IN THE MISSOURI SUPREME COURT

IN RE;	**)**	
	)	
GEORGE SPENCER MILLER,	**)**	**SC91026**
	)	
Respondent.	**)**	

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

IN THE MISSOURI SUPREME COURT

IN RE;	**)**	
	)	
GEORGE SPENCER MILLER,	**)**	**SC91026**
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JURISDICTIONAL STATEMENT

Respondent agrees that this matter is properly within the statutory and constitutional jurisdiction of this Court.

STATEMENT OF FACTS

NOTE; This statement of facts is being provided because the Statement of Facts provided by Informant is inadequate and does not fairly present the facts of this case. Therefore, this Statement of Fact is designed to amplify and supplement the Statement of Facts provided by the Informant.

Respondent was admitted to practice in 1973. During the approximate 37 year period of time that he has been actively practicing law, Respondent has practiced law in the United States Marine Corps; practiced with a personal injury firm in Kansas City, Missouri; established his own litigation law firm in 1981; and moved his practice from the Kansas City Greater Metropolitan Area to Maryville, Missouri. (T. 68-69) Respondent has practiced with a firm and has most recently been a sole practitioner. (T. 69) Respondent's practice began with military law; changed to personal injury litigation and finally to a general practice in a rural community. (T. 69-72). After opening his own office in Maryville, he never has had a professionally trained office staff. In 1994 he was diagnosed with Attention Deficit Disorder and has been treated by Dr. Stephen Huk. (T.70) Respondent takes Dexedrine as prescribed by Dr. Huk. (T. 70)

In 1978 he was awarded the Lon O. Hocker Award for his trial excellence.(T. 68-69). In addition, this Court can take judicial notice of the fact that the Respondent has been counsel of record for numerous cases presented to the various appellate courts both state and federal.

There are two complaints that are the subject of this matter. One complaint was filed by Jake Giesken and the other by Connie Backman. From a chronological standpoint the facts relating the Giesken complaint occur before the Backman facts. Therefore, the two complaints will be addressed from the chronological perspective.

GIESKEN COMPLAINT

Jacob William Giesken (aka Jake Giesken) filed his complaint against the Respondent on April 9, 2009. (Informant's Appendix A-75) The complaint referred to events involving Respondent that began approximately one year earlier in March or April 2008. Before that time frame, Mr. Giesken and the Respondent had both a social and business relationship.

Socially, the Respondent and Mr. Giesken attended church together in Maryville, Missouri. From the business perspective, Respondent first represented Mr. Giesken in the late 1970's. At that time Respondent was practicing with a law firm in Kansas City. (T.45-46) Later, Respondent represented Mr. Giesken in a claim against Mark Beery. In that matter, a

judgment was obtained in Missouri and was subsequently recorded in Clarinda, Iowa. The Beery matter was resolved in 2003. (T. 45) In addition, Respondent was a customer at Mr. Giesken's welding shop. (T. 46-47) During the time that Respondent and Mr. Giesken interacted, there were discussions about legal matters. (T. 47) In those instances, there was never any fee charged or any retainer agreement signed. (T. 48)

At the time that Mr. Giesken came to Respondent's office in March or April 2008, Mr.Giesken brought a returned check with him. (T.48-49) The normal practice of the office whenever something was brought in for review a copy was made with the original being retained by the person who brought it in. (T. 48-49) When Mr. Giesken came into the office, two different matters were mentioned. (T. 49 and Informant's Exhibt 13, A-76.) Mr. Giesken was upset about an insufficient funds check and he wanted the person put in jail. (T. 49) In the conversation, Mr. Giesken was told that the Respondent could not put anyone in jail for a check charge. Mr. Giesken was told that the matter needed to be taken to the prosecuting attorney and that if he did he would not be required to pay an attorney's fee. (T. 50) There is no question about the fact that Mr. Giesken did not pay an attorney's fee and did not make a payment for any filing fee or any service fee. (T. 31-32) There was no evidence that any details about the check were discussed

between Mr. Giesken and the Respondent. In fact, the Respondent testified without contradiction that no details concerning the check were discussed. (T. 51) Respondent did not pursue the check matter and ultimately, Mr. Giesken turned the matter over to the prosecuting attorney in August 2008.(T. 33-34)

At the time of the hearing before the disciplinary panel. Mr. Giesken testified that he returned to Respondent's office and spoke to him about the check matter. (T. 18) Respondent testified that he did not recall Mr. Giesken ever coming back into the office. (T.49) In Mr. Giesken's complaint that he filed with the Office of the Chief Disciplinary Counsel, he never stated that he had any subsequent conversations with Respondent, but rather he talked to the "office girl". (Exhibit 13, A76) At the time of the hearing Mr. Giesken testified that what was put in the complaint that he was making (Exhibit 13) is what he considered to be important. (T.40)

In the interim, Robert Stephenson hired Respondent to represent him in regard to a charge of having a sawed off shotgun.(T. 52-53) Then, after the weapons charge was filed, there was an additional charge filed against Mr. Stephenson involving Mr. Giesken's bad check. (T.52-53) At the time that Respondent began representing Mr. Stephenson on the check charge, he did not believe that there was a conflict. (T.54) Mr. Giesken wanted

restitution for his check and in order for there to be a resolution of any criminal charge against Mr. Stephenson, restitution would be a requirement, (T. 54) It was Respondent's belief that it was in the best interest for Mr. Giesken to receive restitution for the check and it was in the best interest of Mr. Stephenson to pay restitution in order to resolve the criminal charge against him.

Ultimately, Robert Stephenson entered into a plea agreement related to the weapons charge and the bad check and restitution was ordered as part of the requirement of probation. (T. 55) He was ordered to serve a period of shock time in jail. After his plea of guilty, Robert Stephenson unexpectedly died. (T.55)

BACKMAN COMPLAINT

Connie Backman came to Respondent's office and hired him to represent her in regard to a credit card matter. Respondent took her information and placed it on his secretary's deck for a file to be opened. For some reason, a file was never opened and as a result, the court date was not docketed on the firm calendar. A default judgment was entered against Ms. Backman. Ms. Backman testified that she called the office several times about the adverse judgment. The Respondent testified that he did not receive any notice of Ms. Backman's attempt to contact him. (Informant's

Appendix, A37) In response to notification about the Backman matter from the Office of the Chief Disciplinary Counsel, Ms. Backman's fee payment was refunded. (Informant's Appendix, A37-38) The judgment was entered on September 25, 2008 and notification about the complaint was received by Respondent April 29, 2009 – seven months later.

Respondent filed his response to the inquiries from the Office of the Chief Disciplinary Counsel concerning the Giesken and Backman Complaints on May 12, 2009 and May 14, 2009 respectively. The Information in this case was not filed until January 7, 2010.

POINTS AND AUTHORITIES

I

IS RESPONSIBLE FOR THE FACT THAT THE CONNIE BACKMAN FILE WAS LOST THAT RESULTED IN RESPONDENT'S FAILURE TO APPEAR AT COURT ON HER HALF AND PREVENTED RESPONDENT FROM COMMUNICATING WITH HER CONCERNING THE STATUS OF HER CASE AND SUCH ACTIONS CONSTITUTED A VIOLATION OF RULES 4-1.3 AND 4-1.4.

Rule 4-1.3

Rule 4-1.4

II

RESPONDENT DID NOT VIOLATE RULES 4-1.7 OR 4-1.9 BECAUSE THERE WAS NOT A CONFLICT OF INTEREST BETWEEN SUCCESSIVE CLIENTS BECAUSE: (1) AN ATTORNEY-CLIENT RELATIONSHIP DID NOT EXIST BETWEEN MR. GIESKEN AND RESPONDENT; (2) THERE WAS NO CONFIDENTIAL INFORMATION THAT RESPONDENT RECEIVED FROM JAKE GIESKEN ABOUT THE INSUFFICIENT FUNDS CHECK; AND (3) THERE WAS NO ADVERSE INTEREST

BETWEEN JAKE GIESKEN AND ROBERT STEPHEN CONCERNING THE INSUFFICIENT FUNDS CHECK.

Polish Roman Catholic St. Stanislaus Parish, v. The Hon. Bryan Hettenbach, 303 S.W.3d 591, 600 (Mo.App. 2010)

Restatement (Third) of the Law Governing Law, § 26

Rule 4-1.7

Rule 4-1.9

III

THE COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE TO PROTECT THE PUBLIC BECAUSE: (A) RESPONDENT'S HISTORY IN THE PRACTICE OF LAW ESTABLISHES THAT HE HAS COMPLIED WITH THE ETHICAL REQUIREMENTS SET FORTH BY THIS COURT WITH THE EXCEPTION OF ISOLATED INSTANCES OF LESS SERIOUS INFRACTIONS; (B) THERE IS NO EVIDENCE THAT THERE IS ANY DANGER TO THE PUBLIC; (C) THE RECOMMENDATIONS OF THE DISCIPLINARY HEARING PANEL ARE ONLY ADVISORY AND SUCH PANEL IMPROPERLY CONSIDERED PRIOR ADMONITIONS; AND (D) RESPONDENT HAS

ACKNOWLEDGED HIS VIOLATION OF APPLICABLE RULES IN THE CASE OF CONNIE BACKMAN AND HAS RELIED ON HIS UNDERSTANDING OF THE APPLICABLE LAW AS IT RELATED TO JAKE GIESKEN.

Rule 5

In Re McBride, 938 S.W.2d 905, 907 (Mo. 1997)

IV

THE RESPONDENT SHOULD BE GRANTED ANOTHER HEARING BEFORE ANOTHER DISCIPLINARY HEARING PANEL BECAUSE THE PROCEDURE FOLLOWED BY THE OFFICE OF DISCIPLINARY COUNSEL IN THIS CASE DENIED RESPONDENT HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL HEARING OF THE COMPLAINT FILED AGAINST HIM IN THAT THE COUNSEL FOR THE OFFICE OF DISCIPLINARY COUNSEL INCLUDED IN THE COMPLAINT AND IN THE PRESENTATION OF EVIDENCE PRIOR RESOLVED MATTERS OF A DISCIPLINARY NATURE THAT WERE IRRELEVANT AND IMMATERIAL AND PREJUDICIAL TO A TO A FAIR DETERMINATION OF WHETHER RESPONDENT HAD

VIOLATED THE RULES OF PROFESSIONAL CONDUCT IN REGARD TO CONNIE BACKMAN OR JAKE GIESKEN.

Rule 5.01

Rule 5.15 (c)

Rule 5.16 (a) and (b)

State v. White, 230 S.W.3d 375, 378-379 (Mo.App. 2007)

ARGUMENT

I

RESPONDENT IS RESPONSIBLE FOR THE FACT THAT THE CONNIE BACKMAN FILE WAS LOST THAT RESULTED IN RESPONDENT'S FAILURE TO APPEAR AT COURT ON HER HALF AND PREVENTED RESPONDENT FROM COMMUNICATING WITH HER CONCERNING THE STATUS OF HER CASE AND SUCH ACTIONS CONSTITUTED A VIOLATION OF RULES 4-1.3 AND 4-1.4.

As set forth in his response to the inquiry by the Office of the Chief Disciplinary Counsel and his testimony before the disciplinary hearing panel, Respondent has consistently acknowledged his responsibility for the Backman matter. Respondent did not act willfully and he refunded Ms. Backman's attorney's fee after he received notice of the matter. The office person who worked for him at the time of the incident is no longer in his employ.

II

RESPONDENT DID NOT VIOLATE RULES 4-1-7 OR 4-1.9 BECAUSE THERE WAS NOT A CONFLICT OF INTEREST BETWEEN SUCCESSIVE CLIENTS BECAUSE: (1) AN

ATTORNEY-CLIENT RELATIONSHIP DID NOT EXIST BETWEEN MR. GIESKEN AND RESPONDENT; (2) THERE WAS NO CONFIDENTIAL INFORMATION THAT RESPONDENT RECEIVED FROM JAKE GIESKEN ABOUT THE INSUFFICIENT FUNDS CHECK; AND (3) THERE WAS NO ADVERSE INTEREST BETWEEN JAKE GIESKEN AND ROBERT STEPHEN CONCERNING THE INSUFFICIENT FUNDS CHECK.

ATTORNEY-CLIENT RELATIONSHIP

In order for Respondent to be responsible for violating Rules 4.1-7 or 4-1.9 there is an essential requirement that an attorney client relationship existed between Mr. Giesken and the Respondent. *Polish Roman Catholic St. Stanislaus Parish, v. The Hon. Bryan Hettenbach,* 303 S.W.3d 591, 600 (Mo.App. 2010) The argument of the counsel for the Office of the Chief Disciplinary Officer essentially assumes that an attorney client relationship existed between Mr. Giesken and the Respondent, but an examination of the facts in this case does noT support such a conclusion.

Mr. Giesken and the Respondent were social acquaintances and they had had business together in the past. Mr. Giesken and the Respondent attended church together; the Respondent had represented Mr. Giesken in the past; and Respondent had transacted business with Mr. Giesken at his

welding shop. In the context of their social interactions, there had been occasions when Mr. Giesken had discussed legal matters with the Respondent. (T. 14, 30, 47) In those curbstone discussions, the Respondent never billed Mr. Giesken and never charged him a fee for information that he provided. (T. 48)

With that background, Mr. Giesken came to Respondent's office and told him that he wanted a person put in jail for giving him a bad check. (T. 16, 30) Mr. Giesken displayed some animosity toward the person who had given him the bad check. The Respondent simply told Mr. Giesken that he was talking to the wrong person because the Respondent was not the prosecuting attorney and he did not have the power to put anyone in jail. Respondent told Mr. Giesken that by letting the prosecuting attorney handle the matter, there would be no attorney's fees. There was as copy of the check that was made as part of the discussion, but any original would have been returned to Mr. Giesken. (T.49) A copy of the check was kept until Mr. Giesken decided what he wanted to do. (Informant's Exhibit 3, p. 1) Mr. Giesken did not pay any retainer or any other type of fee. In addition, he was not asked for a filing fee or a service fee. (T. 32) It is clear that the Respondent simply told Mr. Giesken that he needed to decide what he wanted to do. The Respondent did nothing further in regard to the matter

which is consistent with his account of the conversation. Mr. Giesken had hired attorneys in the past and he was a business man. Obviously, he knew that if an attorney was going to accept employment, then there would be the issue of an attorney's fee and that subject was never discussed. The fact is that ultimately, Mr. Giesken did go to the prosecuting attorney for purposes of seeking a remedy relating to the check. That possible course of action obviously came from Respondent.

There is a dispute in the evidence. At the hearing before the disciplinary hearing panel, Mr. Giesken testified that he had subsequent conversations with Respondent. That was denied by the Respondent, but of greater significance is the fact that Mr. Giesken never made that claim in the complaint that he filed with the Office of the Chief Disciplinary Counsel. The information in the complaint is consistent with the testimony of Respondent and is inconsistent with the testimony of Mr. Giesken at the hearing.

Informant would assume that the facts recited establish that there was an attorney-client relationship. Before considering the applicable law, it is suggested that common sense dictates that there was no attorney-client relationship. The course of conduct between the parties (Giesken and Respondent) supports the conclusion that his was just another informal

discussion. Mr. Giesken admitted that he was not given any advice about the bad check. (T. 19) Although the question of whether a person pays a fee is not dispositive of an attorney-client relationship it is a relevant factor. Of greater significance is that money was never discussed. There was no discussion of or payment of a filing fee or the payment of a service fee. Again, it is the type of situation that occurs between acquaintances where one asks the other about a situation and the other responds by saying go to someone else. From the common sense standpoint, the argument of the Informant suggests that any time a person asks a legal question of a lawyer, then there is an attorney-client relationship. If that is true, then all attorneys should refuse to have discussions of any nature with anyone about legal matters lest a potential for a conflict of interest might arise. There are various hypothetical scenarios that illustrate the complexity of the issue presented.

Assume that a lawyer is at a local restaurant and an acquaintance of the lawyer tells him that he was involved in an automobile collision and his motor vehicle was damaged and his automobile insurance company that provided collision coverage for his vehicle was refusing to may payment for the damage. The acquaintance then asks whether he should sue his insurance company and the lawyer responds that he should. Later, an insurance

company contacts the lawyer and asks him to defend the company in a claim filed by the acquaintance. Is the lawyer prohibited from representing the insurance company because there was an attorney-client relationship with the acquaintance. According to the argument of the Informant, the lawyer would be precluded from representing the insurance company. There was no express agreement for representation; there was no meeting of the minds; there was no fee; and there were no out of pocket expense advanced. A better and more practical conclusion is that the lawyer is not precluded from representing the insurance company.

This precise issue has great significance because one of the responsibilities of an attorney is to assist in the education of the public concerning the law and the legal system. If causal conversations give rise to an attorney-client relationship that could result in malpractice claims or disciplinary complaints, then there will be a chilling effect on the responsibility to assist the public.

Section 26 of the Restatement (Third) of the Law Governing Lawyers provides:

> 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.

Using the Restatement as a guide, it is clear that under the circumstances of this case, there was no attorney-client relationship. There was no intent expressed for Respondent to pursue the check matter. Specifically, without a discussion about fees and expenses, the conversation was simply a preliminary discussion about possible representation. Respondent never manifested his intent to represent Mr. Giesken, and he did not have any reasonable basis to know that Mr. Giesken was relying on him. Again, no advice was given and Mr. Giesken never returned to discuss fees and expenses. The question of fees and expenses is critical in this case because fees and expense could totally consume any recovery in a civil action to collect the amount of the insufficient funds check. Without an attorney-client relationship that could not be a violation of Rule 4-1.7 or Rule 4-1.9.

CONFIDENTIAL INFORMATION

It is the assertion of Informant that Mr. Giesken "described to Respondent the facts of the trailer sale between Stephenson and Giesken." That assertion is clearly **not supported by the record.** A review of the totality of the testimony of Mr. Giesken will confirm that he never testified that he discussed the facts of the trailer sale with Respondent. In fact, the unrebutted testimony of the Respondent the trailer information was not

discussed and that no details were discussed and there was no discussion with Mr. Giesken that was used by defendant to determine that there was no defense to the check charge (T. 51) Therefore, the argument by the Informant that there were confidential communications is not correct. There was no confidential information that could have been used by Respondent in any hypothetical cross examination of Mr. Giesken and there was no information from Mr. Giesken that was used by Respondent in assessing any potential defenses to check charge.

LACK OF DIVERSE INTERESTS

There was no attorney-client relationship between Respondent and Mr. Giesken as set forth above, but even if there were an attorney-client relationship, the facts show that interests of Jake Giesken and Robert Stephenson were not adverse. The question is what did the Respondent know at the time that he accepted employment by Robert Stephenson in regard to the bad check matter. Obviously, Respondent would have had the benefit of information from his client Robert Stephenson and the benefit of the paperwork filed with the court as well as any discovery provided by the prosecuting attorney. In addition, Respondent would know what his prior experience had been in handling other similar cases. In the day to day activities of practicing law, an attorney can “know” things that can not be

proved by scientific certainty. Therefore, it is reasonable for the Respondent to know what would happen in the Stephenson matter.

Based on the information that Respondent had, none of which came from Mr. Giesken, Respondent knew that the case would be resolved with a plea bargain and that restitution would be required as a condition of probation. Based on that knowledge, Respondent knew that Mr. Giesken would be protected by an enforcement mechanism far greater that a simple civil judgment. Respondent knew that it would be in Robert Stephenson's best interest 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.

Informant has argued that there was an adverse interest between Giesken and Stephenson because Giesken wanted Stephenson to go to jail. However, the jail issue was never anything that Respondent had any control over at the time that Mr. Giesken came to Respondent's office. Respondent was not the prosecuting attorney and he was not the judge. Therefore, the imposition of a jail sentence was never within the power of Respondent's representation of either client. The fact is that Robert Stephenson did go to jail for a period of shock time as an additional condition of his probation. That was agreeable to Robert Stephenson as being within the terms of his

plea bargain, and Mr. Giesken got everything he wanted – a requirement of restitution and jail time.

Informant has also argued that there was a conflict of interest because of a letter that Robert Stephenson sent to Jake Giesken. However, the analysis of the Informant is flawed. Informant's Exhibit 10 does not provide any basis to suggest that Robert Stephenson had any defense to the check charge. At best it suggests that he has certain civil claims against Giesken for unrelated matters. It is certainly not a defense to a bad check charge that the person who received the check owes money in an unrelated matter to the person who wrote the check.

Therefore, since there was not an attorney-client relationship; there was no confidential information give to Respondent; Respondent did not provide any legal advice; and there not a directly adverse situation involving Giesken and Stephenson, there was no violation of Rules 4-1.7 or 4-1.9.

III

THE COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE TO PROTECT THE PUBLIC BECAUSE: (A) RESPONDENT'S HISTORY IN THE PRACTICE OF LAW ESTABLISHES THAT HE HAD COMPLIED WITH THE ETHICAL REQUIREMENTS SET FORTH BY THIS COURT WITH THE

EXCEPTION OF ISOLATED INSTANCES OF LESS SERIOUS INFRACTIONS; (B) THERE IS NO EVIDENCE THAT THERE IS ANY DANGER TO THE PUBLIC; (C) THE RECOMMENDATIONS OF THE DISCIPLINARY HEARING PANEL ARE ONLY ADVISORY AND SUCH PANEL IMPROPERLY CONSIDERED PRIOR ADMONITIONS; AND (D) RESPONDENT HAS ACKNOWLEDGED HIS VIOLATION OF APPLICABLE RULES IN THE CASE OF CONNIE BACKMAN AND HAS RELIED ON HIS UNDERSTANDING OF THE APPLICABLE LAW AS IT RELATED TO JAKE GIESKEN.

The primary focus of the Informant involves the prior admonitions that were accepted by Respondent in regard to prior matters. It is the contention of Respondent that such emphasis is misplaced and is contrary to the public policy of this Court. Informant pleaded the prior admonitions in the Information filed against Respondent and Respondent in his Answer contested the appropriateness of such allegations. Informant presented evidence of the admonitions to the disciplinary hearing panel and such were received over the objection of Respondent. Then, in the Statement of Facts in this brief brief, Informant begins with reference to the admonitions. It is

apparent that the Informant is attempting to taint a fair consideration of the underlying facts in this case.

A review of Rule 5 that has been promulgated by this Court, establishes that this Court favors amicable resolution of complaints involving attorneys licensed to practice in this state. Certainly, the amicable resolution of those matters is in the best interest of all concerned.

Whenever a complaint is received against an attorney licensed in Missouri, the Office of Chief Disciplinary Counsel can participate in a resolution that results in a nonpublic admonition of an attorney. It is implied by the rule that such a resolution is designed for matters that are less serious minor in nature and that do not involve a threat to the public. In that context, prior matters involving the Respondent were resolved. That was a resolution advanced by the Office of the Chief Disciplinary Counsel and accepted by Respondent. It was deemed that the matters were less serious and were satisfactorily resolved with an admonition. There admonitions primarily involved communication issues. Any violation of the Rules is serious, but obviously, the violations in regard to those admonitions did not rise to the level of seriousness that required the intervention of this Court. That was the decision of the Office of the Chief Disciplinary Counsel. Nevertheless, the Informant emphasizes those violations despite the past commendable record

of Respondent. Respondent suggests to this Court that such an approach is inherently unfair and is contrary to the interests of this Court. If prior admonitions are going to be used as Informant uses them in this case, then a member of the bar is well advised not to accept such an admonition but rather have the Office of Chief Disciplinary Counsel decide if the matter merits the filing of an information. Such an approach will at least insure an attorney a hearing on the matter by people not involved in the disciplinary process.

The ultimate objective of proceedings such as these is to make an inquiry into an attorney's fitness to practice law. "The ultimate objective is not to punish the attorney but to protect the public and maintain the integrity of the profession and the court." *In re McBride*, 938 S.W.2d 905, 907 (Mo. 1997). It is the argument of the Informant that under that standard, the Respondent should be suspended from the practice of law. In other words, in order to protect the public and maintain the integrity of the profession, a suspension is warranted. However, that suggestion and recommendation is totally contrary to the actions of the Informant in this case.

On April 9, 2009 the Giesken complaint was filed and on April 14, 2009 the Backman complaint was filed. The Office of the Chief Disciplinary Counsel contacted Respondent about both complaints and requested a reply.

Respondent responded to the Giesken complaint on May 12, 2009 and Respondent responded to the Backman complaint on May 14, 2009. Thereafter, there was no activity related to either complaint until January 7, 2010 at which time an Information was filed. There was a delay of almost eight months after all of the information was in the hands of the Office of the Chief Disciplinary before any action was taken. Now the Office of the Chief Disciplinary Counsel argues that the public is at risk and Respondent should be suspended from the practice of law. If the public is so seriously at risk so as to require a suspension from the practice of law why did the Office of the Chief Disciplinary Counsel wait eight months to file an Information. If the analysis of the Chief Disciplinary Counsel is correct, then for eight months there was a risk to the public that was not addressed. Such a factor seriously causes the argument for suspension to be highly questioned.

The Backman matter was the result of an administrative snafu. The Informant argues that Respondent lost the file. The fact is that the file was lost. It was put in a place for a file to be opened and a file was never opened. Respondent is responsible not only for his own actions but also for the action of those acting under his supervision. There was never any willful conduct by Respondent. After Respondent became aware of the mistake, then the fee was returned to Ms. Backman. By that time, the relationship between Ms.

Backman and Respondent had become adversarial. Respondent was not in a position to continue to represent Ms. Backman under the circumstances. She did not hire another attorney to seek a judicial remedy and apparently no one suggested that she do so. Respondent has never attempted to avoid the consequences for the missing file. Respondent suggests that a suspension is not appropriate in regard to the Backman matter.

The Giesken complaint is what is used by the Informant as the real fuel for his argument for suspension. The Giesken matter raises complex issues of law related to when an attorney-client relationship actually begins and when casual conversation between prior acquaintances becomes something formal rather than casual. The Giesken matter does not involve a clear violation of the Rules of Professional Conduct. Respondent has in good faith presented the evidence: that establishes that there was no attorney-client relationship; that there was no confidential information given to him; and that there was no adverse interests among the people involved. Respondent recognizes that this Court may disagree with such an analysis, but even so, under all of the circumstances, a suspension should not be imposed when Respondent had a good faith basis for his conduct.

IV

THE RESPONDENT SHOULD BE GRANTED ANOTHER HEARING BEFORE ANOTHER DISCIPLINARY HEARING PANEL BECAUSE THE PROCEDURE FOLLOWED BY THE OFFICE OF DISCIPLINARY COUNSEL IN THIS CASE DENIED RESPONDENT HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL HEARING OF THE COMPLAINT FILED AGAINST HIM IN THAT THE COUNSEL FOR THE OFFICE OF DISCIPLINARY COUNSEL INCLUDED IN THE COMPLAINT AND IN THE PRESENTATION OF EVIDENCE PRIOR RESOLVED MATTERS OF A DISCIPLINARY NATURE THAT WERE IRRELEVANT AND IMMATERIAL AND PREJUDICIAL TO A TO A FAIR DETERMINATION OF WHETHER RESPONDENT HAD VIOLATED THE RULES OF PROFESSIONAL CONDUCT IN REGARD TO CONNIE BACKMAN OR JAKE GIESKEN.

There is no question about the fact that an attorney in the state of Missouri is entitled to due process in regard to a complaint that is prosecuted against him/her that could adversely affect his/her license to practice law. This Court has acknowledged that legal right and has implemented rules that relate to disciplinary complaints. (Mo.R.Civ.Pro. 5.01, et seq.)

Under the applicable rules, whenever a matter is referred to a disciplinary hearing panel, the hearing is to be conducted in accordance with the "rules of this Court" and the "rules of evidence for trials in the Circuit Courts shall apply". (Mo.R.Civ.Pro. 5.15 (c)). Certainly, these provisions constitute some of the provisions that would relate to the requirement of due process.

Although the decision and recommendations of a disciplinary hearing panel are not binding on this Court, the action of a disciplinary hearing panel are significant in the overall process. For instance:

1. A disciplinary hearing panel may find that the information should be dismissed. (Mo.R.Civ.Pro. 5.16(a).

2. A disciplinary hearing panel may find that a matter should be resolved by a written admonition that may be accepted or rejected by either party. (Mo.R.Civ.Pro. 5.16 (a) and (b).

3. A decision by a disciplinary panel shall be filed with this Court and that decision may be accepted or rejected by either party. (Mo.R.Civ.Pro. 5.19).

4. A decision by a disciplinary panel is a matter that is advisory to this Court.

Therefore, even though matters of attorney discipline, are considered by this Court *de novo,* the decision and recommendations are an important part of due process that may result in the ultimate resolution of a matter.

In this case, counsel for the Chief Disciplinary Counsel has from the very beginning injected prior matters into the entire fact finding process. In the Information that was filed, counsel pleaded a prior admonitions that related to Gregory and Emily Daniels, Terry Wallen, Madeline Adam, and Brenda Moore-Wells as well as a Missouri state income matter that was never pursued by the Chief Disciplinary Counsel as a violation of the Rules of Professional Conduct. These matters were each irrelevant and immaterial to the questions presented by the Backman and Giesken complaints for the same reason that prior negligent acts are usually irrelevant in a motor vehicle personal injury case. Even if there was some mistake in some other setting that does not suggest or imply that a person has culpability in a totally separate and independent matter. Nevertheless, counsel for the Chief Disciplinary Counsel alleged those prior incidents in the Information and began with the same information in his brief filed in this case.

It is noted that Respondent objected to the references to the prior matters in the Answers that he filed (A30-48) at the time of the hearing before the disciplinary hearing panel. (A-19, pp 66-67 of Transcript of

Hearing) Respondent's objection was overruled and the prior admonitions were admitted for consideration by the disciplinary hearing panel.

In a civil setting, the law is clear that evidence of prior conduct is generally inadmissible in another case because what happened at some other time does not give rise to any inference that a person acted inappropriately later. In a criminal setting, evidence of a prior conviction is likewise inadmissible in a subsequent criminal trial unless it becomes admissible for impeachment purposes. *State v. White,* 230 S.W.3d 375, 378-379 (Mo.App. 2007) There is no doubt that references to prior admonitions was improperly presented to the disciplinary hearing panel in the Information and in the evidence presented. As a result, Respondent was denied his right to due process in regard to a fair hearing.

In accordance with the applicable rules, it is specifically provided that prior accepted admonitions may be considered by this Court. There is no corresponding provision relating to the propriety of such consideration by a disciplinary hearing panel. Therefore, in accordance with the rules of evidence in circuit courts, reference to the prior admonitions was improper.

The effect of the improper injection of the prior admonitions is that Respondent was deprived of the opportunity to have the disciplinary hearing panel consider the allegations against him without the presence of improper

information. Without the information concerning prior admonitions, the disciplinary hearing panel could have reached a different decision. That decision could have resulted in a resolution of the matters without the necessity of this Court intervention. Although, Respondent receives a *de novo* consideration by this Court, he should not be required to forego his right to have a fair consideration by the disciplinary hearing committee and the opportunity for a resolution without a Court hearing.

CONCLUSION

Respondent has been licensed to practice law by this Court for almost 37 years. At times the service that he has provided to the bench and the bar has been highly commendable. There have been a few occasions after the nature of his practice changed and his relocation from an urban practice that was limited in scope to a rural practice that was more general in nature. While in Kansas City he relied on a trained, professional office staff. In Maryville, he did not have a professional office staff. Respondent is not happy with his failures but is doing his best to provide representation for clients consistent with the principles adopted by this Court. Therefore, Respondent is respectfully submitting this matter to this Court and he will be guided by its wisdom in the decision that it reaches.

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IN THE MISSOURI SUPREME COURT

IN RE;	**)**	
	)	
GEORGE SPENCER MILLER,	**)**	**SC91026**
	)	
Respondent.	**)**	

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2010, two copies of Respondent's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class Mail to:

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	)	
Respondent.	**)**	

CERTIFICATE OF COMPLIANCE WITH MO.R.CIV. 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 6563 words and 941lines according to Microsoft Word which is the word processing program used to prepare this brief; and

4. This brief has been scanned it was determined that it is virus free.

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APPENDIX

INDEX TO APPENDIX