

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

DAVID B. LACKS,

Respondent.

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Supreme Court #SC93500

INFORMANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF JURISDICTION	3
STATEMENT OF FACTS	4
BACKGROUND AND DISCIPLINARY HISTORY	4
DISCIPLINARY PROCEEDING	5
POINTS RELIED ON.....	8
I.....	8
II.....	9
ARGUMENT	10
I.....	10
<i>Standard of Review of Disciplinary Hearing Panel Decision.....</i>	<i>10</i>
A. <i>Respondent’s overt comments as an expression of his sexual interest</i> <i>in S.M. was a concurrent conflict in violation of Rule 4-1.7(a)(2)</i>	<i>11</i>
B. <i>Engaging in Conduct that is Prejudicial to the Administration of Justice ..</i>	<i>12</i>
II.....	13
CONCLUSION	18
CERTIFICATE OF SERVICE	19
CERTIFICATION: RULE 84.06(C)	19

TABLE OF AUTHORITIES

Cases

<i>In re Coleman</i> , 295 S.W.3d 857 (Mo. banc 2009)	15, 16
<i>In re Crews</i> , 159 S.W.3d 355 (Mo. Banc 2005).....	10, 13
<i>In re Griffey</i> , 873 S.W.2d 600 (Mo. banc 1994)	13
<i>In re Howard</i> , 912 S.W.2d 61 (Mo. 1995)	14, 15, 17
<i>In re Oberhellman</i> , 873 S.W.2d 851 (Mo. banc 1994)	13
<i>In re Piatt</i> , 951 P.2d 889 (Ariz. 1997).....	15
<i>In re Shelhorse</i> , 147 S.W.3d 79 (Mo. Banc 2004)	11
<i>In re Snyder</i> , 35 S.W.3d 380 (Mo. Banc 2000).....	14, 17
<i>In re Warren</i> , 888 S.W.2d 334 (Mo. banc 1994)	13
<i>In re Wiles</i> , 107 S.W.3d 228 (Mo. banc 2003).....	15
<i>In re Yarborough</i> , 524 S.E.2d 100 (S.C. 1999).....	16

Other Authorities

A.B.A. <i>Standards for Imposing Lawyer Sanctions</i> (1991 ed.).....	9, 13, 16, 17
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Rules

Rule 4-1.7 (2011).....	8, 10, 11, 14, 15, 17
Rule 4-8.4 (2011).....	8, 10, 12

STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent is David B. Lacks who was licensed as an attorney in Missouri on April 30, 1966. **App. 2.**¹ Respondent is 73 years old. Respondent has been the subject of prior discipline having received one admonition in 1995. **Id.**

S. M.² retained Respondent to represent her in connection with a modification of certain terms of her divorce, having been acquainted with Respondent as a result of his relationship with her father. **Id.** S. M. was experiencing financial difficulties because her husband suddenly stopped paying court ordered child support. **App. 3.** Upon calling Respondent to seek his assistance with respect to the nonpayment, Respondent invited S. M. to his office to discuss the matter. After arriving at his office, S. M. asked how he was doing and Respondent replied that he was thinking about sex. **Id.** S. M. attempted to ignore the statement, but Respondent asked whether she heard his comment. **Id.**

Following S. M.'s acknowledgement that she heard his statement, Respondent stated that he could not take any action against her former husband regarding the child

¹ The facts contained herein are drawn from the Joint Stipulation of Facts and Conclusions of Law entered into by the parties. Citations to the record are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example “**App. ____**”.

² The complainant's initials are being used rather than her name in order to protect her privacy.

support matter because 30 days had not elapsed since his failure to pay. **Id.** Respondent added, however, that he had always been attracted to S. M. and would pay her \$100 for each time she participated in a sexual activity with him and inquired of her sexual likes and dislikes. **Id.** Respondent then instructed her to think about his offer and call him “at any time of day or night” with her response. S. M. did not accept any of Respondent’s offers or advances. **Id.** However, S. M. felt she had no option other than to allow Respondent to continue to represent her because she lacked the financial resources to terminate him and engage alternate counsel. **Id.**

S. M. filed a disciplinary complaint against Respondent (the “Complaint”) stating that during Respondent’s representation he made repeated unwanted sexually inappropriate comments to her and asked that she perform a sex act in exchange for money during a visit to his office on May 16, 2011. **App. 2.** Respondent admitted that he made “an improper suggestion of a sexual nature” in his response to the Complaint. **App. 3.**

Disciplinary Proceeding

The Office of Chief Disciplinary Counsel received the Complaint on September 6, 2011. The Complaint was referred to the Region XI Disciplinary Committee for investigation. On March 2, 2012, the Region XI Disciplinary Committee completed its investigation of the matters, found probable cause and voted to issue an Information against Respondent. Informant served the Information on Respondent on or about June 29, 2012. Respondent’s Answer to the Information was received on or about July 13,

2012. **App. 6.** The Chair of the Missouri Supreme Court Advisory Committee appointed a Disciplinary Hearing Panel (the “Panel”) in this case on July 31, 2012. **App. 9.**

Informant and Respondent entered into a Joint Stipulation of Facts and Conclusions of Law dated as of April 8, 2013 (the “Joint Stipulation”). **App. 12.** The Panel adopted the Joint Stipulation as its decision on May 13, 2013 (the “DHP Decision”). **App. 18.**

As a result of adopting the Joint Stipulation as its decision, the Panel concluded that Respondent is guilty of professional misconduct under Rule 4-8.4(a) because:

- a. Respondent’s overt comments to S.M. as an expression of his sexual interest in her created a concurrent conflict in violation of Rule 4-1.7(a)(2) since his conduct presented a significant risk that his representation of S. M. would be materially limited by his own personal interest in her; and
- b. Respondent’s sexually inappropriate comments and offer to pay S. M. to perform a sexual act was conduct prejudicial to the administration of justice and violated Rule 4-8.4(d).

The Panel did not find any aggravating factors. The Panel found the following as mitigating factors:

- a. lack of any recent disciplinary history,
- b. the fact that he has only been disciplined once in his more than 46 years of practice, and
- c. cooperation with the Office of Chief Disciplinary Counsel.

Based on the foregoing findings and conclusions as a result of adopting the Joint Stipulation as the DHP Decision, the Panel recommended that Respondent be reprimanded. **Id.**

Informant accepted the DHP Decision by letter dated May 22, 2013. **App. 26.** By order dated August 13, 2013 this Court ordered Informant and Respondent to file briefs in this matter. **App. 27.** Informant filed the record in this matter with the Court on September 12, 2013.

POINTS RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

- (A) EXPRESSING HIS SEXUAL INTEREST IN S.M. THEREBY CREATNG A CONCURRENT CONFLICT IN VIOLATION OF RULE 4-1.7(A)(2) SINCE THERE WAS A SIGNIFICANT RISK THAT HIS REPRESENTATION OF S.M. WOULD BE MATERIALLY LIMITED BY HIS PERSONAL INTERESTS; AND**
- (B) MAKING SEXUALLY INAPPROPRIATE COMMENTS TO S.M. AND OFFERING TO PAY HER TO PERFORM A SEXUAL ACT WAS CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND VIOLATED RULE 4-8.4(d).**

Rule 4-1.7 (2011)

Rule 4-8.4 (2011)

POINTS RELIED ON

II.

**THIS COURT SHOULD REPRIMAND RESPONDENT BECAUSE
RESPONDENT'S FAILURE TO RECOGNIZE THAT HIS
REPRESENTATION OF S.M. COULD BE MATERIALLY
AFFECTED AS A RESULT OF HIS EXPRESSION OF SEXUAL
INTEREST IN HER WAS NEGLIGENT.**

A.B.A. *Standards for Imposing Lawyer Sanctions* (1991 ed.)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

- (A) MAKING OVERT COMMENTS TO S.M. AS AN EXPRESSION OF HIS SEXUAL INTEREST IN HER WHICH CREATED A CONCURRENT CONFLICT IN VIOLATION OF RULE 4-1.7(A)(2) BECAUSE HIS CONDUCT PRESENTED A SIGNIFICANT RISK THAT HIS REPRESENTATION OF S.M. WOULD BE MATERIALLY LIMITED BY HIS PERSONAL INTEREST IN HER; AND**
- (B) MAKING SEXUALLY INAPPROPRIATE COMMENTS TO S.M. AND OFFERING TO PAY HER TO PERFORM A SEXUAL ACT WAS CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND VIOLATED RULE 4-8.4(d).**

Standard of Review of Disciplinary Hearing Panel Decision

It is well settled that a Disciplinary Hearing Panel's recommendations are advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. Banc 2005). In a disciplinary proceeding, this Court reviews the evidence *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *Id.* Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id.* Where misconduct is

proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. Banc 2004).

A. Respondent's overt comments as an expression of his sexual interest in S.M. was a concurrent conflict in violation of Rule 4-1.7(a)(2)

S. M. retained Respondent to represent her in connection with a modification of certain terms of her divorce. **App. 2.** S. M. was experiencing financial difficulties because her husband suddenly stopped paying the court ordered child support. **Id.** Upon calling Respondent to seek his assistance with respect to the nonpayment, Respondent invited S. M. to his office to discuss the matter. During the meeting in his office, Respondent offered to pay S. M. \$100 for each time she participated in a sexual activity with him. **App. 3.** S. M. did not accept Respondent's offers or advances. **Id.** However, S. M. felt she had no option other than to allow Respondent to continue to represent her because she lacked the financial resources to terminate him and engage alternate counsel. **Id.** Respondent's sexual advances toward S.M. were a concurrent conflict in violation of Rule 4-1.7(a)(2).

Based upon the foregoing, Respondent violated Rule 4-1.7(a)(2) by making overt comments to S.M. as an expression of his sexual interest in her which created a concurrent conflict in violation of Rule 4-1.7(a)(2) because his conduct presented a significant risk that his representation of S.M. would be materially limited by his personal interest in her.

B. Engaging in Conduct that is Prejudicial to the Administration of Justice

Despite Respondent's instruction for S.M. to call him "at any time of day or night" with her response to his sexual advances, S. M. did not accept any of Respondent's offers or advances. **Id.** However, S. M. felt she had no option other than to allow Respondent to continue to represent her because she lacked the financial resources to terminate him and engage alternate counsel. **Id.** Respondent's sexually inappropriate comments to S.M. and his offer to pay her to perform a sexual act on him was conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d).

Based upon the foregoing, Respondent violated Rule 4-8.4(d) by making sexually inappropriate comments to S.M. and offering to pay her to perform a sexual act on him.

ARGUMENT

II.

**THIS COURT SHOULD REPRIMAND RESPONDENT BECAUSE
RESPONDENT’S FAILURE TO RECOGNIZE THAT HIS
REPRESENTATION OF S.M. COULD BE MATERIALLY
AFFECTED AS A RESULT OF HIS EXPRESSION OF SEXUAL
INTEREST IN HER WAS NEGLIGENT.**

This Court has relied on the American Bar Association’s Standards for Imposing Lawyer Sanctions (“ABA Standards”) to determine the appropriate discipline to be imposed in attorney discipline cases. *See, e.g., In re Crews*, 159 S.W.3d 355, 360-61 (Mo. banc 2005); *In re Warren*, 888 S.W.2d 334 (Mo. banc 1994); *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994). Therefore, the reprimand guidelines included within the ABA Standards are instructive. Based upon an analysis of the ABA Standards and Missouri case law, a reprimand is the appropriate sanction in this case.

According to the ABA Standards, reprimand is appropriate in various circumstances, including, (a) in matters involving the failure to avoid conflicts of interest, when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer’s own interests and the negligence causes injury or potential injury to a client (Section 4.33 of the ABA Standards), and (b) when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system (Section 7.3 of

the ABA Standards). Respondent's failure to recognize that his representation of S.M. could be materially affected as a result of his expression of sexual interest in her was negligent. Furthermore, making sexual advances to S.M. violated Attorney Lack's professional duty as an attorney. Therefore, reprimand is the appropriate sanction.

Imposition of this sanction is also consistent with Missouri case law. For example, Respondent's verbal expression of his sexual interest in S.M. was in violation of Rule 4-1.7(a)(2) since his conduct presented a significant risk that his representation of S. M. would be materially limited by his personal interests in her. See *In re Snyder*, 35 S.W.3d 380 (Mo. Banc 2000). In *In re Snyder*, Attorney Snyder entered into agreements with two clients where he acquired interests in the clients' respective residential properties, alleged to be in exchange for legal services. This Court held that his conduct violated Rules 1.7 and 1.8 and suspended Mr. Snyder's license. In *In re Howard*, 912 S.W.2d 61 (Mo. 1995) this Court suspended Attorney Howard's license as a result of his violation of Rules 4-1.7 and 4-2.1 by attempting to force his female clients to prostitute themselves in exchange for legal services. This Court declined to reprimand Attorney Howard, finding that a public reprimand was not the appropriate discipline "especially in view of the aggravating factors: (1) the pattern of sexual misconduct, (2) a blatant refusal to acknowledge the wrongful nature of his conduct, and (3) the multiple offenses including the additional violation of Rule 8.2(a)" Id. at 64. There are no such aggravating factors in the instant case.

Unlike Attorney Snyder, who this Court described as being "steadfast [in his] refusal to recognize his breach of ethical principles," Attorney Lacks recognizes and

accepts responsibility for violation of his ethical principles as evidenced by his execution of the Joint Stipulation. Furthermore, unlike *Howard*, Respondent lacks any pattern of sexual misconduct, apologized for his statements to S.M. shortly after having made them, did not make any other sexual advances towards S.M. and he accepts full responsibility for his actions as stated herein. As a result, it is appropriate that Attorney Lacks receive a reprimand.

The lesser discipline of reprimand is also supported by additional prior decisions of this Court. For example, in *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003) this Court noted that due to Attorney Wiles' prior disciplinary history, "a reprimand [was] insufficient to ensure the protection of the public and integrity of the legal profession" and instead ordered a stayed suspension. *In re Wiles*, 107 S.W.2d at 229. Similarly, Attorney Larry Coleman received a stayed suspension even though he had three prior incidents of discipline when he was found to have violated several rules of this Court, including Rule 4-1.7 for failing to avoid conflicts of interest. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Unlike *Wiles* and *Coleman*, however, Respondent does not have a repeated disciplinary history. In fact, Respondent has only been disciplined once in his more than 46 years of practice and lacks any disciplinary history since 1995.

Courts in other jurisdictions have also found reprimand the appropriate discipline in cases with repetitive sexual behavior. For example, in *In re Piatt*, 951 P.2d 889 (Ariz. 1997), the attorney sexually harassed two clients. Over the course of three meetings, the attorney told one client she looked delicious, inquired whether she would be willing to have a sexual relationship without emotional involvement and had her come to his house

for a meeting and greeted her wearing only a robe. At that time he told his client if she did not respond to his advances he would no longer represent her unless she paid him a lot more money. He made frequent inappropriate sexual comments to another client, which included lewd remarks at a lunch meeting concerning what he could do with her under the tablecloth. Upon returning to the office, he smacked his lips and told her a chemical attraction existed. After she expressed her disinterest, including in writing, he demanded a lot more money if she wanted him to rewrite the proposed property settlement documents. The lawyer did not have a prior disciplinary history and the court found that the lawyer's inappropriate sexual comments and contacts toward clients warranted public censure and instruction to obtain counseling for his behavior. In the instant case, Respondent did not make repeated advances toward S.M., nor did he threaten to withdraw from the matter or charge her more money if she did not comply with his requests.

Similarly, in *In re Yarborough*, 524 S.E.2d 100 (S.C. 1999), the attorney made repeated sexual advances towards his client, including hugging and kissing her without her consent and when she rebuffed him inquired if she was a lesbian or had been sexually abused as a child. The attorney, who had a prior disciplinary history, was publicly reprimanded as a result of his unwanted sexual proposals and coarse remarks to client.

The ABA Standards provide that after misconduct has been established, aggravating and mitigating circumstances may be considered in determining an appropriate sanction. In *Coleman*, this Court considered the attorney's past disciplinary history as an aggravating factor and the absence of a dishonest motive as a mitigating

factor. *Id.* Applying the ABA Standards, this Court determined the nature of the attorney's conduct justified the suspension of his license for one year, but stayed the suspension and placed him on probation. *Id.* In addition, in *Howard* this Court found that the attorney's pattern of sexual misconduct, refusal to acknowledge the wrongful nature of his actions and the multiple offenses involved were aggravating factors. *In re Howard*, 912 S.W.2d. at 64. Also applying the ABA Standards, this Court determined that the attorney's conduct justified the suspension of his license indefinitely with leave to apply for reinstatement six months after the effective date of his suspension. *Id.*

There are no aggravating factors in this case. Attorney Lacks' lack of any disciplinary history since 1995, the fact that he has only been disciplined once in his more than 46 years of practice and his cooperation with the Office of Chief Disciplinary Counsel in the prosecution of this case can be considered mitigating factors. In addition, the fact that Attorney Lacks recognizes and accepts responsibility for violation of his ethical duties as evidenced by his execution of the Joint Stipulation, further supports the recommended discipline. See *In re Snyder*, 35 S.W.3d 380 (Attorney Snyder's license was suspended for violating Rules 4-1.7 and 4-1.8 and this Court described him as being "steadfast [in his] refusal to recognize his breach of ethical principles"); See also *In re Howard*, 912 S.W.2d. 60, 64 (Attorney Howard's license was suspended for violating Rules 4-1.7, 4-2.1 and 4-8.2(a) and this Court described him as possessing "a blatant refusal to acknowledge the wrongful nature of his conduct").

Informant concurs in the discipline recommended by the Panel and submits that the evidence, Missouri case law and the ABA Standards support such a disposition.

CONCLUSION

Respondent committed professional misconduct by violating Rules 4-1.7 and 4-8.4(d) by: (a) making overt comments to S.M. as an expression of his sexual interest in her which created a concurrent conflict in violation of Rule 4-1.7(a)(2) because his conduct presented a significant risk that his representation of S.M. would be materially limited by his personal interest in her; and (b) making sexually inappropriate comments to S.M. and offering to pay her to perform a sexual act which was conduct prejudicial to the administration of justice and violated Rule 4-8.4(d). The lack of aggravating circumstances and presence of mitigating circumstances support the imposition of discipline as described herein. Informant respectfully requests that this Court reprimand Respondent for his conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

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Cheryl D. S. Walker

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b); and
3. Contains 3,433 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Cheryl D. S. Walker