her representation by Respondent and R. Scott Richart, CD filed post-judgment motions yet never blamed Respondent for CD's position, because it was CD's failing to follow the Court's orders that caused her to lose custody of N (**App. 213-214, 218, 226, 230**). Therefore, no aggravating factors justify the increase in the degree of discipline to be imposed.

4. Mitigating Factors:

This Court adheres to a practice of applying progressive discipline when imposing sanctions on attorneys who commit misconduct." *In re Krigel*, 480 S.W. 3d 294, 302 (Mo. 2016) (citing *In re Forck*, 418 S.W.3d 437, 444 (Mo. banc 2014)). In *Krigel*, this Court, according to the ABA Standards, suspended Krigel from the practice of law, but stayed the suspension subject to Krigel's completion of a two-year term of probation in accordance with conditions imposed. The Court further held that "[t]his 'sanction' is designed to maintain the public's trust, protect the integrity of the legal system, and is supported by prior disciplinary proceedings." 480 S.W. 3d at 302. However, the Court further held that if Krigel violated the terms of his probation, his probation may be revoked, or further discipline imposed. *Id.* (citing Rule 5.225(f)(2)).

a. Absence of prior disciplinary records.

Respondent has had no prior disciplinary record as Informant admits (Informant's Brief, p. 36). Considering Respondent has never been disciplined by this Court and has been a practicing domestic relations attorney for twenty years, members of the legal community that know the circumstances of this case feel that should Respondent's discipline be suspension, the suspension should be stayed for probation (**R.App. 95-141**).

b. Timely good faith effort to make restitution or to rectify consequences of misconduct.

Respondent made timely good faith effort to make restitution and rectify the consequences of his misconduct through the legal malpractice lawsuit filed by CD (**App. 20-101, p. 11**). Respondent settling CD's lawsuit was an effort to rectify the consequences of his actions and avoid subjecting CD to a lengthy and embarrassing trial, to allow CD to move forward. *Id.*

c. Full and free disclosure to Disciplinary Board or cooperative attitude toward process.

Respondent fully and freely disclosed to the disciplinary board his misconduct by admitting his violation of 4-1.8(j) and was cooperative toward the proceedings.

d. Character or reputation.

Respondent has good character and an outstanding reputation in the legal community as set forth in the thirty-one-character witness letters submitted herewith as **Exhibit 112 (R.App. 95-141)**. Courts often accept evidence of good character when the lawyer has an outstanding reputation or engages in good works. *People v. Rolfe*, 962 P.2d 981, 983 (Colo. 1998) (public censure rather than suspension in light of good character and

reputation, as well as other mitigators). The character witness letters are from former Judges, past Bar Presidents, both male and female attorneys of the Bar, including those practicing family law and clients. Those providing letters know Respondent's character both personally and professionally.

The character witness letters set forth the significant outstanding reputation and integrity Respondent has in both the legal community and community at large. The letters are replete with statements which attest to Respondent's zealous advocacy. The letters show that Respondent enjoyed a reputation as a hardworking conscious lawyer dedicated to his clients and committed to the ethical practices, who has been a mentor to other lawyers and has played an important and valued role in defending all types of people. The letters further set forth Respondent's honesty, trustworthiness, and competence.

There is little doubt that these authors knew of Respondent's charge and the hearing Panel's Decision yet the respect for his competence and integrity was undimmed. Respondent has been a mentor to other lawyers, and he has played an important and viable role in defending persons accused of criminal conduct and represented clients pro bono numerous times.

The authors of the character witness letters find that the community, as a whole, benefits from Respondent practicing law, and they request this Court to permit Respondent to continue practicing law. Further, the letters indicate that Respondent is not a threat to his clients and is not likely to victimize any client in the future. Respondent has learned from his lapse of judgment and continues to grow professionally. As the character witness letters read, in general, the authors feel that it would result in a disservice to clients, the

Bar, and the public as a whole, should Respondent be prevented from practicing law (**R.App. 95-141**).

R. Scott Richart is CD's former attorney who represented CD after Respondent's withdrawal as her attorney. Mr. Richart has known Respondent for 20 years. His letter sets forth his respect and explains the zealous advocacy Respondent has for his clients and that Respondent is consistently professional, well prepared, and extremely knowledgeable about the facts and applicable law. Further, the letter indicates that it would be a detriment to Respondent's current clients should his license to practice be negatively affected. Additionally, he states that "the bar as a whole is better with him as a practitioner" (**Exhibit 112, p. 121, R.App. 95-141**). *Id.*

Former Jackson County Circuit Court Judge Robert M. Schieber wrote that he is honored and privileged to write a letter in support of Respondent, having known Respondent for over ten years (**R.App. 95-141, pp. 125-126**). He had the good fortune to preside over several cases Respondent tried. It is Judge Schieber's opinion that as an attorney and friend, Respondent has a wonderful demeanor and zeal for trial. *Id.* Further, Respondent is always well prepared and handles cases with "great skill, compassion, dedication, guts and enthusiasm," and is "a trial lawyer's trial lawyer" in effectiveness. *Id.* Judge Schieber indicates new lawyers should strive to become the same kind of litigator as Respondent, who is needed in the Circuit Court of Jackson County, since Respondent has such an impeccable reputation of integrity. Judge Schieber further illustrates that Respondent treats all he encounters with dignity, respect and humility, and that Respondent is the epitome of what a litigator should be (**Exhibit 112, pp. 125-126, R.App. 95-141**).

Kendall R. Garten, who served as a Disciplinary Panel Hearing Officer for the Missouri Bar for ten years, stated in his letter, that Respondent is very competent and trustworthy, and that Respondent represents his clients well (**Exhibit 112, p. 99, R.App. 95-141**). Mr. Garten has recommended Respondent to represent clients “without reservation.” Mr. Garten stated that Respondent has a stellar, honest, and trustworthy reputation. *Id.* Further, Mr. Garten is aware of the complaint based upon unrebutted characterizations of Respondent from social media published by CD. *Id.* Mr. Garten believes the public would not be served should Respondent’s license be suspended. *Id.*

Jessica Holloway, sent a letter to Respondent thanking him for working on a case (**Exhibit 112, p. 103, R.App. 95-141**). Having an abusive father, Respondent saved the lives of her and her brothers based upon his work. *Id.* She states that “[w]ords cannot even express the gratitude in my heart for what you did.” *Id.* She was “overjoyed” to see that Respondent is practicing family law, because of her experience, she feels whoever utilizes Respondent’s services will have “quality representation.” *Id.*

Former Jackson County Circuit Court Judge Michael W. Manners, who has known Respondent since 2001, also submitted a character witness letter on Respondent’s behalf (**Exhibit 112, pp. 110-111, R.App. 95-141**). Presiding over hundreds of contested bench and jury trials, Judge Manners states that Respondent was a zealous advocate for his clients and his candor toward the court was refreshing. *Id.* Further Respondent’s ethical conduct was “exemplary and he poses no threat to his clients. *Id.*

Former Jackson County Circuit Court Judge Stephen Nixon has known Respondent since 2000 and worked closely with him when Respondent was a law clerk for Judge

Jeffrey Bushur (**Exhibit 112, pp. 115-116, R.App. 95-141**). Judge Nixon is familiar with Respondent's work ethic and legal reasoning which were "exemplary." *Id.* Respondent is considered a highly ethical attorney who demonstrated candor to the court as well as an attorney who was prepared on the law. *Id.* Further, having taken responsibility for his poor choice and remorsefulness, Judge Nixon believes that Respondent should be allowed to continue in the profession. *Id.*

Patrick Stark, who has been a lawyer since 1979, past President of the Missouri Bar Association and past President of the Missouri Bar Board of Governors, submitted a character letter that indicates that it would be a disservice should Respondent's license be suspended for any amount of time (**Exhibit 112, pp. 129-130, R.App. 95-141**). Further, that should a sanction be required, the sanction of probation should be required. *Id.* Mr. Stark has known Respondent since 1999 as well as Respondent's professionalism and competence as an attorney. He assures that Respondent is honest and trustworthy, well prepared attorney with a great reputation in the community and having good character. *Id.* Mr. Stark has referred several clients to Respondent and will continue to do so. Mr. Stark is also proud to serve in the same professional community with Respondent. *Id.*

Linda Diem Tran, a former police officer and now an attorney and former Rule 13 intern for Respondent, submitted a character letter (**Exhibit 112, pp. 132-136, R.App. 95-141**). She does not know where she would be without Respondent's guidance, mentoring, and encouragement. *Id.* He helped bridge the gap for her as a minority law student and opened opportunities for her. *Id.* He assisted her father, a Vietnamese immigrant with

various legal matter, always treating him with respect, and never making him feel inferior. *Id.*

James A. Witteman, Jr., is an attorney who has known Respondent his entire legal career (**Exhibit 112, p. 141, R.App. 95-141**). Both Mr. Witteman and his law partner often consult with Respondent over complex cases. *Id.* The letter states Respondent is very remorseful and Mr. Witteman believes a person should be judged on his long history of accomplishments “rather than one misstep.” *Id.*

Finally, Mark Rains, Respondent’s former partner who has known Respondent since 2005, states that he can attest to how truly remorsefulness Respondent has been and that Respondent is aware of how significantly he disappointed Mr. Rains, Respondent’s family, and the community (**Exhibit 112, pp. 121-122, R.App. 95-141**). Mr. Rains finds that Respondent’s commitment to law and justice is impeccable and believes that Respondent’s deserves to be judged by his lifetime of belief in justice and fairness rather than one foolish mistake and lapse of judgment which was an aberration. *Id.* Mr. Rains adds that if given another chance, Respondent will not disappoint. *Id.*

e. Delay in the disciplinary proceedings.

After CD filed this Bar Complaint on November 11, 2013, the matter was stayed based on the lawsuits filed by CD (**App. 20-102, p. 11 and App. 273**). As such, this matter has been ongoing for in excess of six years. During that time, Respondent has received no prior disciplinary.

f. Remorseful.

The character witness letters submitted (**Exhibit 112, R.App. 95-141**) also show that the attorneys who know Respondent personally have found him profoundly remorseful, and they vouch that he is no threat to the public. *Id.* Moreover, since Respondent has such an impeccable reputation of trustworthiness and honesty, these respected attorneys ask this Court not to deprive the community of such a skilled attorney, especially in the practice of domestic relations.

As set forth in the letter of Mark Rains, Respondent's former partner, Mr. Rains can attest to the truly remorsefulness Respondent has, including his feelings of disappointing Mr. Rains, his family and the community (**Exhibit 112, pp. 121-122, R.App. 95-141**). Mr. Rains finds that Respondent's commitment to law and justice is impeccable and he deserves to be judged by his lifetime of belief in justice and fairness rather than his foolish mistake and lapse of judgment. *Id.* Mr. Rains adds that if given another chance, Respondent will not disappoint this Court or the Bar. *Id.*

g. Humiliation.

Respondent has endured public and personal humiliation which should be an important mitigating factor in that CD published the charges against him in the local press, the Pitch, radio, and social media so that the public and legal community is well aware of the case (**App. 203-204**). Humiliation can be considered in mitigation, but lawyers will find it difficult to establish. *See In the Matter of Kenneth Peasley*, 90 P.3d 764 (2004), 208 Ariz. 27 (Ariz. 2004). *See also In re Walker*, P.3d 602 (Ariz. 2001) (lawyer found sexually harassed a client to enter into a consensual sexual relationship with the client warranted

censure; his public and personal humiliation was an important mitigating factor in that he was arrested at his office, prosecuted for sexual indecency, taken to jail in handcuffs, charges against him were made public by local press, he was prosecuted for sexual indecency and prostitution and forced to participate in a diversion program, subject to malpractice allegations and agreed to \$50,000 settlement). However, in this case, the authors of the Character Witness Letters establish the public humiliation experienced by Respondent (**R.App. 95-141**). Respondent also relinquished his position as the prosecutor for the City of Blue Springs due to the publicity (**App. 242**).

When CD contacted The Pitch, a local Kansas City newspaper, to tell her story about this case. The articles that ran for two consecutive weeks as the cover story On November 24, 2015 and December 1, 2015 (**App. 203**). In 2018, CD also gave a radio podcast regarding the same issues involving Respondent (**App. 203**). CD again gave an interview with the Independence Examiner, that was published, regarding her relationship with Respondent (**App. 203**). Counsel opposing Respondent in other cases printed copies of the Independence Examiner to distribute and it was the talk around the courthouse (**App. 272-273**). All judges, opposing counsel, and the Bar in general are aware of CD and Respondent's sexual relationship because the publicity of it has been going on for over six years (**App. 273**). As CD's publications continued, Respondent did not provide a response (**Exhibit 112, R.App. 95-141**).

Fair discipline requires consideration of both aggravating and mitigating factors, but not in a vacuum. Rather, the Court should view the factors to consider the totality of the circumstances innate to each case. *Disciplinary Proceeding Against Remero*, 94 P.3d 939,

944 (WA 2004). When factors in mitigation outweigh factors in aggravation, the discipline may be decreased. *In re Hislop*, 2016 AZ LEXIS 343 *29 (Arizona 2016) (lawyer's mitigation factors outnumbered and outweighed aggravating factors resulting in a probation instead of presumption sanction of suspension for lawyer who failed to properly maintain operating and trust accounts).

As set forth above, each case is determined by its own particular facts. *Waterman*, 890 N.W.23, 327 (Iowa 2017). In *Waterman*, an attorney had a sexual relationship with a client during the course of his representation in a domestic relations matters, but only a relatively brief suspension of the attorney's license was warranted since the attorney lacked a prior disciplinary record, self-reported the relationship, engaged in pro bono work, sought mental health therapy, and there was no actual client harm. The attorney was suspended for 30 days and automatically reinstated after that time. *Id.*

Consideration of both aggravating and mitigating factors should result in a lessening of discipline in this case.

C. Neither Respondent's Rule Violation Nor The Disciplinary Hearing Panel's Recommended Discipline Would Cause The Profession To Fall Into Disrepute, Pursuant To Rule 5.225's Directives

There appears to be no Missouri case law that states that the profession falls into disrepute when a lawyer has a sexual relationship with a client. This was a one-time incident with one client. As set forth in the character witness letters submitted on behalf of Respondent, the profession is not in disrepute.

The ABA Standards suggest that probation is the appropriate punishment when the **conduct can be corrected** and the attorney's right to practice law needs to be monitored

or limited rather than revoked. ABA Standards for Imposing Lawyer Sanctions 2.7, commentary (1992). This concept is recognized by Missouri Supreme Court Rule 5.225.

Under Rule 5.225, 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. Rule 5.225. Of those factors, only (B) seems to be disputed by Informant in the present case.

This Court's recent precedent is that a lawyer is actually eligible for probation when charged with violating the rules of professional conduct by having a sexual relationship with a client. See *In re Gunter*, SC96162, February 28, 2017 (**R.App. 49-74**); *In re Brady*, SC97859, May 31, 2019 (**R.App. 27-48**); and *In re Bergman*, SC94683, May 26, 2015 (**R.App. 75-84**).

Further, Informant's Brief relies on *Atty. Griev. Comm'n of Md. v. Hall*, 969 A.2d. 953, 968 (Md. App. 2009); *In re Liebowitz*, 516 A.2d 246, 249 (N.J. 1985); and *In re Hoffmeyer*, 656 S.E.2d 376, 379 (S.C. 2008) for the argument that the profession falls into disrepute when a lawyer engages in a sexual relationship with a client (Informant's Brief, pg. 32-33). Nevertheless, the lawyer in *In re Liebowitz*, was only publicly reprimanded for having a sexual relationship with a pro-bono client. *In re Liebowitz*, 516 A.2d 246, 249 (N.J. 1985). Further, South Carolina appears to have abandoned this position because recent precedent indicates that South Carolina now places lawyers on probation who were disciplined for having sexual relationships with clients. See *In re Johnson*, 402 S.C. 381

(S.C. 2013); *In re Savage*, 418 S.C. 368 (S.C. 2016); *In re Mayer*, 396 S.C. 515 (S.C. 2012); *In re Mullinax*, 396 S.C. 504 (S.C. 2012); and *In re Anonymous Member of S.C. Bar*, 389 S.C. 462 (S.C. 2010).

Moreover, as set forth in the character witness letters, the authors repeatedly suggest Respondent's conduct in this case does not make the profession fall into dispute (**R.App. 95-141**). Instead, the consensus is that it would be a disservice to the legal community, the Bar, and the public should Respondent's license be suspended.

Moreover, Respondent has been actively practicing law throughout the pendency of this matter when his clients, members of the Bar and the judges before whom Respondent appears, are aware of the circumstances. They have not turned their back on the profession or Respondent, but instead, have sought to support Respondent while recognizing the mistake he made.

Finally, as evidenced by the character witness letters, Respondent's lapse of judgment was an aberration, and this Court can be assured that it will never happen again.

CONCLUSION

Respondent admits that he violated Rule 4-1.8(j) and accepts the consequences of that violation. However, a violation of one rule should not be an automatic violation of any other rule. Further, based upon Respondent's duty to CD, his mental state, the lack of CD's injuries, and Respondent's mitigating circumstances, the ABA's disciplinary standards support probation. Additionally, Respondent is eligible for probation under Rule 5.225 because Respondent's violation of Rule 4-1.8(j) would not cause the profession to fall into disrepute based on this Court's recent decisions in the cases of *In re Brady*, SC97859 (**R.App. 27-48**), *In re Bergman*, SC94683 (**R.App. 75-84**), and *In re Gunter*, SC96162 (**R.App. 49-74**), where this Court stayed the suspension and placed the attorney on probation. Therefore, Respondent requests this this Court accept the Disciplinary Hearing Panel's Decision and stay Respondent's suspension in favor of probation, should suspension be imposed for his lapse of judgment, which was an aberration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 22st day of January, 2020, the above and foregoing was filed with the Supreme Court of the State of Missouri using the Case.Net electronic filing system which serves a copy via electronic mail, to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY to the best of my knowledge, information and belief, that the above and foregoing Respondent's Brief:

1. The originally signed Brief of Respondent was signed by James C. Morrow and will be maintained at the offices of Morrow Willnauer Church, LLC in accordance with Rule 55.03.
2. Respondent's Brief was served on Informant via electronic mail through the Case.Net electronic filing system on the 22nd day of January, 2020;
3. Respondent's Brief complies with the requirements of 84.06(b);
4. Respondent's Brief contains 16,407 words according to Microsoft Word which was used to prepare Respondent's Brief.

/s/JAMES C. MORROW
ATTORNEYS FOR RESPONDENT