IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
PETER G. BENDER	)	**Supreme Court No. SC99845**
1516 E. St. Louis Street, Suite A	)	
Springfield, MO 65802	)	
	)	
Missouri Bar No. 46976	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF CHIEF DISCIPLINARY COUNSEL

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INFORMANT

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, RSMo.

STATEMENT OF FACTS

General Information Regarding Respondent

Respondent was licensed to practice law in Missouri on or about September 29, 1995, and his Missouri Bar license is currently in good standing. **R. at Vol. 1, p. 1 & p. 20.** Based in Springfield, Missouri, Respondent is a criminal defense attorney. **R. at Vol. 1, p. 243 (Tr. 176:13-16).**

Respondent has no previous disciplinary history, but on December 19, 2012, the Region XV Disciplinary Committee cautioned Respondent with respect to his inappropriate contact with an alleged victim of domestic assault while representing the accused boyfriend in the pending domestic assault criminal case. Citing Rule 4-4.3 (Dealing with Unrepresented Person), the Committee noted that the interests of the girlfriend "as the alleged victim of domestic assault and a witness in the case, were in potential conflict with the interests of your client, the defendant in the case." **R. at Vol. 1, pp. 377-79.**

The Preliminary Hearing

In January of 2019, Matthew W. Johnson was charged by the State of Missouri (Greene County Prosecuting Attorney) with a number of misdemeanor and felony crimes (Case No. 1931-CR00009). Respondent entered his appearance on behalf of Mr. Johnson on February 8, 2019. **R. at Vol. 1, p. 463.** The probable cause statement identified the victim as "B.C.", who is the mother of one of Mr. Johnson's children. **R. at Vol. 1, pp. 455-58.** B.C. was described by an assistant prosecutor as a "vulnerable victim who is relatively unsophisticated and was just scared." **R. at Vol. 1, p. 2 & p. 20.** The criminal

complaint was amended on March 29, 2019, to contain additional charges including the class D felony of *attempted* tampering with a victim. Again, the probable cause statements identify the victim as B.C. **R. at Vol. 1, pp. 470 to Vol. 2, pp. 481.**

On April 2, 2019, the State filed a Motion to Proceed at Preliminary Hearing under the Doctrine of Forfeiture by Wrongdoing.[1] The brief in support of the State's motion explained that B.C. would be served as a witness for the upcoming preliminary hearing, but, if she failed to appear, the State would proceed under the theory of forfeiture by wrongdoing. **R. at Vol. 2, pp. 482-93.** The motion and brief were drafted and filed by Assistant Prosecutor Aaron Wynn,[2] who testified that the motion was "filed in this case because of the constant threats and [the prosecutor's] belief that [B.C.] wasn't going to be there because of those threats[.]" Wynn also testified that the State wanted B.C. to appear and testify at the preliminary hearing, "because if she was there and we got her testimony locked in on the record, that was all we needed." **R. at Vol. 1, pp. 125-29 (Tr. 58:12-20, 59:23-60:1, Tr. 61:20-24; Tr. 62:13-15).**

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[1] "Forfeiture by wrongdoing is an exception to a defendant's Sixth Amendment confrontation right. The theory behind the doctrine is that a defendant should not profit from his or her own misconduct if the defendant is the reason the witness is unavailable. A defendant who wrongfully procures the absence of a witness cannot complain about his or her inability to cross-examine that witness. For example, if a defendant in a domestic violence case has murdered, or simply persuaded the victim not to attend a hearing, and yet is still permitted to invoke his or her confrontation right to exclude hearsay statements

The State's brief in support of the motion to proceed under the doctrine of forfeiture by wrongdoing contains descriptions of numerous incidents of alleged threats and/or violence involving Mr. Johnson and B.C. For example:

a. On September 11, 2018, B.C. called the police because Mr. Johnson had kicked her back door multiple times;

b. On September 13, 2018, the police responded to B.C.'s home because Mr. Johnson was fighting with her father;

c. On October 19, 2018, B.C.'s mother called the police because Mr. Johnson had attempted to strike her. Additionally, he had a knife and threatened to "stab her to death" before proceeding to break items around the home;

d. On October 20, 2018, Mr. Johnson telephoned B.C. and threatened to "kick her ass."

R. at Vol. 2, pp. 484-93.

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from the victim, it unfairly rewards that defendant for procuring the victim's absence." Evanthia A. Pappas, *Forfeiture by Wrongdoing after* Crawford *and* Giles*: An Effective Tool for Prosecutors with an Absent Victim at Trial*, 52-OCT Prosecutor 26 (October 2018).

[2] Mr. Wynn has since gone into private practice. **R. at Vol. 1, p. 110 (Tr. 43:10-18).**

On or about October 22, 2018, the Circuit Court issued a full order of protection for B.C. and against Mr. Johnson. Nevertheless, during the order's effective period, the following incidents were cited by the State to support its motion:

a. On November 13, 2018, Mr. Johnson struck the hood of B.C.'s car with a baseball bat and climbed onto the hood. He later threatened, via a Facebook message, to kill her;

b. On December 8, 2018, the police responded to B.C.'s home. When they got there, Mr. Johnson was there, but B.C. told them he had gone because he was holding her child, and she was afraid of what he might do. He had threatened to tie her up and burn her house down;

c. On December 15, 2018, Mr. Johnson appeared at B.C.'s house twice, but both times he left before the police arrived;

d. On December 16, 2018, B.C.'s son called the police because Mr. Johnson was there banging on the front door;

e. On December 18, 2018, Mr. Johnson was parked outside of B.C.'s house, but he left before the police arrived;

f. On January 2, 2019, Mr. Johnson again showed up at B.C.'s home, but he left before the police arrived;

g. On January 3, 2019, police were called to B.C.'s home and found Mr. Johnson inside. He had come in through a window after she refused to open the door. He fled but was later taken into custody.

R. at Vol. 2, pp. 484-93.

On March 6, 2019, Mr. Johnson's bond was revoked and he was rearrested. The State's brief includes the following contacts that Mr. Johnson made with B.C. via text messages and telephone calls:

a. In a text message sent on March 13, 2019, Mr. Johnson threatened to kill B.C. and her children, saying, among other things, "im slicing ur throat u rat bitch";

b. A voicemail message from that same day ended with, "I hope your kids fucking die";

c. On March 26, 2019, Mr. Johnson telephoned B.C. from jail saying, "Tell me this. Why you tryin to keep me in here?" and "I've been charged because of you";

d. Mr. Johnson telephoned B.C. 19 more times on March 26, 2019;

e. On March 27, 2019, Mr. Johnson telephoned B.C. again, saying, "Prison aint going to help me. If I go back to prison, it's going to be all hate, you see what I'm saying?"

R. at Vol. 2, pp. 484-93.

The State amended the criminal complaint on April 8, 2019, to add a charge of tampering with a victim, a class D felony. **R. at Vol. 2, pp. 494-97.**

The preliminary hearing was held on April 8, 2019. **R. at Vol. 1, pp. 445-46 (docket sheet).** B.C. did not come to court for the preliminary hearing. **R. at Vol. 1, p. 143 (Tr. 76:19-21).** The trial court took up the State's motion pertaining to forfeiture by

wrongdoing with the preliminary hearing. **R. at Vol. 1, pp. 445-46 (docket sheet).** On April 10, 2019, the trial court made the following docket entry:

> AFTER CONSIDERING ALL EVIDENCE THIS COURT FINDS THE FORFEITURE BY WRONGDOING DOCTORINE [sic] APPLIES IN THIS CASE. THERE WAS AMPLE EVIDENCE FROM THE WITNESSES THAT TESTIFIED THAT DEFENDANT HAS BEEN HARASSING VICTIM SIGNIFICANTLY AND CONSISTANTLY, INCLUDING THREATS TO KILL VICTIM AND HER CHILDREN BECAUSE OF VICTIM'S COOPERATION WITH LAW ENFORCEMENT. THIS COURT FINDS VICTIM'S STATEMENTS ARE ADMISSIBLE UNDER THE FORFEITURE BY WRONGDOING DOCTRINE AS DEFENDANT'S ACTIONS WERE INTENDED TO CAUSE VICTIM TO BE UNAVAILABLE TO TESTIFY.

R. at Vol. 1, p. 446 (docket sheet).

The Affidavit

Respondent devised a plan to demonstrate that B.C. was not an unavailable witness in order to ask the Circuit Court to remand the criminal case back to Associate Circuit Court for another preliminary hearing. Respondent testified that he believed the trial court's finding regarding B.C.'s unavailability was essentially "a fraud on the court." Respondent told Mr. Johnson: "When we prove that there is a fraud on the court, that's going to result to your benefit." **R. at Vol. 1, pp. 397-402 (Tr. 18:10-15, 19:10-17, 20:12-21, 22:19-25, 23:5-6); p. 280 (Tr. 213:16-19).**

Mr. Johnson, in a telephone call from the jail, told his mother about the plan to obtain an affidavit from B.C. that would say that she was not afraid of him. **R. at Vol. 2, pp. 514-15.** The Greene County Prosecutor's office overheard this conversation because it had been monitoring Mr. Johnson's telephone calls. **R. at Vol. 2, p. 148 (Tr. 81:15-83:6).** Respondent also had access to these telephone calls because he had sought and received them through discovery. **R. at Vol. 1, pp. 314-15 (Tr. 247:17-248:2).**

Respondent told Alicia Teeter that he "thought there was a fraud on the court" and "sent word" through her to B.C. that he wanted to talk to B.C. **R. at Vol. 1, p. 279 (Tr. 212:6-8), p. 401 (Tr. 22:19-25).** Ms. Teeter was Mr. Johnson's girlfriend and is also the mother to one of his children. **R. at Vol. 1, p. 221 (Tr. 154:12-13), p. 244 (Tr. 177:24-178:1).** Respondent acknowledged that he was then "conscious of the idea that somebody might later accuse [him] of tampering with [B.C.]" He said that was why he did not reach out to her directly. **R. at Vol. 1, p. 280 (Tr. 213:21-25), p. 405 (Tr. 26:7-10).** Then Assistant Prosecutor Aaron Wynn believes that B.C. was "lured" to Respondent's office. **R. at Vol. 1, p. 103 (Tr. 136:13-24).**

B.C. telephoned Respondent's office to find out what Respondent wanted to talk to her about. Respondent's staff told B.C. that she could not speak to Respondent on the telephone and would need to come in to his office to speak in person. **R. at Vol. 2, pp. 514-515.** B.C. went to Respondent's office late in the afternoon on May 7, 2019. She was accompanied by Ms. Teeter, and they had B.C.'s baby with them. **R. at Vol. 1, p. 89 (Tr. 22:11-13), pp. 252-32 (Tr. 185:25-186:4).** Ms. Teeter may have driven B.C. to Respondent's office. **R. at Vol. 1, p. 221 (Tr. 154:8-13), p. 180 (Tr.213:7-10).**

In his sworn statement given to Informant, Respondent recalled the beginning of that meeting as follows:

> Well, I probably told her - - my recollection is I told her that I'm not her lawyer and that I represent Matthew and that she doesn't have to talk to me, and if she wants a lawyer, maybe she should get one. And then I told her that the state has had her declared unavailable as a witness, and I asked her if she was unavailable and she said, no, so, yeah, it started like that.

R. at Vol. 1, p. 404 (Tr. 25:3-9). Respondent also reported that to emphasize the point, he told B.C., "not only did I tell you that I didn't represent you, I told you that I'd ask for a warrant for your arrest at the last court date. Do you remember that?" Respondent testified that he told B.C. that "it was up to her to decide if I represented her interests[.]" **R. at Vol. 1, p. 254 (Tr. 187:3-25); Vol. 2, p. 634 (Tr. 13:17-20).** At some point during his meeting, Ms. Teeter left with the baby and Respondent was alone with B.C. in his conference room. **R. at Vol. 1, p. 253 (Tr. 186:7-23).**

Respondent acknowledged that he probably should not have been alone with B.C. **R. at Vol. 1, p. 273 (Tr. 206:20-21).** Assistant Prosecutor Aaron Wynn testified he saw that Respondent had alternatives to having B.C. in his office. For example, he could have scheduled a deposition, talked with B.C. in the presence of the prosecutor or the victim advocate, or asked another defense attorney to talk to B.C. **R. at Vol. 1, p. 192 (Tr. 125:6-16), p. 197 (Tr. 130:12-19).**

With typing assistance from his secretary, Respondent drafted an affidavit for B.C.'s signature. **R. at Vol. 1, p. 406 (Tr. 27:8-11).** Respondent's secretary testified

during a sworn statement that even though B.C. was present while the affidavit was drafted for her signature, Respondent (not B.C.) "basically told me what to say."

> Q: When it says, "I," because that's the first person, "have no objection to Matthew Johnson being released from jail," did [B.C.] say those words or were those the words of Mr. Bender?
>
> A: No, [B.C.] did not say those. Mr. Bender stated those words . . .."

R. at Vol. 2, p. 669-70 (Tr. 14:22-15:2). Respondent admitted that the words in the affidavit were his words, not B.C.'s. **R. at Vol. 1, p. 274-75 (Tr. 207:24-208:1).** The affidavit contained the following averments:

a. I am the alleged victim in Matthew Johnson's pending case.
b. I have chosen through my own free will not to participate in this case because the Prosecuting Attorney is seeking charges and sentences against Matthew that I disagree with.
c. I do not feel intimidated by Matthew Johnson in any way, and his actions have not affected my decision not to participate in this case.
d. I have no objection to Matthew Johnson being released from jail.

R. at. Vol. 2, p. 506. The affidavit makes no mention of the preliminary hearing; it does not include B.C.'s explanation for not being there. **R. at Vol. 1, p. 283 (Tr. 216:21-23).**

B.C. hesitated, standing in silence, for as long as 20 minutes before she signed the affidavit. **R. at Vol. 1, p. 412 (Tr. 33:21); Vol. 2, p. 640 (Tr. 34:1-6).** At one point, Respondent's secretary said to B.C., "I've got to go and pick up my child. Sign it or not." **R. at Vol. 1, p. 412 (Tr. 33:8-10).** Respondent's secretary notarized B.C.'s

signature on the affidavit but did not have B.C. sign her notary book. **R. at Vol. 2, p. 673 (Tr. 18:19-23).** B.C. was later deposed in the criminal case, Case No. 1931-CR00009-01, on June 27, 2019. B.C. testified at the deposition that she did not understand that her statements were being made under oath at the time she signed the affidavit. **R. at Vol. 2, p. 636-37 (Tr. 19:21-21:6).** B.C. also testified that she was not afraid of Mr. Johnson at the time she signed the affidavit, but only because he was in jail. Had he gotten out of jail, "it'd be a different story. I can't say I wouldn't be scared." **R. at Vol. 2, p. 637 (Tr. 23:24-24:4).**

Assistant Prosecutor Aaron Wynn met with B.C. on numerous occasions during the pendency of these criminal matters and he described her as scared.

> Q. Tell us what you saw and heard that leads you to give that answer.
>
> A. When she talked about things that had happened to her as a result of Mr. Johnson, she would shake, she would cry, she would tap her foot. She looked scared. She was skittish. She would call on different occasions. I saw her cry on numerous occasions. I've worked with enough victims, it's my opinion that she was scared.

R. at Vol. 1, p. 127 (Tr. 60:4-19). Mr. Wynn, who was present on June 27, 2019, for B.C.'s deposition in the criminal case, testified that, based on his previous interactions with B.C., he believed that "[s]he didn't want to be scared. She didn't want anyone to think she was scared." **Ex. 7; Tr. 97:23-98:2; Tr. 100:22-101:2.**

Mr. Wynn testified: "I don't believe that affidavit adequately reflects [B.C.'s] position, feelings, or thoughts." **R. at Vol. 1, pp. 201-02 (Tr. 134:24-135:1).** He offered

the following testimony regarding the affidavit:

> The way that affidavit was crafted was in and of itself inherently manipulative and I believe was worded in a way and crafted in a way to confuse and trick Ms. C_____ which is why she immediately called our office after leaving, crying, realizing that she had made a terrible mistake when it was filed in the case.

R. at Vol. 1, p. 194 (Tr. 127:17-23). B.C. was not represented by an attorney during her deposition. **R. at Vol. 2, p. 639 (Tr. 33:21-22).**

During B.C.'s deposition, Respondent never asked her any questions that would relate to Mr. Johnson's underlying criminal charges or her likely testimony against him. That deposition may have been Respondent's only opportunity to question B.C. regarding her knowledge of the facts relating to the criminal charges. **R. at Vol. 1, pp. 168-169 (Tr. 101:11-102:21); Vol. 2, pp. 630-646.**

On May 13, 2019, Respondent filed, on behalf of Mr. Johnson, a Motion to Remand, arguing that B.C. was and is not an unavailable witness and that Mr. Johnson should be released from jail. The motion relied upon B.C.'s affidavit, which was attached to the motion. **R. at Vol. 2, pp. 503-06.** Assistant Prosecutor Aaron Wynn testified as follows, with respect to his understanding regarding the purpose of the affidavit of B.C.:

> [It] was very important because what they had attempted to do was to say that she had chose not to participate through her own freewill, not because of anything that Mr. Johnson had done. And also that she does not feel intimidated by Mr. Johnson.

> The reason – the impact of this is that that was the only way to defeat the motion for forfeiture by wrongdoing. The motion for forfeiture was the only way the State could proceed in that case without B.C. Without the motion for forfeiture by wrongdoing, without proceeding under that doctrine, we had no possibility of moving this case forward. It would have been dismissed. And to do that we had to show that she was scared and that she was not cooperating because of what Mr. Johnson had done.
>
> This affidavit was very purposely designed – and I think it's clear on its face – to try to – to undermine that assertion, specifically that it was because she didn't want to appear and it was because – and that she wasn't scared of Mr. Johnson. If she wasn't scared and she didn't come on her own freewill, the doctrine of forfeiture by wrongdoing would not apply, this case would ultimately be dismissed, and nothing would happen with Mr. Johnson. And so that is why this affidavit was so concerning.

R. at Vol. 1, pp. 146-48 (Tr. 79:23-81:10).

Mr. Wynn asserted that the affidavit "was perfectly crafted to defeat the one way that the State had with proceeding with their charges." **R. at Vol. 1, p. 201 (Tr. 134:15-17).** He explained that the motion to remand with the supporting affidavit "was the only way [Mr. Johnson] was going to get out of custody. And he would have likely spent the next year, year and a half in custody even if this had gone to trial and was later dismissed because she didn't cooperate." **R. at Vol. 1, p. 235 (Tr. 168: 2-7).** Respondent testified that his "plan was to get the affidavit and use it to demonstrate that [B.C.] was available."

R. at Vol. 1, p. 251 (Tr. 184:8-9).

Criminal Case No. 1931-CR00009-01

On May 16, 2019, the State filed a motion seeking an order of protection for B.C. from Respondent. **R. at Vol. 2, pp. 509-15.** The State filed the motion in order to protect the victim, B.C., and to protect their prosecution because "[a]t this point we felt that . . . Peter Bender was basically tampering with our victim, was assisting Mr. Matthew Johnson in doing the same, so we felt it was necessary." **R. at Vol. 1, pp. 151-52 (Tr. 84:22-85:5).** The motion was noticed up for May 17, 2019, at 9:00 a.m. **R. at Vol. 2, pp. 509-15.** Respondent had also noticed up his client's motion to remand for May 17, 2019, at 9:00 a.m. **R. at Vol. 2, pp. 507.** Respondent failed to appear in court on May 17, 2019, at 9:00 a.m. **R. at Vol. 1, p. 448 (docket sheet).** On May 21, 2019, the trial court issued the following:

> Counsel for the defendant, Peter Gabriel Bender is not to have any contact or communication with the alleged victim, B.C. other than through the formal discovery process, by and through the Greene County Prosecutor's office as laid out in Missouri Rules of Criminal Procedure 25.01 – 25.19, and Missouri Rule of Civil Procedure 56.01.

R. at Vol. 1, p. 516.

On May 31, 2019, the State moved to disqualify Respondent due to conflicts of interest. **R. at Vol. 1, p. 549-50.** With reference to Rule 4-3.7, the State's suggestions in support of the motion to disqualify argued that Respondent, "through his conduct, has become an essential witness in Mr. Johnson's cases." The State's suggestions also

discussed a conflict of interest between Mr. Johnson's interests and Respondent's personal interests, as would be prohibited by Rule 4-1.7(a)(2). Specifically, the State asserted that "any statements or comments made by Mr. Bender in defense of Mr. Johnson could have adverse implications for Mr. Bender himself." **R. at Vol. 1, pp. 551-71.**

On July 16, 2019, the trial court issued an order denying the State's motion to disqualify counsel for the defendant, but the trial court did order Respondent to obtain a conflict waiver from his client before continuing with the representation. Specifically, the trial court's order included the following:

> Attorney for the Defendant is obligated by the Rules of Professional Conduct, and by this Order, to carefully review with the Defendant any conflict of interest, or potential conflict of interest and thereafter proceed with representation of the Defendant only after Defendant has given his informed consent to his waiver of any conflict, or potential conflict of interest. Defendant's attorney may proceed with representation only after filing his statement with this Court confirming he has obtained the written informed consent of the Defendant acknowledging Defendant's desire to waive any conflict, or potential conflict of interest.

R. at Vol. 1, pp. 601-02.

Respondent filed a Waiver of Conflict, signed by Mr. Johnson, but not until August 7, 2019. The Waiver discussed Mr. Johnson's potential conflicts with B.C. "should it be determined in the future that my attorneys' actions created an attorney client

relationship between Bender and Bender and witness BC."[3] The Waiver did not address any potential conflicts between the interests of Mr. Johnson and Respondent, as was alleged by the State and ordered by the trial court. **R. at Vol. 1, pp. 294-95 (Tr. 227:20-228:1); Vol. 2, pp. 603-04.** Respondent understood that the court had directed him to "provide something in writing from your client indicating if he chose to that he was going to waive any conflict." **R. at Vol. 1, 270-71 (Tr. 203:24-204:3).** However, the Waiver of Conflict was not signed until August 7, and it was not filed until after Mr. Johnson had entered his guilty plea. **R. at Vol. 2, pp. 603-04, p. 720 (Tr. 19:14-21), p. 724 (Tr. 23:11-13).**

At the plea hearing, after the waiver was filed, the judge questioned Mr. Johnson regarding possible conflicts of interest with his attorney, Respondent Peter Bender:

> My expectation, and I will review with you, Mr. Johnson, your satisfaction with your lawyer, and I will do it again, I've already done it once, but I will do it again at the time of your sentencing.
>
> I'm going to ask you a question or two right now though. There has been a document filed entitled "Waiver of Conflict," and it's a written document, it's signed by you, and it has to do with the possibility that your lawyer has a conflict of interest. I'm not suggesting that he has one, but he might have one. Do you understand that?

[3] To address a conflict of interest between current clients, Rule 4-1.7(b)(4) requires each affected client to give informed consent, confirmed in writing.

THE DEFENDANT: Yes, sir.

THE COURT: And you have been made aware of that from the very beginning?

THE DEFENDANT: Yes, sir.

THE COURT: And your lawyer has discussed that with you; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you have chosen to continue with Mr. Bender as your lawyer and have agreed to waive any conflict of interest?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you understand it's not Mr. Bender's job, it's your job to waive it because the conflict is yours to assert?

THE DEFENDANT: Yes, sir.

THE COURT: And you have chosen not to assert it, to waive the conflict, accept Mr. Bender's advice, and enter a plea of guilty; is that correct?

THE DEFENDANT: Yes, sir.

R. at Vol. 2, pp. 724-26 (Tr. 23:18-25:1).

Mr. Johnson was sentenced on October 18, 2019, appearing in person with Respondent at the sentencing hearing. Mr. Johnson pleaded guilty to and was sentenced for the following:

a. Resisting/Interfering with Arrest for a Felony;

b. Violation of Order of Protection for Adult;

c. Stalking – 1st Degree;

d. Tamper or Attempt to Tamper with a Victim in a Felony Prosecution.

R. at Vol. 2, pp. 606-10.

Criminal Case No. 1931-CR02903

On May 16, 2019, the State filed a new criminal charge of victim tampering against Mr. Johnson, alleging in the complaint that he had "solicited help from another, in order to prevent or dissuade B.C. . . . from assisting in the felony prosecution of Matthew Johnson." (Case No. 1931-CR02903). **R. at Vol. 2, p. 617.** The probable cause statement identifies Respondent by name and discusses conduct by and events associated with Respondent. **R. at Vol. 2, pp. 618-19.**

The crime charged was victim tampering, which is codified in Section 575.270(2), RSMo, as follows:

> A person commits the crime of tampering with a . . . victim if [he] purposely prevents or dissuades or attempts to prevent or dissuade any person who has been a victim of any crime or a person who is acting on behalf of any such victim from:
>
> (a) Making a report of such victimization to any peace officer, state, local or federal law enforcement officer, prosecuting agency, or judge;
>
> (b) Causing a complaint, indictment or information to be sought and prosecuting or assisting in the prosecution thereof;

(c) Arresting or causing or seeking the arrest of any person in connection with such victimization.

R. at Vol. 2, p. 647. By the plain language of the statute, an *attempt* to tamper with a victim is an actual violation of the statute. **R. at Vol. 1, pp. 199-200 (Tr. 132:17-133:2).**

Assistant Prosecutor Aaron Wynn, when he wrote "solicited help from another," was referring to Respondent Peter Bender. **R. at Vol. 1, p. 145 (Tr. 89:22-90:1).** Respondent also thought that the reference was to him. **R. at Vol. 1, p. 306 (Tr. 239:2-9).** In fact, the Greene County Prosecutor contemplated charging Respondent Peter Bender with victim tampering. In the end, the Prosecutor decided against filing criminal charges against Peter Bender because (1) they were reluctant to involve the victim, B.C., and (2) they believed that the attorney discipline process could adequately address his conduct. **R. at Vol. 1, pp. 157-58 (Tr. 90:2-91:18).**

On May 24, 2019, Respondent entered his appearance in Case No. 1931-CR02903. **R. at Vol. 2, p. 620.** Respondent knew the reference to "another" in the complaint was a reference to him and "that was one of the reasons that [he] entered [his] appearance." **R. at Vol. 1, p. 306 (Tr. 239:12-13).** On July 25, 2019, the State moved to disqualify Respondent. With reference to Rule 4-3.7, the State's suggestions in support of the motion to disqualify argued that Respondent, "through his conduct, has become an essential witness in Mr. Johnson's cases." **R. at Vol. 2, pp. 621-28.** Respondent advised his client, Mr. Johnson that it was likely he was going to have to be a witness in the case. **R. at Vol. 1, p. 311 (Tr. 244:13-16).**

The motion to disqualify Respondent was filed to protect the integrity of the

prosecution and Mr. Johnson's conviction, according to Assistant Prosecutor Aaron Wynn:

> And my fear was that we would ultimately obtain a conviction for Mr. Johnson and that two days later we would have a PCR, a post conviction relief, motion on our table for ineffective assistance of counsel because his attorney was – basically is alleged to have committed the same act that we had charged Mr. Johnson with because they were acting in concert together.
>
> And so the idea of having him represent Mr. Johnson where we were then going to have to fight to uphold this conviction was inappropriate. And so this, in my mind, was to protect – I say protect Mr. Johnson, but it was to protect our prosecution of Mr. Johnson.

R. at Vol. 1, pp. 162 (Tr. 95:4-18). The State's suggestions also discuss a conflict of interest between Mr. Johnson's interests and Respondent's personal interests, as would be prohibited by Rule 4-1.7(a)(2). Specifically, the State asserted that "any statements or comments made by Mr. Bender in defense of Mr. Johnson could have adverse implications for Mr. Bender himself." **R. at Vol. 2, pp. 623-28.**

The State's motion to disqualify was noticed up for July 26, 2019. **R. at Vol. 2, p. 621-22.** On July 26, 2019, the hearing on the motion to disqualify was continued to August 16, 2019. On August 16, 2019, Respondent failed to appear. The matter was continued to August 21, 2019. On August 21, 2019, Respondent failed to appear. **R. at Vol. 1, p. 272 (Tr. 205:12-15); Vol. 2, page 615 (docket sheet).** On August 22, 2019,

the trial court issued an order denying the State's motion, noting that "The State presented no evidence on State's Motion to Disqualify Counsel." The trial court's order also noted that Respondent had failed to appear on August 16, 2019, and again on August 21, 2019, and that he had failed to request a continuance for either of those settings. **R. at Vol. 2, p. 629.** Respondent also failed to appear in court for an August 28, 2019 hearing. **R. at Vol. 2, p. 615 (docket sheet).** Respondent testified: "I did not make any actual court appearances in that case. . .. I was counsel of record, but I did nothing except arrange for that case to be dismissed." **R. at Vol. 1, p. 244 (Tr. 177:5-9).**

On October 18, 2019, the State dismissed this criminal case "per plea agreement in case 1931-CR00009-01." **R. at Vol. 2, pp. 615-16 (docket sheet).**

The OCDC Complaint

This matter began when the Greene County Prosecuting Attorney, Dan Patterson, filed a complaint against Respondent with the Office of Chief Disciplinary Counsel. Respondent provided Informant with a response to the allegations in the complaint on or about July 29, 2019. His response letter suggests that it was the complaint that created the conflicts of interest asserted by the State in its motions to disqualify Respondent from representing Mr. Johnson: "Additionally we think it improper to allow the State to create conflicts of interest with bar complaints that deprive a defendant of the lawyer of his choosing." **R. at Vol. 2, pp. 648-53.** Similarly, Respondent testified at the hearing: "I also thought that the State was trying to engineer conflicts to try to knock me out because they don't really like me over there. If they had a dartboard at the prosecutor's office in Greene County, it would have my face on it because they've lost 40 jury trials. **R. at Vol.**

1, pp. 269-70 (Tr. 202:24-203:4).

Assistant Prosecutor Aaron Wynn testified on cross-examination regarding the filing of the OCDC complaint:

> I want to be very clear. I do not want to be here. I did not want to do this. I did not want to report Mr. [Peter] Bender. I've lost numerous cases as a prosecutor. I've had numerous affidavits dropped in my lap that I didn't like where someone recanted. Whether or not I actually believe they were true doesn't matter. I have dealt with those things before. This report was made in this case because this was different.
>
> So you can make it seem like I was mad that we got this affidavit, but that's not the case. It really isn't. In my career, I prosecuted hundreds and hundreds of cases and I have continued on through there. Not a single one of them is worthy my reputation.
>
> So yes, it was bad for our case. No, that is not why we are here.

R. at Vol. 1, p. 209 (Tr. 142:2-19).

Defendant's Evidence

Even though it is more likely considered legal authority, Respondent produced and submitted as evidence the American Bar Association's Criminal Justice Standards applicable to the Defense Function (ABA Defense Standards). **R. at Vol. 3, pp. 776-898.** Similarly, he offered as evidence, eight published opinions discussing ineffective assistance of counsel. **R. at Vol. 3, pp. 899-1001.** With reliance upon these authorities, Respondent argued that he did not violate the Rules of Professional Conduct, because he

was simply providing Mr. Johnson with effective representation, as the following excerpt of his direct testimony illustrates:

Q. So are you familiar with the Defense Function as published by the American Bar Association?

A. Well, we constantly restudy it, but yes.

Q. And is - - is the Defense Function as published by the American Bar Association - - is that something that you regard as authoritative in terms of the duties of a defense lawyer?

A. Because of the Supreme Court decision in Strickland, I believe it is the law.

Q. One of your obligations in - - or under the Defense Function is to investigate a case; is that correct?

A. Correct. You cannot be an effective lawyer without an investigation of the case.

Q. And does that include investigation as needed in each particular case?

A. Yes.

Q. Does it include specifically interviewing the victim?

A. Yes.

Q. And following the Defense Function . . . do you believe that you can be effective in a case if you have not interviewed the victim, particularly in a case like this?

A. In a domestic case like this, I do not think that the defense lawyer could be effective.

R. at Vol. pp. 260-61 (Tr. 193:13-194:16).

Here is another excerpt from Respondent's testimony in front of the Disciplinary Hearing Panel:

Q. The affidavit that you did prepare and that B.C. signed was harmful to the State's proceeding under forfeiture by wrongdoing; is that correct?

A. I believe that's true, yes.

Q. Do you know of any rule that prohibits you from taking an affidavit that's favorable to your case and harmful to the State's case?

A. On the contrary. I think I'm required to do that. Ultimately, the Sixth Amendment to the Constitution says I have to be effective. And, if I don't take that statement and don't use it, I'm not an effective lawyer.

R. at Vol. 1, p. 265 (Tr. 198:8-15).

And another:

Q. They filed a new charge against Matthew - -

A. Yes.

Q. - - Johnson?

And the new charge was based upon your obtaining the affidavit pursuant to some plan. What did you think of the charge . . . a felony, trying to dissuade a witness from cooperating? What did you think of that charge?

I. I thought that it demonstrated that the State had no idea what was in the Constitution that essentially . . . in every case a defendant has the right to ask the defense lawyer to talk to any and all witnesses, and that was essentially what they were trying to criminalize, was the defense - - the defendant's request for the defense lawyer to talk to the witnesses in a case.

So I thought that - - that ultimately they were trying to criminalize effective assistance of counsel[.]

R. at Vol. 1, pp. 268-69 (Tr. 201:17-202:12).

And finally:

Q. So summing up, a major issue in the State's case was whether or not B.C. was available to testify or unavailable to testify by reason of Matthew Johnson, your client; is that correct?

A. Why she wasn't - - the fact of her availability or unavailability and then the reason that she wasn't appearing was the issue.

Q. And was it appropriate for you to question B.C. regarding those issues?

A. I think I'm required by law to do it. So beyond appropriate.

R. at Vol. 1, pp. 273-74 (Tr. 206:23-207:9).

The Disciplinary Hearing Panel

This matter was heard by a disciplinary hearing panel on May 4, 2022. **R. at Vol. 1, pp. 68-348.** On August 29, 2022, the Panel issued its findings and recommended that the Information be dismissed. **R. at Vol. 1, pp. 28-64.** Respondent accepted the Panel's

recommendation on September 7, 2022. **R. at Vol. 1, pp. 66-67.** Informant rejected the Panel's recommendation on September 9, 2022. **R. at Vol. 1, p. 65.**

POINT RELIED ON

I.

RESPONDENT VIOLATED RULES 4-1.7(a)(2), 4-3.4(c), 4-4.3, 4-4.4, 4-8.4(a), and 4-8.4(d) AS ALLEGED IN THE INFORMATION.

Rule 4-1.7(a)(2)

Rule 4-3.4(c)

Rule 4-4.3

Rule 4-4.4

Rule 4-8.4(a)

Rule 4-8.4(d)

POINT RELIED ON

II.

UPON CONSIDERATION OF THIS COURT'S DECISIONS IN PREVIOUS ATTORNEY DISCIPLINE CASES, AND THE ABA SANCTION GUIDELINES, RESPONDENT SHOULD BE INDEFINITELY SUSPENDED WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS.

ABA Standards for Imposing Lawyer Sanctions (1991)

In re Crews, 159 S.W. 3d 355 (Mo. banc 2005)

In re Farris, 472 S.W.3d 549 (Mo. banc 2015)

In re Shelhorse, 147 S.W.3d 79 (Mo. banc 2004

ARGUMENT

I.

RESPONDENT VIOLATED RULES 4-1.7(a)(2), 4-3.4(c), 4-4.3, 4-4.4, 4-8.4(a) and 4-8.4(d) AS ALLEGED IN THE INFORMATION.

Standard of Review

Professional misconduct is established by a preponderance of the evidence. *In re Crews*, 159 S.W. 3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence and reaches its own conclusion of law. *Id.* In matters of attorney discipline, the disciplinary panel's decision is advisory. *In re Farris*, 472 S.W.3d 549, 557 (Mo. banc 2015).

An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his license. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

Conflict of Interest

Rule 4-1.7 prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. Such a conflict exists if "there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer." Respondent violated Rule 4-1.7(a)(2) by continuing his representation of Mr. Johnson in the first criminal case (Case No. 1931-CR0009-01) after Respondent's

personal interests were implicated by the Court after entering order of protection against Respondent and on behalf of the victim.

The first criminal case had two possible conflicts. The first is between Respondent's client, Mr. Johnson, and Mr. Johnson's alleged victim, B.C. The second is between Respondent and Mr. Johnson. Both types of conflicts are addressed by Rule 4-1.7, which provides that a "concurrent conflict interest" exists, if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Rule 4-1.7(a). However, there is an exception:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Rule 4-1.7(b).

This Rule and its exception must be read with reference to the applicable definitions. Specifically, "informed consent" is said to "denote[ ] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of a reasonably available alternatives to the proposed course of conduct." Rule 4-1.0(e). Similarly, "confirmed in writing," when used in reference to informed consent, references an actual writing or timely transmission of a writing confirming oral consent. Rule 4-1.0(b).

To the extent there was a conflict between Mr. Johnson and B.C., the Waiver filed by Respondent fails to satisfy the requirements set out in these Rules. Obviously, the Waiver is only signed by Mr. Johnson. If there was an attorney/client relationship formed between Respondent and B.C. – notably, not a question that is before this Court – then this Waiver is inadequate to waive the conflict because it has not been signed by B.C. The rule requires each affected client to give informed consent in writing.

Additionally, it appears B.C. could not sign such a waiver, because she was the alleged victim in these criminal cases. In another criminal case where the lawyer purported to represent both the criminal defendant and the victim, the court of appeals was not satisfied with the waiver obtained by the lawyer – even though it was signed by both clients. *State ex rel. Horn v. Ray*, 325 S.W.3d 500 (Mo. App. 2010). With emphasis on the victim's status as a victim, and therefore something more than a material witness, that court concluded:

> [C]ounsel cannot represent the interests of both the defendant and the victim. First such dual representation violates Rule 4-1.7 of the Rules of

> Professional Conduct. Second, such dual representation compromises the defendant's Sixth Amendment right to the effective assistance of counsel. Third, such representation threatens the integrity of the judicial system and public confidence in the system.

Id. at 504-505.

More significantly, the Waiver Respondent had Mr. Johnson sign does not even hint at the conflict between Mr. Johnson and Respondent. Respondent suggests that the colloquy with the court after Mr. Johnson entered his guilty plea is adequate. However, that testimony fails to satisfy the requirements in Rule 4-1.7 because it is not in writing and it took place after the fact. The Waiver was signed at the end of the case on the day that Mr. Johnson pled guilty. The Rule – and the trial court's order - clearly require that informed consent be obtained in writing and beforehand so that the client has the opportunity to evaluate the *proposed* course of conduct related to the representation.

Respondent also violated Rule 4-1.7(a)(2) by entering his appearance for Mr. Johnson in the second criminal case (Case No. 1931-CR02903). Respondent was clearly referenced in the Felony Complaint and identified by name in the Probable Cause Statement. Though he was not charged with victim tampering, the prosecutor considered bringing such charges. And, the probable cause statement included detailed discussions of Respondent's involvement in the events that lead to the charges that were filed against Mr. Johnson. At the very least, he was likely to be called upon to testify for one side or the other. Accordingly, Respondent had a personal interest in the prosecution of that case, an interest that was not necessarily aligned with Mr. Johnson's interests. "Where a

constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

Obligation to Follow Court Orders

Rule 4-3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal. Respondent violated Rule 4-3.4(c) when he knowingly disobeyed the trial court's July 16, 2019 order in Case No. 1931-CR00009-01 after he continued to represent Mr. Johnson without obtaining a timely conflict waiver that addressed the potential conflict between Mr. Johnson's interests and the personal interests of Respondent. The trial court's order expressly instructed Respondent to review any actual or potential conflicts with Mr. Johnson and "thereafter proceed with representation of the Defendant only after Defendant has given his informed consent[.]" The order made it clear that Respondent was to obtain his client's informed consent *before* continuing with the representation:

> Defendant's attorney may proceed with representation only after filing his statement with this Court confirming he has obtained the written informed consent of the Defendant acknowledging Defendants desire to waive any conflict, or potential conflict of interest.

R. at Vol. 1, pp. 601-02. Respondent disregarded the instructions in the trial court's order.

Professional Misconduct

Rule 4-3.7 states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness[.]" Rule 4-8.4(a) includes in the definition of "professional misconduct" attempts to violate the Rules of Professional Conduct. Respondent violated Rule 4-8.4(a) and demonstrated his intent to violate Rule 4-3.7(a) by entering his appearance on behalf of Mr. Johnson in Case No. 1931-CR02903 even though it was clear from the probable cause statement that he was likely to be a necessary witness. Respondent violated Rule 4-8.4(a) and demonstrated his intent to violate Rule 4-3.7(a) by failing to withdraw from his representation of Mr. Johnson after the State explicitly identified him, in its Motions to Disqualify, as a person who was likely to be a necessary witness for the defense as well as the prosecution.

Dealing with Unrepresented Persons

Rule 4-4.3 states that "When dealing on behalf of a client with a person who is not represented by counsel" . . . "a lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel." In situations where the unrepresented person's interests are adverse to those of the lawyer's client, "the possibility that the lawyer will compromise the unrepresented person's interest is so great that Rule 4-4.3 prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." Comments to Rule 4-4.3. Respondent violated Rule 4-4.3 by impermissibly advising B.C. to execute an affidavit in that he exerted his influence with respect to the

contents of the affidavit and created an atmosphere of intimidation with respect to its signing.

Rights of Third Persons

Rule 4-4.4 prohibits a lawyer, "in representing a client" from using "methods of obtaining evidence that violate the legal rights of such person." "The Missouri Constitution confirms the unique status of the victim in the criminal-justice system, and provides victims with many enumerated rights" including the right "to reasonable protection from the defendant." *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 505 (Mo. App. 2010). Respondent violated Rule 4-4.4 by conspiring with his client to execute the plan to obtain an affidavit from B.C. with the objective of reversing the trial court's probable cause finding and securing Mr. Johnson's release from jail.

"It is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct . . . or do so through the acts of another." Rule 4-8.4(a). Respondent violated Rule 4-8.4(a) by collaborating with his client, Mr. Johnson, to obtain an affidavit from B.C. to support Mr. Johnson's efforts to have his criminal case remanded back to associate circuit court and to secure his release from jail.

Conduct Prejudicial to the Administration of Justice

"It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]" Rule 4-8.4(d). Respondent violated Rule 4-8.4(d) by engaging in the following:

a. Continuing to represent Mr. Johnson without a conflict waiver after a potential conflict of interest had been identified;

b. Disobeying a direct order of the trial court;

c. Demonstrating intent to act as an advocate in a matter where he had been identified as a necessary witness;

d. Having an inappropriate interaction with an unrepresented person; specifically, the vulnerable victim in a criminal case, while representing the defendant;

e. Violating the rights of that victim;

f. Failing to appear in court for scheduled motion hearings;

g. Asserting that the prosecutor filed the OCDC complaint in order to create a conflict of interest and protect the State's interest in these criminal proceedings.

Respondent's Theory of Defense

Respondent's defense of this matter suggests he believes that his obligations as a defense attorney outweigh any requirements or prohibitions imposed by the Rules of Professional Conduct. Nothing, however, in the ABA Defense Standards even suggests that a lawyer may disregard the applicable Rules of Professional Conduct in order to provide effective assistance of counsel. On the contrary, they expressly state the opposite:

> For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct. **No inconsistency is ever intended; and in any case a lawyer should always read and comply with the rules**

> **of professional conduct** and other authorities that are binding in the specific jurisdiction or matter, including choice of law principles that may regulate the lawyer's ethical conduct.

Standard 4-1.1(b) - ABA Defense Standards, (emphasis added).

Another section, covering Standard 4-1.2, Functions and Duties of Defense Counsel, repeats and emphasizes this theme: "Defense counsel who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but **should comply with it unless relieved by court order**." Standard 4-1.2(c) - ABA Defense Standards (emphasis added). Similarly, the Standard discussing conflicts of interest opens with the following statement: "Defense counsel should **know and abide by the ethical rules regarding conflicts of interest** that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues." Standard 4-1.7(a) – ABA Defense Standards (emphasis added).

While it is true that the Supreme Court of the United States has cited to the ABA Defense Standards when discussing claims of ineffective assistance of counsel, the Court made it clear that the Standards "are only guides." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). And, while Respondent may have followed the guidance in the ABA Defense Standards in an effort to provide effective advocacy to his client (which is not an issue presented by this disciplinary matter), those standards do not provide any justification for his misconduct and they certainly do not trump the Rules of Professional Conduct.

Interestingly, the Eighth Circuit Court of Appeals, in an ineffective assistance of counsel claim, asserted the opposite: "the Constitution prevails over rules of professional ethics[.]" *Whitesides v. Scurr*, 744 F.2d 1323, 1328 (8th Cir. 1984) (with reference to "the ABA Model Rules 3.3 comment, Appendix B"). However, that decision was subsequently overturned by the Supreme Court of the United States in *Nix v. Whitesides*, 475 U.S. 157 (1986). In *Nix*, the issue before the Supreme Court was "whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." *Id.* at 159. Even though the issues here are not identical, what the Court had to say about the lawyer's ethical obligations is instructive.

> These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct[.]

Id. at 168 (referencing the Model Code of Professional Responsibility and the Model Rules of Professional Conduct).

Another court addressed this duty in a disciplinary case that alleged criminal defense lawyers included false information in a motion seeking a judge's recusal:

> The question to be answered is what standard of conduct respondents had to meet before bringing such a direct attack on the judicial process. This in reality is two questions: What is the standard? And, did respondents meet that standard here?

> In replying to those questions, respondents point to the high duties of vigorous representation which they owed to their clients. Respondents are correct. Attorneys owe high duties to their clients to defend their cases fully, vigorously, and even with arguments which might be offensive or ultimately unsuccessful. This is particularly true in criminal cases, where the clients' liberties are at stake, and where the adequacy of the attorneys' representation can raise constitutional issues. But the obligations which respondents owe to their clients does not answer the dilemma. It merely states the dilemma.
>
> The other side of the dilemma is that defense attorneys are also officers of the court and owe duties, which can be even higher duties, to the administration of justice.

In re Order to Show Cause, 741 F.Supp. 1379, 1381 (N.D. Cal. 1990).

Additionally, Respondent suggests that his client's Constitutional rights as a criminal defendant are absolute and therefore transcend the Rules of Professional Conduct. This suggestion is not supported by case law. First, a criminal defendant's Sixth Amendment rights are not absolute.

> A criminal defendant's choice of counsel is properly constrained by regulations governing the practice of law. In other words, the right to counsel of one's choosing is not unlimited. . .. [E]ven during a pending criminal proceeding, ethical violations may override a defendant's choice and permit counsel's disqualification.

In re Hawver, 339 P.3d 573, 592 (Kan. 2014).

Second, Respondent cannot assert his client's rights as a defense to these disciplinary proceedings. A Kansas lawyer made a similar argument that "disciplining him for his conduct in representing [the criminal defendant] would infringe upon [the defendant's] rights because it would deprive [him] of the right to counsel of his choice[.] *Hawver*, 339 P.3d at 591. The Kansas Supreme Court disagreed: "This argument is without merit because a lawyer cannot raise a client's Sixth Amendment rights as a defense in a disciplinary proceeding." *Id.*

II.

UPON CONSIDERATION OF THIS COURT'S DECISIONS IN PREVIOUS ATTORNEY DISCIPLINE CASES, AND THE ABA SANCTION GUIDELINES, RESPONDENT SHOULD BE INDEFINITELY SUSPENDED WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS.

ABA Standards for Discipline

Since its decision in *In re Storment,* 873 S.W.2d 227 (Mo. banc 1994), the Missouri Supreme Court has consistently turned to the ABA Standards for Imposing Lawyers Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose.

ABA Standard 4.32 is applicable to situations involving the duty owed to a client arising out of an alleged conflict of interest. Specifically, this Standard addresses the violations of Rules 4-1.7 (conflict of interest), 4-3.7 (lawyer as witness), and 4-8.4(a) (violations/attempted violations). Respondent acted knowingly, because he acted "with conscious awareness of the nature or attendant circumstances of his . . . conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards, Theoretical Framework. ABA Standard 4.32 says that:

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

Here, Respondent was aware of the possible conflict with Mr. Johnson, and Mr. Johnson was therefore subjected to potential injury because Respondent failed to timely and adequately disclose the conflict and obtain his client's informed waiver in writing.

ABA Standard 6.22 is applicable to violations of the duty owed to the legal system, notably Rule 4-3.4(c) (disobeying the rules of the tribunal) and Rule 4-8.4(d) (conduct prejudicial to the administration of justice).

> Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Here, once the potential conflicts were brought to light by the State, the trial court ordered Respondent to discuss all possible conflict(s) of interest with his client and obtain a waiver if he was going to continue in the representation. Respondent disregarded that order.

Finally, Standard 6.32 is applicable in this case due to violations of the following Rules: 4-4.3 (dealing with an unrepresented person), 4-4.4 (respect for rights of third persons), 4-8.4(a) (violations/attempted violations), 4-8.4(d) (conduct prejudicial to the administration of justice). The Standard says:

> Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the

outcome of the legal proceeding.

In this case, Respondent knew that B.C. was vulnerable as the victim of domestic violence at the hands of his client, Mr. Johnson. Respondent knew that his client had threatened to kill B.C. and her children. Respondent knew that his own conduct was likely to be viewed as victim tampering, yet he lured B.C. to his office under the pretense of wanting to ask her some questions, when he knew all along he wanted to get her to sign an affidavit for the purpose of reversing the preliminary hearing decision and getting his client released from jail. Once she was there, he met with her alone in his conference room for a time. Even when there were other witnesses present, it is important to remember that those witnesses were Respondent's employee and Mr. Johnson's girlfriend. These actions potentially injured Mr. Johnson in that they relate to additional criminal charges that were brought against him, and they threatened the outcome of the legal proceeding by undermining the prosecutor's confidence in securing a conviction that would not be overturned on appeal. Additionally, there was potential injury to B.C. Contrary to Respondent's argument, he was not meeting with B.C. as a witness to obtain facts about the underlying allegations. His sole purpose was to obtain the affidavit. Had he succeeded in securing Mr. Johnson's release from jail, there was a risk of physical harm to B.C. and her children.

Mitigating and Aggravating Factors

Although suspension is the presumptive discipline, the Court must consider mitigating and aggravating circumstances to see if any of these factors might suggest either increasing or decreasing the level of discipline. Mitigating factors do not serve as a

defense to a finding of misconduct, but they may justify a downward departure from the presumptively proper discipline. *In re Farris,* 472 S.W.3d 549, 562 (Mo. banc 2015). The mitigating factors are set forth in ABA Standard 9.32 and the aggravating factors are set forth in ABA Standard 9.22

The Court should consider the mitigating impact of Respondent's cooperative attitude toward the proceedings and the fact that Respondent has no prior discipline. However, the Panel notes that Respondent was previously cautioned by the Region XV Disciplinary Committee for a violation based upon very similar facts. Specifically, he was made aware that the Rules of Professional Conduct control his interactions with his criminal clients' victims.

Additionally, there are some aggravating factors. Notably, this case involves multiple offenses, and Respondent has refused to acknowledge the wrongful nature of his conduct. Additionally, the evidence presented establishes B.C.'s vulnerability. Finally, the Court should take note of the fact that Respondent has substantial experience in the practice of law.

When both mitigating and aggravating factors are considered, the aggravating factors outweigh the mitigating factors. Therefore, suspension is the appropriate discipline.

CONCLUSION

For the reasons set forth above, Informant respectfully requests that this Court:

(a) find that Respondent is guilty of professional misconduct and find that Respondent has violated Missouri Supreme Court Rules 4.1-7 (a)(2), Rule 4-3.4, Rule 4-4.3, Rule 4-4.4, Rule 4-8.4(a), and Rule 4-8.4(d);

(b) order that Respondent be indefinitely suspended with no leave to apply for reinstatement for six months;

(c) tax all costs in this matter to Respondent, including the $1,000.00 fee pursuant to Rule 5.19(h); and

(d) require Respondent to comply with Rule 5.27.

Respectfully submitted,

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INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2022, a copy of Informant's Brief is being served upon Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

Mr. Richard Dale Bender
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Attorney for Respondent

Laura E. Elsbury

Laura E. Elsbury

CERTIFICATION: RULE 84.06(c)

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

1. includes the information required by Rule 55.03;
2. was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. complies with the limitations contained in Rule 84.06(b);
4. contains 10,659 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Laura E. Elsbury

Laura E. Elsbury