IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SAM S. PHILLIPS #30458
DEPUTY CHIEF DISCIPLINARY COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
Sam.Phillips@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

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

PROCEDURAL HISTORY& KEY DATES

May 12, 2006	Admonition - Communication and Fees Violations
May 16, 2006	Admonition - Communication Violation
October 8, 2008	Admonition - Communication and Diligence Violations
October 8, 2008	Admonition - Communication Violation
February 2, 2009	Suspension - Failure to Pay Taxes
April 9, 2009	Jake Giesken Complaint
April 14, 2009	Connie Backman Complaint
May 12, 2009	Respondent's Response to Giesken Complaint
May 14, 2009	Respondent's Response to Backman Complaint
January 7, 2010	Information
February 8, 2010	Answer to Information
March 1, 2010	Letter from Advisory Committee appointing DHP
March 4, 2010	E-mail from Legal Ethics Counsel, Sara Rittman, to Respondent
March 5, 2010	Amended Answer (Respondent's Complaint Responses Attached)
April 20, 2010	Hearing before DHP
May 10, 2010	Decision by DHP; Panel Recommendation for Suspension
June 9, 2010	Respondent Rejects DHP Decision

BACKGROUND

Respondent, George Spencer Miller, has practiced law in Kansas City and Maryville for thirty-seven years. **App. 19 (T. 69)**. Until 2006, he had not been disciplined. Since 2006, he has received four admonitions for six violations of the Rules of Professional Conduct, related to the representation of four clients. **App. 49-55**.

On June 2, 2006, Respondent accepted an admonition for violating Rule 4-1.4 (communication) and 4-1.5 (fees) in his 2003-2005 representation of Gordon and Emily Daniels. The Daniels family had hired Respondent to pursue a property damage claim. Respondent filed a suit but dismissed it four days before trial; he then failed to respond to the Daniels' requests for information, in violation of Rule 4-1.4. Respondent's failure to reduce his contingency fee agreement to writing violated Rule 4-1.5. **App. 50-51**.

On June 1, 2006, Respondent accepted an admonition for violating Rule 4-1.4 (communication) in his 2002-2005 representation of Terry Wallen. Ms. Wallen had hired Respondent to represent her in a personal injury claim. After Ms. Wallen initially complained to the OCDC about frustrations with communication, Respondent agreed to provide adequate communication. Over the next two years, however, he violated Rule 4-1.4 by sending only one form letter and interrogatories to Ms. Wallen, and failing to notify her when her case was dismissed in 2005, despite numerous efforts to reach him by Ms. Wallen's other attorney. **App. 52-53**.

On November 6, 2008, Respondent accepted an admonition for violations of Rule 4-1.3 (diligence) and 4-1.4 (communication) in his representation of Madeline Adam. Respondent violated Rule 4-1.3 by failing to monitor her class action claim such that he

took no effort to learn whether and when her settlement check had been mailed; he violated Rule 4-1.4 by failing to keep his client informed about the status of the case. **App. 54-55**.

On November 6, 2008, Respondent accepted an admonition for violating Rule 4-1.4 (communication) in his representation of Brenda Moore-Wells. Respondent violated Rule 4-1.4 by failing to clarify a misunderstanding with his client about their respective responsibilities for obtaining counsel in the state where her accident had occurred. **App. 54-55**.

On February 2, 2009, Respondent's license was suspended, pursuant to Rule 5.245, for failure to pay Missouri state income taxes. His license was reinstated on March 23, 2009, upon proof of a payment plan with the Missouri Department of Revenue. **App. 56-59**.

COUNT I (BACKMAN)

In the summer of 2008, Capital One, a credit card company, was trying to collect $5,000.00 from Connie Backman, a Maryville woman. **App. 3 (T. 4)**. Ms. Backman knew she needed a lawyer and was familiar with Respondent because he had previously represented her mother. **App. 3 (T. 5); 5 (T. 12)**. She made an appointment with Respondent's assistant and subsequently met with Respondent at his law office. **App. 3 (T. 5)**. Respondent asked for a $250.00 fee, and she paid him $250.00 to defend her against Capital One's claim. **App. 4 (T. 6)**. Ms. Backman testified that Respondent told her that he could clear the record and she would not have to pay. **App. 3-4 (T. 5-6)**. She gave Respondent her copies of the correspondence with Capital One.

Ms. Backman also gave Respondent a copy of her summons, **App. 4 (T. 6)**, directing her to appear at the Nodaway County Circuit Court on September 25, 2008. Respondent told her that he would take care of the case and that she did not need to appear at court on that date. **App. 4 (T. 6)**. Respondent did not appear for her in court on September 25; at no time did he do anything on her behalf. **App. 17 (T. 61)**.

Within a day or two after the missed court date, Ms. Backman learned that a default judgment had been entered against her. She immediately contacted Respondent's office. Respondent was not in his office on the day of her call because his young son had been mauled by a dog that morning. **App. 4 (T. 7)**. Respondent offered no explanation for his whereabouts on September 25, the day the default judgment was entered against Ms. Backman. **App. 17 (T. 61)**.

Respondent testified that he had neither record nor recollection of representing Ms. Backman. **App. 17 (T. 59-61)**. But, he acknowledged that she paid him $250.00. **App. 17 (T. 59)**. He said her case was just a "lost file" that "fell through the cracks." **App. 17 (T. 61); 22 (T. 79)**.

Ms. Backman told the Panel that, after her default judgment, she repeatedly continued to try to contact Respondent. She left several messages with Respondent's staff and on his law office answering machine. He did not respond. **App. 4 (T. 7)**. She also visited his law office. **App. 4 (T. 8)**. Respondent told the Panel that he did not recall receiving further messages from Ms. Backman. He testified, "I can only assume that I didn't get the - - my secretary was not taking them off or not giving me the messages, my former secretary." **App. 18 (T. 63-64)**. Both Ms. Backman and

Respondent testified about an unplanned meeting at the Courthouse, occurring after the default judgment. **App. 4-5 (T. 9-10).** Upon being confronted by Ms. Backman about her case, Respondent said that he told her to call his office to schedule a meeting. **App. 17 (T. 60)**. Respondent testified that he had neither notes nor other correspondence relating to his representation of Ms. Backman. **App. 17 (T. 60-61)**. After the OCDC opened an investigation into Ms. Backman's complaint, Respondent reimbursed Ms. Backman's $250.00. **App. 5 (T. 11-12)**.

COUNT II (GIESKEN)

Jake Giesken owns a welding business in Nodaway County, Missouri. He sometimes sells his fabricated products. **App. 6 (T. 14)**. In October 2007 Mr. Giesken sold a storage trailer to his neighbor, Robert Stephenson. Mr. Stephenson gave Mr. Giesken a $1,500.00 check, as payment for the trailer. **App. 6 (T. 15)**. The check bounced. After two attempts to transact the check at Stephenson's bank, Mr. Giesken took the bank's copy of the check to Respondent. **App. 6 (T. 16); 9 (T. 26-27)**. Respondent had previously represented Mr. Giesken (at least twice) and had engaged in "legal chatter" with him at their church and at a local coffee shop. **App. 6 (T. 14-15); 8 (T. 24); 13-14 (T. 45-46); 15 (T. 51)**. Mr. Giesken met with Respondent at Respondent's law office. **App. 6 (T. 16); 9-10 (T. 29-30)**. While there, Giesken asked Respondent to collect the money from Stephenson. **App. 6 (T. 17)**. He also told Respondent that he wanted Stephenson jailed. **App. 6 (T. 17); 10 (T. 30); 12 (T. 41)**. Respondent told Mr. Giesken that he would work on his case. **App. 6 (T. 17); 12-13 (T. 41-44)**. About one month later, Mr. Giesken contacted Respondent regarding the status of the matter.

Respondent told Mr. Giesken that he was still "working on it." **App. 6-7 (T. 17-18)**. Three weeks to a month later, Mr. Giesken contacted Respondent again for an update and was again told by Respondent that he was "working on it." **App. 7 (T. 18-19); 75-77**.

Respondent told the Panel that he initially talked to Mr. Giesken about the case in his law office, but that he did not get paid. **App. 14 (T. 48-49)**. He said he told Mr. Giesken to go see the Nodaway County Prosecuting Attorney, who could obtain restitution in a criminal case. **App. 15 (T. 50)**.

Mr. Giesken testified that he believed Respondent would help with the check because, when he met with Respondent at his office, Respondent told him that "We'll get on it," and Respondent took the bank's copies of the check. In addition, Respondent twice told Mr. Giesken that he was "working on it." **App. 12 (T. 41)**.

Respondent testified that he told Mr. Giesken that he should go to the Prosecuting Attorney, because there would be no fee. He also said that it commonly happened in Nodaway County that people go to jail for bad checks and that restitution would be easiest through a criminal prosecution. **App. 15 (T. 50-51)**.

Mr. Giesken eventually took his complaint to the prosecutor. He said he had no choice but to file a complaint with the prosecutor because Respondent had custody of his case materials for several months, but had done nothing. **App. 10 (T. 33)**. The prosecutor eventually filed Insufficient Funds charges against Stephenson for the check he gave Mr. Giesken.

Respondent acknowledged that Mr. Giesken gave him the bank's copy of Stephenson's bad check and that Mr. Giesken eventually retrieved those materials to take them to the Prosecuting Attorney. **App. 14 (T. 48)**.

Some months later, Mr. Giesken learned from Stephenson that Respondent was defending Stephenson on the bad check charge. **App. 9 (T. 26)**. At that time, Respondent also represented Stephenson on an unrelated weapons charge. (Mr. Stephenson was also charged with possessing a sawed off shotgun.) **App. 11 (T. 35)**.

Mr. Giesken said he confronted Respondent about Respondent's representation of Stephenson in the criminal case involving the same check that he had discussed with Respondent. Giesken reported that Respondent simply told him that the cases were not the same. **App. 8 (T. 22)**. Respondent testified that he immediately recognized that the same check was involved when Stephenson asked Respondent to represent him on his check case. He neither sought nor discussed a waiver of any conflict with Mr. Giesken. **App. 15-16 (T. 53-54)**. And, he obtained no waiver from either Stephenson or Giesken. **App. 15-16 (T. 53-54)**. He did not discuss his representation of Stephenson with Mr. Giesken until he had already taken Stephenson's case, and not until Mr. Giesken confronted him about it. **App. 15 (T. 53)**.

Respondent explained that he did not believe a potential conflict existed because, in his view:

(a) "… I knew that there was or I believe that there was no defense to the check case, that ultimately there would have to be a plea arrangement or plea agreement. And I didn't know in this case, I can't say that, but I believe that any

plea agreement would require restitution. I mean, that's typically what happens, and I believe at that point that Mr. Giesken would be fully and completely protected." Respondent further testified: "In fact, he was in a better position, he didn't have to pay any kind of attorney's fee, he didn't have to pay a filing fee, and he would have a better result because Mr. Stephenson could go to jail if he didn't comply." **App. 16 (T. 54)**;

(b) "… I didn't believe that anything that happened in the criminal case was going to have any impact or would impair Mr. Giesken's ability to recover, if he pursued a civil matter." **App. 16 (T. 54)**;

(c) [I believed] it was in Stephenson's best interests to be required to reimburse Mr. Giesken. **App. 16 (T. 55)**;

(d) "… as an attorney representing him [Stephenson], I never became aware of any fact that was going to be a defense to the check case." **App. 16 (T. 55)**; and

(e) Giesken was "quasi-represented" by the Prosecuting Attorney.

Respondent acknowledged, however, that he could not have known in advance that the ultimate result in the criminal case would be in the best interests of the victim [Giesken], and the defendant [Stephenson].

Q … How can you know it in advance?

A … "I cannot know it as a fact in advance." **App. 16 (T. 57)**.

"But", he said "based upon prior experience in a given case what's going to happen, I mean, predictably what's going to happen. I don't have a crystal ball, I don't have any way to foretell the future, but I know and knew then, that on any – let me just put it this

way. There is no check charge in Nodaway County that I know of that has not required restitution." **App. 16-17 (T. 57-58)**.

In the hearing, Respondent remained adamant, "I still am not convinced that I had a conflict …." **App. 22 (T. 79)**.

"I did not see any adversity in that situation …." "There was nothing about what he [Giesken] had said that changed the defense from Mr. Stephenson. The fact of the matter is both of them were fully and completely protected." **App. 22 (T. 80)**.

HEARING PANEL DECISION

The Hearing Panel listened to the testimony of Ms. Backman, Mr. Giesken, and Respondent and considered the proffered exhibits. They found that Respondent violated the Rules of Professional Conduct in his representation of both Ms. Backman and Mr. Giesken. Specifically, the panel found and concluded that Respondent violated Rule 4-1.3 (Diligence) and Rule 4-1.4 (Communication) by failing to appear and take legal action on behalf of Ms. Backman and by failing to communicate with her. As to Mr. Giesken, the panel found and concluded that Respondent violated Rule 4-1.7(a) and Rule 4-1.9 (Conflicts) by representing Mr. Giesken on the collection of the insufficient funds check and then representing Mr. Stephenson on a criminal charge involving the same check, without communicating with and obtaining the consent of Mr. Giesken. As to the conflict, the Panel explained: "Further, the Panel does not believe that it would be reasonable to believe that it was possible to provide competent and diligent representation to each of the clients." **App. 81**.

POINT RELIED ON

I.

RESPONDENT VIOLATED RULES 4-1.3 AND 4-1.4 IN HIS REPRESENTATION OF CONNIE BACKMAN BY (A) FAILING TO ACT DILIGENTLY ON HER BEHALF IN THAT HE LOST HER FILE AND FAILED TO APPEAR FOR HER AT A KEY CASE SETTING AND (B) FAILING TO COMMUNICATE WITH HER IN THAT HE DID NOT REPORT HER CASE STATUS TO HER AND FAILED TO RESPOND TO HER REQUESTS FOR INFORMATION.

Rule 4-1.3

Rule 4-1.4

POINT RELIED ON

II.

RESPONDENT VIOLATED RULES 4-1.7 AND/OR 4-1.9 BY ENGAGING IN A CONFLICT OF INTEREST BETWEEN SUCCESSIVE CLIENTS IN THAT (A) HE REPRESENTED BOTH JAKE GIESKEN AND ROBERT STEPHENSON AT TIMES WHEN THEIR INTERESTS WERE MATERIALLY ADVERSE; AND (B) HE DEFENDED STEPHENSON ON A BAD CHECK CRIMINAL CASE BASED ON A CHECK STEPHENSON WROTE TO GIESKEN AFTER HE CONSULTED AND ADVISED GIESKEN ABOUT POSSIBLE REMEDIES AGAINST STEPHENSON FOR THE SAME CHECK; AND (C) HE GAINED CONFIDENTIAL INFORMATION IN HIS CONSULTATION WITH JAKE GIESKEN THAT POSITIONED HIM TO HAVE TO DECIDE WHETHER TO USE THAT CONFIDENTIAL INFORMATION AGAINST GIESKEN DURING HIS LATER REPRESENTATION OF STEPHENSON.

In the Matter of Saienni, 2006 WL 6318979 (AZ Disc. Commission)

United States v. White Buck Coal Company, 2007 WL 130322 (S.D.W.Va.)

Castillo v. Estelle, 504 F.2d 1243 (U.S. C.A. 5th Cir. 1974)

ABA/BNA Lawyers' Manual on Professional Responsibility

Rule 4-1.7

Rule 4-1.9

POINT RELIED ON

III.

IN ORDER TO PROTECT THE PUBLIC, THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE: (A) DURING THE PAST FOUR YEARS, RESPONDENT HAS ENGAGED IN A PATTERN OF MISCONDUCT LEAVING MULTIPLE CLIENTS WITHOUT ADEQUATE REPRESENTATION; (B) DESPITE FOUR PREVIOUS ADMONITIONS AND A SUSPENSION FOR FAILURE TO PAY HIS STATE INCOME TAXES, RESPONDENT HAS NOT IMPROVED HIS PRACTICE; (C) THE DISCIPLINARY HEARING PANEL RECOMMENDS A SUSPENSION; AND (D) PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA SANCTION STANDARDS INDICATE GRADUATED DISCIPLINE FOR REPEATED MISCONDUCT, ESPECIALLY WHEN, AS HERE, ATTORNEYS FAIL TO ACKNOWLEDGE THEIR MISCONDUCT.

In re Adams, 737 S.W.2d 714 (Mo. banc 1987)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

RESPONDENT VIOLATED RULES 4-1.3 AND 4-1.4 IN HIS REPRESENTATION OF CONNIE BACKMAN BY (A) FAILING TO ACT DILIGENTLY ON HER BEHALF IN THAT HE LOST HER FILE AND FAILED TO APPEAR FOR HER AT A KEY CASE SETTING AND (B) FAILING TO COMMUNICATE WITH HER IN THAT HE DID NOT REPORT HER CASE STATUS TO HER AND FAILED TO RESPOND TO HER REQUESTS FOR INFORMATION.

Count I (Backman)

Respondent admits that he lost Connie Backman's file and that her case just slipped through the cracks. **App. 17 (T. 61)**. He failed to meet his fundamental obligation to Ms. Backman to keep track of her case and appear in court for her. By that conduct, he violated Rule 4-1.3 (diligence). As a direct result of his violation, a default judgment was entered against Ms. Backman.

Additionally, he violated Rule 4-1.4 by ignoring Ms. Backman's numerous efforts to contact him after the court entered a default judgment against her.

ARGUMENT

II.

RESPONDENT VIOLATED RULES 4-1.7 AND/OR 4-1.9 BY ENGAGING IN A CONFLICT OF INTEREST BETWEEN SUCCESSIVE CLIENTS IN THAT (A) HE REPRESENTED BOTH JAKE GIESKEN AND ROBERT STEPHENSON AT TIMES WHEN THEIR INTERESTS WERE MATERIALLY ADVERSE; AND (B) HE DEFENDED STEPHENSON ON A BAD CHECK CRIMINAL CASE BASED ON A CHECK STEPHENSON WROTE TO GIESKEN AFTER HE CONSULTED AND ADVISED GIESKEN ABOUT POSSIBLE REMEDIES AGAINST STEPHENSON FOR THE SAME CHECK; AND (C) HE GAINED CONFIDENTIAL INFORMATION IN HIS CONSULTATION WITH JAKE GIESKEN THAT POSITIONED HIM TO HAVE TO DECIDE WHETHER TO USE THAT CONFIDENTIAL INFORMATION AGAINST GIESKEN DURING HIS LATER REPRESENTATION OF STEPHENSON.

Count II (Giesken)

Respondent accepted Jake Giesken's paperwork concerning Robert Stephenson's $1,500.00 bad check payable to Mr. Giesken. He acknowledged holding the paperwork and discussing legal options with Giesken at his law office. And, he acknowledged later defending Stephenson in a criminal case filed by the Prosecuting Attorney in response to

Giesken's complaint, involving the same $1,500.00 check. He did not seek waivers from either of his clients, Jake Giesken or Robert Stephenson.

Rule 4-1.7(a)(1) prohibits Respondent's conduct because Giesken's interests were directly adverse to Stephenson's. Rule 4-1.7(a)(1) provides as follows:

> Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client. Rule 4-1.7(a)(1).

Mr. Giesken's goals, as he explained to Respondent, were to have Stephenson in jail and his $1,500.00 returned. Conversely, Stephenson's goals, at least at the outset of Respondent's representation, could not have been to go to jail and pay restitution. Respondent has argued that the two clients' interests were not adverse, although he acknowledges that he could not have known that at the beginning of his representation of Stephenson.

A letter from Respondent's second client, Robert Stephenson, to his first client, Jake Giesken, is telling. **App. 73-74**. In his letter, Stephenson implied that he had a defense to Giesken's claim for reimbursement, writing that Giesken actually owed him money. Stephenson also indicated that he was planning to give the trailer back to Giesken. Finally, Stephenson implied that he hired Miller to *defend* him when he wrote that Giesken could "address a letter to my lawyer on this also, Spencer Miller." **App. 73-74**. Stephenson apparently sold the trailer to a third party, so it could not be returned to

Giesken. **App. 12 (T. 38)**. With Respondent's assistance, Mr. Stephenson agreed to a plea agreement requiring restitution as a condition of probation. Stephenson died soon thereafter, before making restitution. **App. 11-12 (T. 37-39)**.

Respondent's argument that no conflict occurred fails the test of common sense, even without consideration of Stephenson's letter. In short, any criminal defense attorney who *knows*, in advance of taking his client's case, that no defenses or arguments can be made on his client's behalf, has surrendered the case before starting. Why, indeed, would Mr. Stephenson even retain Respondent? At the outset of his representation of Stephenson, Respondent could not have known what he now claims in retrospect, as obvious. He could not have known that he could both obtain restitution for Giesken and protect Stephenson's best interests, before determining whether Stephenson had defenses or colorable arguments against either a guilty finding or a particular sentence. He could not have known whether Stephenson even wrote the check, or whether Stephenson might have had another reason to overdraw his account or whether bank error might have caused the insufficient funds. Before undertaking Stephenson's case and hearing his story, Respondent's only source of any of that information would have been none other than Stephenson's victim – his former client, Jake Giesken. And, Respondent knew that Mr. Giesken wanted Stephenson to go to jail. Evidently, Respondent was able to prevent that occurrence, contrary to Giesken's express wishes. Respondent violated Rule 4-1.7(a)(1) by representing both Stephenson and Giesken when their interests in resolving Stephenson's bad check charge were directly adverse.

Rule 4-1.7(a)(2) prohibits Respondent's joint representation of Giesken and Stephenson because his representation of Stephenson was materially limited by his responsibilities to Giesken, a former client. Rule 4-1.7(a)(2) provides as follows:

> Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (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)(2).

Respondent's duty of loyalty is governed by Rule 4-1.7 and described by Comment 1 to that Rule: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Comment 3 to Rule 4-1.7 explains that conflicts "may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of Rule 4-1.7(b)."

Respondent violated Rule 4-1.7(a)(2) by representing both Stephenson and Giesken in that there was a significant risk that his representation of Mr. Stephenson would be materially limited by his responsibilities to Mr. Giesken, a current or former client.

Assuming Respondent's representation of Mr. Giesken ended when Mr. Giesken retrieved his file from Respondent's law office, Mr. Giesken's status changed to that of a

former client of Respondent. Under Rule 4-1.9(a), Respondent was prohibited from representing Stephenson in the bad check case because it was the same (or, at the least, a substantially related matter) and Giesken's interests were materially adverse to Stephenson's interests. Giesken did not give consent, and none was discussed or requested. "After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and, thus, may not represent another client except in conformity with this Rule 4-1.9." Rule 4-1.9(a), Comment 1.

And, perhaps more to the point in this case, "… a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction." Rule 4-1.9(a), Comment 1. The instant case, a converse to that example, provides another conflict: Respondent represented opposing parties in successive civil and criminal cases involving a single bad check written by one of his clients to his other client. As Comment 2 to Rule 4-1.9 explains: "When a lawyer has been involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited" … "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."

Mr. Giesken's civil claim resulted in no civil lawsuit. But, the matter at issue in the claim by Giesken against Stephenson (as discussed with Respondent) was "substantially related" to the subsequent criminal charge against Stephenson for purposes

of Rule 4-1.9 because it involved the same check written by Stephenson and payable to Giesken. Rule 4-1.9, Comment 3.

In certain settings, courts have found conflicts for attorneys engaging in successive representations of victims and defendants, even when the matters were not related. *Castillo v. Estelle*, 504 F.2d 1243 (U.S. C.A. 5th Cir. 1974). In that case, the court found that Castillo (the defendant in a stealing case) was denied a fair trial because his attorney had recently represented the president of the corporation whose property was stolen. (The prior representation was in an unrelated matter). The attorney did not disclose his representation to Castillo. The 5th Circuit explained the conflict:

> A reviewing court deals with a cold record, capable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may result from divided loyalty. Accordingly, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice. *Castillo*, 504 F.2d at 1245.

In 2006, the Arizona Supreme Court Disciplinary Commission disciplined a lawyer who attempted to represent both the child victim of alleged abuse (in the child's purported resistance to an appointment of a Guardian Ad Litem) and the alleged adult abuser (in the related criminal case). *In the Matter of Saienni*, 2006 WL 6318979 (AZ Disc. Commission). The attorney (Joe Saienni) argued that his representation of the child and her mother "was limited solely to the issue of the state's motion for a guardian ad litem." He further argued, at least initially, that no conflict existed because the child, mother, and the alleged abuser "all 'concurred in the goal of' pushing back what they believed to be a

corrupt and dishonest government going back on their word and trying to destroy them by incarcerating their bread winner." The attorney eventually acknowledged the conflict and was reprimanded by the court. *Saienni*, (WL 638979).

In another disqualification case involving successive representation, the United States District Court in West Virginia found a conflict inherent in situations where an attorney cross examines former clients in related matters. *United States v. White Buck Coal Company*, 2007 WL 130322 (S.D.W.Va.).

Mr. Miller, in the instant case, could not have known at the time he undertook Stephenson's criminal case, that he would not need to cross examine Jake Giesken, the victim of Stephenson's alleged offense. The Federal District Court in West Virginia explained that a showing of a serious *potential* for conflict is sufficient, *White Buck Coal Company*, (WL 130322).

As shown, conflicts can arise when successive clients' interests are materially adverse. But conflicts can also occur when lawyers learn information in consulting with one client and are later faced with deciding whether that information might be useful to another client. Generally, lawyers are irrebuttably presumed to have gained confidential information from their clients. ABA/BNA Lawyers' Manual on Professional Responsibility Sec. 51, p. 235. In this case, it was Mr. Giesken who initially described to Respondent the facts of the trailer sale between Stephenson and Giesken. And, it was Giesken who explained that he had completed his end of the bargain and that Stephenson had written a bad check in paying for the trailer. Any information Respondent learned during his meetings with Giesken was confidential information under Rule 4-1.6 and

Rule 4-1.9. Under those circumstances, the question is not whether Respondent actually used that information in representing Stephenson, but whether later Respondent could have used that information. ABA/BNA Lawyers' Manual on Professional Responsibility Sec. 51, p. 240. For example, if Respondent learned of any possible defense, counterclaim, or even if he learned of a mitigating circumstance, when talking to Jake Giesken, he would be in a quandary as to whether to take advantage of that information in negotiating with Giesken, or the Prosecutor, or in cross-examining Giesken or other witnesses. Simply put, Respondent's use of the information was prohibited by Rules 4-1.7 and 4-1.9; but, any failure to use the information for Stephenson's benefit would likely constitute ineffective assistance of counsel, malpractice, and a violation of Rules 4-1.1 (competence), 4-1.3 (diligence), and 4-1.4 (communication). Hence, the conflict of interest arises when an attorney gains information in representing one client that the attorney has to decide whether to use in representing another client. In this case, the confidential information was not merely tangential facts; instead Respondent learned enough key information from Giesken that he believed that Stephenson would have no defenses to the criminal charges and that he, with the cooperation of a willing prosecutor, could resolve the matter in everyone's best interests. Recall his testimony to the Hearing Panel:

> "… I knew that there was or I believe that there was no defense to the check case, that ultimately there would have to be a plea arrangement or plea agreement. And I didn't know in this case, I can't say that, but I believe that any plea agreement would require restitution. I mean, that's typically what happens, and I believe at

that point that Mr. Giesken would be fully and completely protected." **App. 16 (T. 54)**.

ARGUMENT

III.

THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PROTECT THE PUBLIC BECAUSE: (A) DURING THE PAST FOUR YEARS, RESPONDENT HAS ENGAGED IN A PATTERN OF MISCONDUCT LEAVING MULTIPLE CLIENTS WITHOUT ADEQUATE REPRESENTATION; (B) DESPITE FOUR PREVIOUS ADMONITIONS AND A SUSPENSION FOR FAILURE TO PAY HIS STATE INCOME TAXES, RESPONDENT HAS NOT IMPROVED HIS PRACTICE; (C) THE DISCIPLINARY HEARING PANEL RECOMMENDS A SUSPENSION; AND (D) PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE ABA SANCTION STANDARDS INDICATE GRADUATED DISCIPLINE FOR REPEATED MISCONDUCT, ESPECIALLY WHEN, AS HERE, ATTORNEYS FAIL TO ACKNOWLEDGE THEIR MISCONDUCT.

Sanction Analysis

But for Respondent's previous discipline, his failure to improve his practice following that discipline, and his failure to acknowledge his conflict of interest in the Giesken matter, a court reprimand might be an appropriate sanction. ABA Sanction Standards 4.33 (conflicts), 4.43 (diligence), and 4.63 (communication) would initially support a reprimand because Respondent's failings in losing Ms. Backman's file and failing to communicate with her appear to be negligent. And, Respondent's conflict of

interest in the Giesken case appears to be as much a miscalculation of the conflict's significance as an intentional abuse of the circumstances. Compare these ABA guidelines:

> ABA Standard 4.32: 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.
>
> ABA Standard 4.33: Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. ABA Standards for Imposing Lawyer Sanctions (1991 ed.).

Unfortunately, the record in this case is not that simple. Instead, the Court is faced with deciding what sanction is necessary to protect the public from this attorney's recent pattern of misconduct. As the court has consistently held, the dual purposes of this process are to protect the public and to maintain the integrity of the profession, *In re Adams*, 737 S.W.2d 714, 717 (Mo. banc 1987).

Since 2006, Respondent has repeatedly violated rules related to fees, client communication, and diligence. Respondent's clients suffered on each occasion; their legal needs were not met. In those attorney-client relationships, his clients were unable to even contact him. Additionally, Respondent failed to take care of his personal legal

obligations: despite repeated efforts by the Missouri Department of Revenue and this Court to encourage him to pay his taxes, Respondent failed to act. As a result of his inaction, Respondent's license was suspended.

And now there is more. In these instant cases, Respondent again failed to communicate with a client, Connie Backman, despite her many efforts to ask him what could be done about the default judgment he allowed. Despite four admonitions to improve, Respondent allowed her case to get lost; he failed to create office systems to prevent that occurrence. Under these circumstances, a reprimand is not adequate to protect the public.

This Court often refers to ABA Sanction Standards in determining appropriate discipline. The ABA Sanction guidelines applicable to this case include those discussed above and the following Aggravating Circumstances:

> ABA Standard 9.22(a) *prior disciplinary offenses*: Respondent has four prior admonitions and a suspension under Rule 5.245.
>
> ABA Standard 9.22(d) *multiple offenses:* In addition to Respondent's four recent prior admonitions, this case establishes at least three new violations involving two more clients.
>
> ABA Standard 9.22(g) *refusal to acknowledge wrongful nature of conduct:* Respondent refuses to admit or simply does not understand that he cannot represent two clients with significantly adverse interests in a substantially related matter.

ABA Standard 9.22(i) *substantial experience in the practice of law*: Respondent has practiced law for over thirty-five years. By this point in his career, he should recognize obvious conflicts and he should know how to create systems to prevent his clients' cases from slipping through the cracks.

Respondent testified that he believes he suffers from Attention Deficit Disorder and that the condition might explain his practice problems. He acknowledged that the condition does not excuse his conduct. **App. 20 (T. 70-72)**. Significantly, the Court recently adopted a rule addressing the appropriate consideration of mental disorders in discipline proceedings. Rule 5.285 provides that such a condition is no defense to allegations of misconduct. And, respondents must meet several conditions before mental disorder can serve in mitigation. First, and sufficiently for this case:

> A mental disorder is not a mitigating factor in a disciplinary proceeding unless an independent, licensed mental health professional provides evidence that the mental disorder caused or had a direct and substantial relationship to the professional misconduct. Respondent shall bear the burden of proof that the mental disorder is a mitigating factor. Rule 5.285.

In this case, Respondent offered only his self diagnosis. Mitigation is not available under applicable law.

Informant's counsel initially asked the Panel to recommend a stayed suspension, hoping that probation might improve Respondent's practice. But, the Informant's Counsel also told the Panel (and Respondent) that if the Panel recommended a

suspension without probation, and if Respondent continued to deny that a conflict existed in his representations of Stephenson and Giesken, then an actual suspension (without probation) might be appropriate. **App. 22 (T. 78-79)**.

Nothing less than a stayed suspension and probation would be adequate to protect the public. And, if Respondent continues to deny his conflict in the Giesken matter, then an actual suspension may be necessary. An actual suspension is the sanction recommended by the Disciplinary Hearing Panel.

CONCLUSION

Informant asks the Court to enter an order finding that Respondent violated Rule 4-1.3 (diligence) and 4-1.4 (communication) in allowing a default judgment against his client, Connie Backman and then failing to respond to her requests for information and that he violated Rules 4-1.7 and 4-1.9 (conflicts) by representing Jake Giesken and Robert Stephenson, who had materially adverse interests. The Court should suspend Respondent's license for at least one year. Probation, under Rule 5.225, should only be considered if, before submission, Respondent acknowledges the conflict and Informant is given an opportunity to recommend probation terms and conditions.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

By: _____
Sam S. Phillips #30458
Deputy Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Sam.Phillips@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2010, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

George Spencer Miller
PO Box 617
Maryville, MO 64468-0617

_____
Alan D. Pratzel

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 6,326 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.

_____
Alan D. Pratzel

TABLE OF CONTENTS – APPENDIX