IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
GEORGE SPENCER MILLER,	**)**	**Supreme Court #SC91026**
	)	
Respondent.	**)**	

INFORMANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

REPLY TO RESPONDENT'S POINT II

In Point II of his brief, Respondent argues he did not violate Rule 4-1.7 or 4-1.9 (Conflicts) because, he suggests:

(1) No attorney-client relationship existed between he and Jake Giesken, who had been presented a bad check by Respondent's client Robert Stephenson;

(2) He received no confidential information from Jake Giesken; and

(3) Giesken and his client Robert Stephenson had no adverse interests.

This reply brief will address only those three arguments.

Existence of Attorney-Client Relationship

Respondent properly cites a 2010 Eastern District Missouri Court of Appeals decision: *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591 (Mo. App. E.D.2010). Although Respondent argues that he had no fee agreement with Mr. Giesken, the *St. Stanislaus* decision explains that neither attorney fees nor fee agreements are necessary to create an attorney-client relationship. Instead, "courts look to the substantive nature of contacts within the relationship regardless of what formal or procedural incidents have occurred," - also citing *McFadden v. State*, 256 S.W.3d 103, 107 (Mo. banc 2008). Before remanding the case to the trial court to make a more complete analysis of the substantive nature of that attorney's relationships, the Eastern District pointed out the long standing relationship between the lawyer and the Parish (the lawyer's purported client). The Eastern District noted his use of "his legal training to play many roles over the years for the Parish, the parish board, and other parishioners." *St. Stanislaus* at 601.

As discussed in Informant's initial brief in the instant case, Respondent had twice previously represented Jake Giesken, had occasionally engaged in legal chatter with him, and given "casual," "curbstone," "back-of-the-church," and "coffee shop" opinions to him. In the instant matter, he met with Giesken in his law office, and listened to Giesken's explanations about the check he received from Stephenson. **App. 13-15 (T. 45-50)**. He listened to such an extent that:

(a) he immediately recognized that the same check was involved when the defendant, Stephenson, first asked him to represent him;

(b) he knew Stephenson would have no defenses;

(c) he "knew" that a criminal prosecution would be a better legal strategy than a civil lawsuit; and

(d) he "knew" that restitution would be required in a criminal prosecution.

In looking at the "substantive nature of contacts" in the instant case, it is significant that, in addition to the information gained during the meeting, Respondent retained Mr. Giesken's copy of the bad check for months after Giesken came to see him. And, according to Mr. Giesken, Respondent and/or his staff repeatedly told him that Respondent was working the check case on Giesken's behalf. **App. 7 (T. 18-19); 12 (T. 41)**. Also, Respondent acknowledged that while Giesken was in his office seeking legal advice, he told Giesken about available legal remedies; and provided a cost/benefit analysis of formally retaining him as compared to seeking criminal prosecution. **App. 14-15 (T. 48-50)**. Finally, Respondent said that he told Giesken that he "had a claim" that Giesken could pursue, but that he, Respondent, would not because "collectability is

pretty minimal." **App. 15 (T. 51)**. The "substantive nature of the contacts" between Respondent and Jake Giesken create an attorney-client relationship, at least for purposes of confidentiality and conflicts.

Respondent also argues, at page 22 of his brief, that Section 26 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS offers guidance. He quotes: A relationship of client and lawyer arises when:

> (1) A person manifests to a lawyer the person's intent that the lawyer provide legal services for the person: and either (a) the lawyer manifests to the person consent to do so: or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.

Here, Respondent acknowledges that Giesken made it clear that he wanted to retain Respondent. Mr. Giesken wrote in his complaint and testified that Respond took his file and promised to work on the case. Mr. Giesken reported that Respondent's staff later reported that he was working on the case. **App. 75-77**. And, he testified that Respondent twice reported that he was working on the case. Respondent denies those conversations. But, even if Respondent's denials of those conversations are deemed credible, Respondent admitted that Giesken believed that Respondent was working on his behalf. **App. 22 (T. 80)**.

<u>Confidential Information</u>

Respondent argues at pages 23-24 of his brief that he received no confidential information when meeting with Mr. Giesken. That argument misconstrues confidential

information, as defined in Rule 4-1.6, and misses the point of the conflicts rules contained in Rule 4-1.7 and 4-1.9. First, the information that is protected by Rules 4-1.6 and 4-1.9 is not limited to secrets. It includes all "information relating to the representation." Information provided by a client or a prospective client is, almost by definition, confidential information. Rule 4-1.6.

Second, consideration should be given to the guidance provided in Rule 4-1.18 (Duties to Prospective Clients). That rule became effective in July 2007, before Mr. Giesken met with Respondent at his office to discuss his case. In a nutshell, Rule 4-1.18 provides prospective clients with some but not all of the protection afforded clients. Rule 4-1.18, Comment 1. The duty of confidentiality is within those protections available to prospective clients:

> Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 4-1.9 would permit with respect to information of a former client.

Rule 4-1.18(b).

> The duty exists regardless of how brief the initial conference may be.

Rule 4-1.18, Comment 2.

Although Giesken describes Respondent's repeated promises to work on the case, Respondent denies those conversations. But this much Respondent acknowledges learning during his meeting with Jake Giesken: Giesken came to his office and asked for legal assistance; during the meeting, he learned from Mr. Giesken that Stephenson had

written him a check for $1,500.00, and that the check bounced; Giesken wanted Stephenson to go to jail; and Giesken wanted to be reimbursed. None of those facts or strategies would have been available in a public record. Respondent took and held Giesken's copy of the check at his office for months. He considered Giesken's legal options and says that he advised Giesken to take the check to the prosecutor. He later represented Stephenson in his criminal case, without seeking a waiver from Giesken.

Third, whether Respondent actually used confidential information against Giesken is not material to the question of whether he violated the Rules of Professional Conduct, *In re Carey & Danis*, 89 S.W.3d 477, 494 (Mo. banc 2002). Conflicts arise, in part, because of the quandary attorneys face when they have information that might benefit one client but which cannot be used because it was received during the representation of another client or prospective client. Rule 4-1.18.

Adverse Interests of Criminal Defendant and his Victim

Respondent argues that, even if he did represent both defendant and victim in the same case, there was no conflict because he was in the perfect position to assure that their respective legal interests were met.

> Respondent knew that it was in Robert Stephenson's best interests to resolve the case with a plea agreement and the payment of restitution for an insufficient funds check. Therefore, there was nothing adverse in the respective positions of Giesken and Stephenson.

Respondent's Brief, p. 25.

Informant's initial brief addressed the logic of Respondent's claim of Solomonic capacity to fairly represent opposing parties in a single case. The point for this brief is to provide the Court with additional guidance on that question. Less than a month ago, the Eastern District Missouri Court of Appeals considered whether a trial court should be required to disqualify an attorney who claimed to be able to fairly represent both the defendant and victim in a domestic violence case. *State ex rel Wendy Wexler Horn v. The Honorable Thomas Ray*, ED 94968 (ED MO, Sept. 21, 2010) (*Mtn. for Rehearing/Transfer pending*). The Eastern District analyzed Rule 4-1.7(a) and properly determined that, despite a waiver signed by both the defendant and the victim, the attorney should be disqualified. In support of its decision, the court relied on several cases from various courts. Those findings include:

(a) a *per se* conflict exists "where counsel represents defendant and victim of defendant's alleged conduct." *People v. Hernandez*, 896 N.E.2d 297, 307 (Ill. 2008);

(b) representation "would inescapably be adverse to the victim, within the meaning of the Revised Rule of Professional Conduct 1.7." *State v. Taylor*, 574 S.E.2d 58, 67 (N.C. Ct. App. 2002); and

(c) "positions of victims and defendants are incompatible; interests are diametrically opposed and may not be reconciled." *United States v. Alex*, 788 F. Supp. 359, 362 (N.D. Ill 1992).

In 1969, this Court referred to established law that an attorney who represents both the defendant and a prosecution witness in the case against the defendant is representing conflicting interests, *Ciarelli v. State*, 441 S.W.2d 695 (Mo. 1969).

Also instructive is a 2008 decision of this Court. *State ex rel Burns v. The Honorable William S. Richards*, 248 S.W.3d 604 (Mo. 2008). In the *Burns* decision, the Court applied Rule 4-1.9 to prohibit the newly elected Nodaway County Prosecutor from pursuing a case against a defendant he had previously represented in a similar type of case. *Burns* at 605. "… prejudice must be assumed because of the concern that the prosecutor has obtained confidential information while representing the defendant that can be used while prosecuting her." *Burns* at 605.

CONCLUSION

Conflicts such as Respondent's are not mere technical violations without consequences; the *St. Stanislaus* case described above explains the policies:

> As our Supreme Court emphasized in *In re Carey*, "[i]mportant policies behind [Rule 4-1.9] include the promotion of `fundamental fairness . . . by prohibiting an attorney from using an informational advantage gained in the course of a former representation, the desire to promote client disclosure of all pertinent information …, and the desire to promote confidence in the integrity of the judicial system.'" 89 S.W.3d at 493 (quoting *Columbus Credit Co. v. Evans*, 613 N.E.2d 671, 676 (Ohio Ct. App. 1992)), *St. Stanislaus*, at 600.

Informant asks the Court to find that Respondent violated the Rules of Professional Conduct by meeting with a victim of a tort (which was also a crime), gathering facts about the same case from the victim, holding the victim's case records, agreeing to work on the case, and providing advice to the victim about available civil and criminal remedies, and then representing the defendant in the criminal case involving the same incident.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2010, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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and also was sent via facsimile to (866) 380-4547.

_____
Sam S. Phillips

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);

3. Contains 2,190 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the disk for viruses and that it is virus free.

_____
Sam S. Phillips