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IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
DANIEL L. VIETS	)	**Supreme Court #SC99160**
15 N. 10th Street	)	
Columbia, MO 65201	)	
	)	
Missouri Bar No. 34067	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violation of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, RSMo 2016.

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STATEMENT OF FACTS

I. Procedural History Of This Case

On October 1, 2020, Informant filed an Information alleging that Respondent Daniel L. Viets violated Rule 4-1.7(a). [1] **App. 6-19.** On December 6, 2020, Respondent filed his Answer **App. 20-23** and on December 10, 2020, the Chair of the Advisory Committee appointed a Disciplinary Hearing Panel ("Panel") to conduct a hearing on the matter. **App. 24-26.**

On January 28, 2021, the Panel held a virtual hearing via WebEx according to this Court's May 13, 2020, Order.[2] **App. 28-29 (Tr. 1, 6).** Present at the hearing were Panel Members attorney Edward Clausen, attorney Joseph Rigler, and layperson Reverend David Rice. **App. 29 (Tr. 5).** Informant was represented by Nancy Ripperger. **App. 29 (Tr. 5).** Respondent was present and represented by J.D. Williamson. **App. 29 (Tr. 5).**

Before the hearing, the parties entered into a joint stipulation agreeing to the admission of Exhibits 1 through 5, Exhibits 7 through 33, and Exhibits 38 through 39. **App. 32 (Tr. 17-18); App. 49 (Tr. 87).** The Panel admitted the exhibits into evidence. **App. 32 (Tr. 17).** Respondent also offered Exhibit 36, Exhibit A, Exhibit B, and Exhibit C into evidence. **App. 32 (Tr. 17-18); App. 49 (Tr. 87).** The Panel admitted Respondent's exhibits into evidence. **App. 32 (Tr. 17-18); App. 49 (Tr. 87).**

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[1] Unless otherwise denoted, all rule references are to the Missouri Supreme Court Rules of Professional Conduct.

[2] The Order restricted in-person disciplinary hearings due to COVID-19.

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Informant put on testimony from two witnesses. **App. 33-64 (Tr. 22-146).** Respondent testified on his own behalf and put on evidence from two-character witnesses. **App. 66-81 (Tr. 153-215).**

On May 4, 2021, this Panel issued its decision. **App. 255-86.** The Panel found that Respondent violated Rule 4-1.7 and recommended that this Court indefinitely suspend Respondent's license with no leave to reapply for six months. **App. 281-84.** On May 12, 2021, Informant accepted the Panel's decision. **App. 187.** On June 3, 2021, Respondent rejected the Panel's recommendation. **App. 290-291.**

This matter was submitted to this Court pursuant to Rule 5.19(d)(2).

II. Testimony And Evidence Presented At The Hearing Or Admitted In Respondent's Answer

A. General Information Regarding Respondent's Practice

This Court licensed Respondent on April 25, 1986. **App. 6; 20.** Initially, Respondent had a diverse practice that included criminal, family, and civil rights law. **App. 66 (Tr. 156).** However, for many years he has limited his practice to representing criminal defendants charged with felony non-violent crimes. **App. 66 (Tr. 156).** He represents criminal defendants throughout the State. **App. 66-67 (Tr. 156-58).** The people he primarily represents have been charged with felony marijuana charges. **App. 66-67 (Tr. 156-58.)**

B. Respondent's Prior Admonitions

Respondent has previously received and accepted four admonitions from Informant.

On March 21, 2006, Informant issued an admonition to Respondent for violation of Rule 4-1.6 (client confidentiality). Respondent accepted the admonition. The admonition provides that after taking a $100 fee from a potential client, Respondent decided not to represent the woman. After there was an unpleasant confrontation between Respondent's staff and the woman regarding a refund of the fee, Respondent called the woman's workplace. When the woman was unavailable to speak with him, Respondent spoke to the woman's supervisor. Respondent advised the supervisor that he did not want the woman to come to his office again and that the woman was facing pending felony criminal drug charges. **App. 7; 20; 91-92.**

On August 16, 2007, Informant issued an admonition to Respondent for violation of Rule 4-1.4 (communication). Respondent accepted the admonition. The admonition provides that Respondent was representing a client in three criminal child-support matters. Respondent had advised the client that he would file a motion to stay the order of child support in one of the cases. Respondent later determined that the court did not have jurisdiction to stay the order. Respondent, however, failed to sufficiently explain the court's lack of jurisdiction to the client. **App. 7; 20; 93-94.**

On April 10, 2009, Informant issued an admonition to Respondent for violation of Rule 4-1.1 (competency). Respondent accepted the admonition. The admonition provides that Respondent was representing a client in a felony domestic assault case. The Information was fatally defective in that it only set forth allegations supporting a misdemeanor assault. Respondent failed to determine that the Information was defective. The client pled guilty to the charge and received a four-year sentence. Two years later

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the client filed a Motion To Vacate The Judgment and the client's guilty plea was set aside. **App. 8; 20; 95-96.**

On July 31, 2020, Informant issued an admonition to Respondent for violation of Rule 4-1.9(a) (conflict of interest with a former client). Respondent accepted the admonition. The admonition provides that Respondent represented a client on federal mail fraud charges that stemmed from the client's sale of illegal synthetic cannabinoids. The United States Attorney's Office filed a Motion to Disqualify Respondent alleging Respondent had a conflict of interest. Respondent previously had represented four individuals who had supplied synthetic cannabinoids to Respondent's current client. The United States Attorney's Office advised the Court that four of the suppliers might testify against Respondent's current client at trial, as they had entered into cooperation agreements with the government. **App. 8; 20; 96-99.**

C. Respondent's Representation of David and Natalie DePriest

1. The DePriests Hired Respondent To Represent Them On Felony Drug Charges

In 2011, siblings David and Natalie DePriest decided to open a retail tobacco shop in Desloge, Missouri. **App. 33-34 (Tr. 24-25); App. 53 (Tr. 101).** In May 2011, Ms. DePriest quit her job as a territory sales manager for RJ Reynolds Tobacco Company and moved from Salt Lake City, Utah to Farmington, Missouri. **App. 33-34 (Tr. 24-25).** In May 2011, the DePriests rented a condominium where they both planned to live while operating the tobacco shop. **App. 33-34 (Tr. 24-25).** During the summer of 2011, Ms. DePriest traveled frequently and only spent twenty days at the condominium. **App. 33-34 (Tr. 24-25).**

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In August 2011, a maintenance person entered the DePriests' condominium to install a fire extinguisher and observed marijuana growing there. **App. 68 (Tr. 164).** The condominium manager called the police and the police searched the DePriests' condominium. **App. 68 (Tr. 164).** The police found twelve marijuana plants, an illegal firearm,[3] marijuana, and some drug paraphernalia. **App. 53 (Tr. 101).** The plants and gun were in Mr. DePriest's bedroom. **App. 53 (Tr. 102).** The drug paraphernalia and marijuana were in the common area of the condominium. **App. 34 (Tr. 29); App. 53 (Tr. 102).**

The police arrested the DePriests and charged each with a Class B felony of cultivating more than five grams of a controlled substance ["Count I"], a Class B felony of possession of more than 5 grams of a controlled substance with intent to distribute ["Count II"], and a Class C felony of illegal possession of a short-barreled rifle ["Count III"]. **App. 34 (Tr. 25-26); 53 (Tr. 101); 100; 112.**

The DePriests assumed that they should hire one attorney to represent them because they had been charged together, their court appearances were scheduled at the same time, and they believed it would save them money. **App. 34 (Tr. 28.)** Ms. DePriest had no criminal history and had never hired an attorney before her arrest in 2011. **App. 34-35 (Tr. 28-29).** Mr. DePriest had hired an attorney once in 2000 when he faced misdemeanor marijuana possession charges. **App. 53 (Tr. 103).**

[3] The firearm had a barrel that was a quarter of an inch shorter than allowed by law. **App. 78 (Tr. 201).**

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The DePriests had difficulty finding someone willing to represent them both. Initially, they met with three local attorneys. **App. 34 (Tr. 28); 53 (Tr. 104).** Each attorney advised them that they would represent Ms. DePriest but would not represent Mr. DePriest. **App. 34 (Tr. 28); 53 (Tr. 104).** The attorneys did not explain why they were only willing to represent Ms. DePriest. **App. 34 (Tr. 28); 53 (104).** The DePriests assumed this was because the case against Ms. DePriest was very weak compared to the case against Mr. DePriest. **App. 34 (Tr. 28); 53 (Tr. 104).**

After being unable to find local counsel, the DePriests contacted Respondent to represent them. **App. 34-35 (Tr. 28-29); 54 (Tr. 105).** They did so because Respondent was a marijuana legalization activist and they believed his background might be helpful for their cases. **App. 35 (Tr. 29).** Respondent agreed to represent both DePriests for a $12,000 fee. **App. 123-24.** This fee included all of Respondent's services through a nonjury trial.[4] **App. 123-24.**

Respondent had represented codefendants in other criminal cases. **App. 67 (Tr. 157).** When Respondent initially spoke with the DePriests, he advised them that representing criminal codefendants could create a conflict of interest and they would have to sign a conflict-of-interest waiver before he could represent them. **App. 35 (Tr. 30); 54 (Tr. 105).** The DePriests advised Respondent that they did not want to testify against each other . **App. 50 (Tr. 90); 74 (Tr. 188).**

[4] The fee agreement provided that if the DePriests chose jury trials, Respondent would charge an unspecified additional fee. **App. 123-24.**

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On January 23, 2012, Respondent sent a letter to the DePriests, which explained that: (1) for an attorney to represent criminal codefendants, the attorney must establish that there is no conflict of interest; (2) based upon his previous discussions with the DePriests, he believed no conflict of interest existed in representing them; (3) he often represented criminal codefendants, especially related codefendants; and (5) in 25 years of criminal defense work he had never had an actual conflict of interest arise when representing codefendants. **App. 123-24.** Respondent noted in his letter; however, that it was still possible for a potential conflict of interest to arise in his representation of them. As a result, he requested that they sign a waiver. **App. 123-24.** He also noted that if an actual conflict of interest arose he might be forced to withdraw. **App. 35 (Tr. 32); 123-24.**

Enclosed with Respondent's letter was a document entitled "Statement and Waiver of Conflict of Interest" ("Waiver"). It stated:

> The undersigned individual, [defendant's name], hereby acknowledges that he [she] has been advised of the existence of a potential conflict of interest between his [her] codefendant [codefendant's name], and that should an actual conflict of interest arise, it would place Dan Viets as his [her] attorney in an ethical dilemma, as previously discussed, in that if Dan Viets represents both defendants and if either is offered a disposition that would harm the other's position or require testimony against the other.
>
> The undersigned acknowledges further that he [she] is aware that he [she] can freely accept such an offer, if made, with such other attorney as he [she] may choose, but that Dan Viets will be forced to withdraw from

his [her] representation and that of his [her] codefendant if he [she] chooses to do so.

The undersigned defendant hereby states that it is not his [her] intention to cooperate in any way whatsoever with the prosecution to do anything that would adversely affect the interest of the other defendant. Further, the undersigned defendant acknowledges that he [she] has been advised that Dan Viets will not represent any individual who, while represented by Dan Viets, cooperates with the police or prosecution against the interest of any other individual regarding any victimless crime allegedly committed by any other individual.

By signing this document [defendant's name] agrees to waive such potential conflict and specifically requests that Dan Viets to represent both him [her] and his [her] codefendant [codefendant's name.]

App. 125-28.

The DePriests signed the Waivers and returned them to Respondent. **App. 36 (Tr. 34); 54 (Tr. 108); 125-28.** Respondent never discussed with the DePriests the advantages or disadvantages of using one attorney to represent them before they signed the Waivers. **App. 35 (Tr. 31); 55 (Tr. 109).** He also did not advise them that they should consult with outside counsel before signing the Waivers. **App. 55 (Tr. 109).** Respondent never advised the DePriests that a conflict of interest arises with joint representation when the culpability of one criminal codefendant is less than the other. **App. 36-37 (Tr. 36-37); 55 (Tr. 110).**

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The DePriests did not have any prior legal training nor any knowledge about how a conflict of interest might arise in their cases. **App. 45 (Tr. 71); 55 (Tr. 109).** Ms. DePriest's degree was in journalism and Mr. DePriest had trained as a gunsmith at a technical trade school. **App. 53 (Tr. 24); 52 (Tr. 100).**

The DePriests testified that when they signed the Waivers they believed that: (1) conflicts of interest usually only occurred when criminal codefendants wanted to testify against each other; (2) it was very unlikely that a conflict of interest would arise in their cases; (3) they were only waiving potential conflicts of interests, not actual conflicts of interests, and (4) if an actual conflict arose in their representation, Respondent would advise them of such and he would withdraw from representing at least one of them. **App. 36 (Tr. 26); 45 (Tr. 71-72); 54 (Tr. 107-08).**

2. Plea Negotiations And Motions Filed While The DePriests' Cases Were Before The Associate Circuit Court

Early in the representation, the DePriests advised Respondent that Mr. DePriest had been the one growing the marijuana and the illegal gun belonged to him. **App. 55 (Tr. 110); 130; 139.** Respondent also knew that the growing operation and gun were found in Mr. DePriest's bedroom. **App. 55 (Tr. 110); 130; 139.**

On March 19, 2012, the Prosecutor offered both Mr. and Ms. DePriest a sentence of 10 years on the two felony drug charges, with a recommendation that the sentences run

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concurrently, and that the Judge sentence them under Section 559.115, RSMo.[5] This offer was contingent upon the DePriests waiving a preliminary hearing and upon both DePriests accepting the offer. **App. 37 (Tr. 38); 129-32.** In a letter dated March 21, 2012, Respondent recommended that the DePriests reject the offer. **App. 129-32.**

On March 21, 2012, Respondent filed a Motion to Quash the Search Warrant and Suppress Evidence ("Motion To Suppress"). **App. 102; 113-14.** The police had conducted a warrantless search of the DePriests' condominium.[6] **App. 68 (Tr. 163-64).** Respondent believed that he had good grounds for challenging the search and had advised the DePriests of this. **App. 68 (Tr. 163-64); 102; 113-14.** On March 26, 2012, the Prosecutor notified Respondent that he was revoking his current offer due to Respondent filing his Motions to Suppress. **App. 133.** The Court held a Preliminary Hearing on May 7, 2012. **App. 102; 114.** On June 21, 2012, the Court denied Respondent's Motions to Suppress and bound the matter over for further proceedings in Circuit Court. **App. 102; 114.**

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[5] Section 559.115, RSMo, gives a judge the authority to release a defendant from the Department of Corrections within 120 days of beginning to serve a sentence and then allows the judge to place a defendant upon probation for the remainder of the sentence.

[6] The police claimed that the warrantless search was permissible and justified because the maintenance person reported that he saw something that resembled a pipe bomb. The "pipe bomb" was an empty PVC cylinder with plastic caps on each end. **App. 68 (Tr. 163-64).**

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3. Plea Negotiations And Motions Filed After The DePriests' Cases Were Bound Over To The Circuit Court

On February 13, 2013, Respondent wrote to the Prosecutor expressing a desire to negotiate a plea agreement. **App. 137.** On or about March 2, 2013, the Prosecutor made a plea offer to both DePriests of a 15-year sentence on Counts I and II with a recommendation that the sentences run concurrently, and that the Judge sentence them pursuant to Section 559.115. Per the offer, the Prosecutor would dismiss Count III. **App. 139-140.**

In a March 2, 2013, email, Respondent recommended that the DePriests reject the offer and consider entering an "open guilty plea."[7] Respondent explained that the DePriests could then request that the Judge grant a suspended imposition of sentence and place them on probation. **App. 139-40.** Respondent also advised the DePriests that they could take their cases to trial but it would be very difficult and dangerous for Mr. DePriest to do so because most of the incriminating evidence was in Mr. DePriest's bedroom. Respondent noted that Ms. DePriest could go to trial and place blame on Mr. DePriest. **App. 139-40.** The DePriests did not accept the plea offer. **App. 38 (Tr. 44).**

On March 7, 2013, Respondent wrote to the DePriests and advised them of what had occurred in Court on March 6, 2013. **App. 141-42.** In the letter, Respondent also advised he did not think the Prosecutor had any case against Ms. DePriest for cultivation and the case against Ms. DePriest for possession was very weak. **App. 141-42.**

[7] An "open guilty plea" is one where a defendant is pleading without any assurance from the prosecution regarding the recommended sentence.

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In early March 2013, a credit card processing company made an electronic withdrawal from the DePriests' tobacco shop checking account. **App. 143.** This caused several checks that Ms. DePriest had written on the account to "bounce." **App. 143.** Ms. DePriest went to the bank, transferred money into the account to cover the checks, and after the checks cleared, she closed the account. Ms. DePriest failed to realize that one check remained outstanding. **App. 143.** The bank returned the check when the payee attempted to cash it. **App. 143.** Ms. DePriest did not receive notice of the returned check from the bank. **App. 143.** The payee turned the check over to the Prosecutor for collection. **App. 39 (Tr. 46); 143.** A few weeks later, the police arrested Ms. DePriest when she went to the Prosecutor's office to pay the returned check. **App. 37 (Tr. 46).**

On March 7, 2013, Respondent filed a second Motion to Suppress. **App. 68 (Tr. 164); 106; 118.** Respondent continued to believe that the DePriests had good grounds for the suppression of the evidence due to the warrantless search and seizure. **App. 68 (Tr. 164); 106; 118.**

On April 30, 2013, the Prosecutor moved to revoke Ms. DePriest's bond on the felony charges after he charged her with the misdemeanor crime of passing a bad check**. App. 118.**

On May 9, 2013, Respondent wrote to the Prosecutor and offered to waive the suppression hearing and for Mr. DePriest to plead guilty to Count I in exchange for the Prosecutor recommending a suspended imposition of sentence for Mr. DePriest. **App. 145-46.** Respondent suggested Ms. DePriest would consider pleading guilty to a misdemeanor marijuana possession charge with a suspended imposition of sentence and the dismissal of

the gun charge. **App. 145-46.** Respondent pointed out that there was no evidence that Ms. DePriest participated in the growing of the marijuana and asserted that the firearm belonged to her brother. **App. 145-46.**

On May 24, 2013, the Prosecutor made an offer on Ms. DePriest's case only. **App. 152.** He offered to allow Ms. DePriest to plead guilty to one B class felony. **App. 152.** In turn, he would dismiss the other two counts and he would recommend a 15-year sentence pursuant to Section 559.115. **App. 152.** He also agreed to withdraw his motion to revoke Ms. DePriest's bond, allow her to plead guilty immediately, and defer her sentencing until June. **App. 152.** The Prosecutor advised that if Ms. DePriest did not accept the offer he would move forward with her bond revocation hearing. **App. 152.** He indicated that he would then make an offer that would require Ms. DePriest to testify against her brother. **App. 152.** He went on to note that if Ms. DePriest refused to testify against her brother he would file a motion to disqualify Respondent. **App. 152.**

Respondent recommended to Ms. DePriest that she turn down the Prosecutor's offer because he did not believe she was guilty of the charged felonies. **App. 153-55.** Ms. DePriest did not accept the Prosecutor's offer. **App. 115-22**. On May 24, 2013, the Court revoked Ms. DePriest's bond. **App. 119.** Ms. DePriest was then incarcerated in the St. Francois County jail. **App. 40 (Tr. 49).** The conditions at the jail were very poor and Ms. DePriest soon became desperate to get out of the jail. **App. 40 (Tr. 49).**

On June 17, 2013, Respondent asked the Prosecutor whether he would consent to Ms. DePriest's release from jail if she made an "open plea" with the understanding she would ask that the Judge grant her probation. **App. 157-58.** The Prosecutor made a

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counteroffer. He offered to consent to the reinstatement of Ms. DePriest's bond and to recommend that the Judge impose a 120-day sentence. **App. 157-58.** However, Ms. DePriest had to enter a guilty plea to all charges and agree not to testify upon her brother's behalf**. App. 157-58.**

While in jail, Ms. DePriest wrote to Respondent and urged him to make plea offers to the Prosecutor which would include her release from jail until she was sentenced. **App. 40 (Tr. 50).** Mr. DePriest knew that his sister was not doing well in jail and he wanted to help her. **App. 57 (Tr. 118).**

Mr. DePriest advised Respondent that he would plead guilty to all pending charges if the Prosecutor agreed to a suspended imposition of sentence and the Prosecutor consented to the reinstatement of Ms. DePriest's bond. **App. 57 (Tr. 118); 161.** The Prosecutor refused Mr. DePriest's offer. **App. 159.** The Prosecutor countered with an offer to reinstate Ms. DePriest's bond if both DePriests pled guilty, both agreed to a 15-year sentence, and both agreed to serve 120 days in jail. **App. 159.**

On June 28, 2013, the Prosecutor made yet another offer. **App. 162.** He advised that he would dismiss Ms. DePriest's bad check charge and consent to the reinstatement of her bond in exchange for both DePriests pleading guilty to the pending drug and gun charges. **App. 162-63**. Ms. DePriest declined this offer advising Respondent she was not guilty of the felony charges brought against her. **App. 163.**

On June 28, 2013, Respondent presented the DePriests' second Motions to Suppress to the Circuit Judge. **App. 107; 119.** The Judge asked Respondent and the Prosecutor to brief the issue. **App. 163.**

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On July 31, 2013, Respondent advised Ms. DePriest that he believed Mr. DePriest should plead guilty. Then he noted that Mr. DePriest could testify on Ms. DePriest's behalf at her trial. **App. 165-67.** He also advised that if Ms. DePriest went to trial, "we certainly should win the trial." **App. 165-67.**

Ms. DePriest became more despondent and desperate the longer she remained in the county jail. **App. 41 (Tr. 53-54).** Respondent advised Ms. DePriest that if she did an "open plea" it was likely the Judge would impose probation because she was a first-time offender. **App. 165-67.**

On August 13, 2013, Respondent advised the Prosecutor that Ms. DePriest would enter a guilty plea to the felony offense of possession of more than 35 grams of marijuana in exchange for a recommendation of probation and the dismissal of all other charges. **App. 168.** The Prosecutor rejected this offer. **App. 41 (Tr. 54).**

4. The DePriests' Plea Agreements, Sentencing, And Post-Conviction Motions

The Court scheduled a pretrial hearing for August 16, 2013. On August 16, 2013, the Court had not ruled upon the DePriests' Motions to Suppress. **App. 107-08; 169.** When Mr. DePriest went to court on August 16, 2013, he had no plans to plead guilty. **App. 56 (Tr. 113-14).** Mr. DePriest strongly believed that the search and seizure of his home had been illegal and he did not want to entertain any more plea negotiations until the Judge ruled upon the Second Motions to Suppress. **App. 56 (Tr. 113-14).** Respondent was aware of Mr. DePriest's wishes. **App. 56 (Tr. 113-14).**

Immediately prior to the pretrial hearing, the Prosecutor made a plea offer to Ms. DePriest. The Prosecutor offered to drop the firearm charge, drop the bad check charge,

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and consent to the reinstatement of Ms. DePriest's bond while she was awaiting sentencing if she entered an "open plea" to both pending marijuana felony charges. **App. 41 (Tr. 54).** Initially, the offer did not include any provisions regarding Mr. DePriest. **R. 198.** However, a few minutes after Ms. DePreist agreed to accept the offer, the Prosecutor then made the offer contingent upon Mr. DePriest entering an "open guilty plea" to all charges. **App. 169.**

Mr. DePriest had five minutes to decide what he wanted to do. **App. 41 (Tr. 55); 58 (Tr. 122); 69 (Tr. 168); 169.** He asked Respondent for advice and Respondent shrugged his shoulders. **App. 58 (Tr. 122).** Respondent did not explain to Mr. DePriest that if he pled guilty he could no longer raise the argument of an illegal search of his home on appeal or in postconviction relief motions. **App. 58 (Tr. 122).** Mr. DePriest decided to plead guilty so that the Prosecutor would recommend the reinstatement of Ms. DePriest's bond. **App. App. 171-72.**

On November 12, 2013, the Court sentenced Mr. DePriest to 15 years for the Class B felony of producing a controlled substance, 15 years for the Class B felony of possession of a controlled substance with the intent to distribute, and 7 years for the class C felony of unlawful possession of a weapon. **App. 109.** The sentences for the drug charges were to run concurrently with the weapon charge to run consecutively for a total sentence of 22 years. **App. 109.** On November 12, 2013, the Court sentenced Ms. DePriest to 15 years for the Class B felony of producing a controlled substance and 15 years for the Class B felony of possession of a controlled substance with the intent to distribute. **App. 120.** The sentences were to run concurrently. **App. 120.**

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Respondent never advised the DePriests that an actual conflict had arisen in their representation nor did he ask them to sign any additional conflict waivers. **App. 37 (Tr. 37-39); 38 (Tr. 44); 39 (Tr. 45, 48); 40 (Tr. 52); 41 (Tr. 53); 48 (Tr. 82), 55 (Tr. 110-12); 56 (Tr. 116); 57 (Tr. 118, 120), 58 (Tr. 122).**

In 2014, both DePriests filed pro se Rule 24.035 Motions alleging ineffective assistance of counsel. **App. 210-253.** Their motions did not address any alleged conflict of interest upon the part of Respondent because they were unaware that such existed. **App. 39 (Tr. 94); 58 (Tr. 135); .** The Court appointed Public Defenders to represent the DePriests and the Public Defenders raised the conflict of interest issue in amended motions. **R. 46 (Tr. 94); 53 (Tr. 123-24).**

The Motion Court overruled their motions without a hearing. **App. 179.** The DePriests appealed. **App. 178.** In February 2017, this Court vacated the DePriests' judgments and remanded the cases to the Motion Court for an evidentiary hearing on the conflict issue. **App. 178-205.** After the remand, the Prosecutor refused to schedule an evidentiary hearing. **App. 42 (Tr. 60).**

In March 2018, the DePriests reached an agreement with the Prosecutor. The DePriests agreed to enter guilty pleas to the same crimes as they had in 2013 and the Prosecutor agreed to recommend sentences equal to the time they had already served. **App. 37 (Tr. 60); 58 (Tr. 124); 110; 122.** The Trial Court accepted this agreement. **App. 37 (Tr. 60); 58 (Tr. 124); 110; 122.** When the DePriests made the agreement, the prison had already released Ms. DePriest. She served four years. Mr. DePriest was still in prison and had served four-and-one-half years. **App. 43 (Tr. 61); 58-59 (Tr. 124-25); 110; 122.**

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5. Respondent's Testimony Regarding Conflict Of Interest Law

Respondent testified that he had researched conflicts of interest law and had found no authority "for the proposition that different levels of culpability create a conflict" or that group plea offers created a conflict. **App. 68 (Tr. 161-62); 75 (Tr. 191); 73 (Tr. 183-84).** He indicated that when researching the issue, he had looked at the Missouri Rules and Missouri Court of Appeals' decisions but he had not looked into federal law on the issue. **App. 73-74 (Tr. 184-85).** He claimed this was not necessary because the DePriests cases were in State Court. He stated, however, he knew that the United States Supreme Court's decision in *Holloway vs. Arkansas*, 435 U.S. 475, 490-91 (1978), held that it may be in the best interest for codefendants to have the same counsel. **App. 74 (Tr. 185).**

He also testified that he was not conceding that a conflict of interest existed in his representation of the DePriests. **App. 74 (Tr. 183); 75 (Tr. 190).**

The Panel questioned Respondent about what he believed Comment 23 to Rule 4-1.7 meant.[8] Respondent stated the comment allowed representation of criminal codefendants if the codefendants were close family members because this created an extraordinary situation. He also added that his actions were guided by what he saw other attorneys doing. **App. 80 (Tr. 210-11).**

[8] Comment 23 to Rule 4-1.7 provides that the potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.

6. Respondent's Character Witnesses' Testimony

Retired Boone County Circuit Judge Gary Oxenhandler testified that he has known Respondent for 34 years, Respondent has an outstanding reputation in the legal community, and Respondent is known for working hard on behalf of his clients. **App. 64-66 (Tr. 148-53).** Retired Missouri Supreme Court Judge Michael Wolff testified that he has known Respondent since the 1980s, in the past he has referred people with marijuana possession charges to Respondent, and Respondent has a reputation for being a good lawyer. **App. 66 (Tr. 153-54).**

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POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-1.7 (CONFLICT OF INTEREST - CURRENT CLIENTS) WHEN HE REPRESENTED CRIMINAL CODEFENDANTS DAVID AND NATALIE DEPRIEST BECAUSE THEY HAD NOT WAIVED CONFLICTS AND THERE WAS A DIFFERENCE IN THE LEVEL OF THEIR CULPABILITIES AND THE PROSECUTOR WAS MAKING GROUP PLEA OFFERS TO THEM.

LaFrance v. State, 585 S.W.2d 317 (Mo. Ct. App. W.D. 1979)

DePriest v. State, 510 S.W.3d 331, 341 (Mo. banc 2017)

In re Schaeffer, 824 S.W.2d 1, 3 (Mo. 1992)

Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978)

RULE 4-1.7

ABA Criminal Justice Standards for the Defense Function

Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct*, 39 St. Mary's L. J. 717, 758 (2008)

Gary Tobias Lowenthal, *Why Representing Multiple Defendants Is A Bad Idea Almost Always*, Crim. Just., Spring 1988

Tigran W. Elred, *The Psychology of Conflicts Of Interest In Criminal Cases*, 58 U. Kan. L. Rev. 43, 43 (Oct. 2009)

William A. Knox, Mo. Prac., *Criminal Practice & Procedure*, Section 6:6 (3d ed.)

John Stewart Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities*, 62 Minn. L. Rev. 119, 125 (1978)

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POINTS RELIED ON

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST THAT SUSPENSION IS AN APPROPRIATE LEVEL OF DISCIPLINE FOR AN ATTORNEY WHO KNOWS OF A CONFLICT OF INTEREST AND DOES NOT FULLY DISCLOSE TO THE CLIENT THE POSSIBLE EFFECT OF THAT CONFLICT AND THE ATTORNEY CAUSES INJURY OR POTENTIAL INJURY TO THE CLIENT.

In re Schenck, 194 P.3d 804, 815 (Or. 2008)

In re Howard, 912 S.W.2d 61 (Mo. banc 1995)

DePriest v. State, 510 S.W.3d 331 (Mo. 2017)

ABA Standards for Imposing Lawyer Sanctions (1991)

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ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-1.7 (CONFLICT OF INTEREST - CURRENT CLIENTS) WHEN HE REPRESENTED CRIMINAL CODEFENDANTS DAVID AND NATALIE DEPRIEST BECAUSE THEY HAD NOT WAIVED CONFLICTS AND THERE WAS A DIFFERENCE IN THE LEVEL OF THEIR CULPABILITIES AND THE PROSECUTOR WAS MAKING GROUP PLEA OFFERS TO THEM.

In matters of attorney discipline, the Panel's decision is only advisory. *In re Shelhorse,* 147 S.W.3d 79, 80 (Mo. banc 2004). This Court reviews the evidence de novo and reaches its own conclusions of law. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.* An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his or her license. *In re Shelhorse*, 147 S.W.3d at 80. A violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

Rule 4-1.7 addresses conflicts of interest between current clients. This rule exists to protect an attorney's duty of loyalty and independent judgment to his or her client. Comment 1 to Rule 4-1.7. As this Court has noted, "a lawyer . . . attempting, to serve masters with conflicting interests cannot give to either the loyalty each deserves." *State v.*

Crockett, 419 S.W.2d 22, 29 (Mo. 1967). It is well-understood that joint representation of parties with conflicting interests impairs each client's legitimate expectation that his or her attorney will devote his or her entire energies to the client's interests. *Great Lakes Constr., Inc. v. Burman*, 114 Cal. Rptr. 3d 301, 307 (Cal. App. 2010).

Rule 4-1.7 creates a general prohibition against the representation of a client if the representation creates a "concurrent conflict of interest." A "concurrent conflict of interest" exists when there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client. Rule 4-1.7(a). However, the rule does permit such if certain requirements are met. The foremost being that each affected client gives informed consent, confirmed in writing. Rule 4-1.7(b)(3).

To determine whether Respondent violated Rule 4-1.7 it is necessary to first determine whether Respondent's representation of the DePriests created a concurrent conflict and if so, then whether the DePriests waived the conflict. "Criminal cases are fraught with the risk of conflicting interests." Tigran W. Elred, *The Psychology of Conflicts Of Interest In Criminal Cases*, 58 U. Kan. L. Rev. 43, 43 (Oct. 2009). Avoiding conflicts of interest in criminal cases is crucial as the Sixth Amendment's right to effective assistance of counsel includes the right to be represented by conflict-free counsel. *Wood v. Georgia,* 450 U.S. 261, 271 (1981); *State ex rel. Fleer v. Conley,* 809 S.W.2d 405, 408 (Mo. App. E.D. 1991).

The risk of a conflict existing or developing in a criminal case is especially likely when one attorney represents codefendants. Elred, *supra,* at 43. As a result, the comments to Rule 4-1.7 warn that ordinarily, a lawyer shall decline to represent more

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than one criminal codefendant. Comment 23 to Rule 4-1.7. Similarly, the ABA Criminal Justice Standards for the Defense Function ("ABA Standards - Defense Function") provide that a defense attorney should not undertake the representation of more than one client in the same criminal case except when necessary to secure counsel for preliminary matters such as an application for bail.[9] See Standard 4-1.7(d).

It is well recognized that conflicts develop with joint representation when there are differences in the codefendants' circumstances. Gary Tobias Lowenthal, *Why Representing Multiple Defendants Is A Bad Idea Almost Always*, Crim. Just., Spring 1988. An attorney's duty of loyalty prohibits the attorney from comparing the two defendants. If the attorney makes these comparisons the attorney puts one defendant at a disadvantage over the other. *Id.* In turn, if the attorney fails to point out the differences, the codefendant with the more favorable status or history suffers. In *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978), the United States Supreme Court acknowledged one of the primary problems with joint representation. The Court held "in a case of joint representation of conflicting interests . . .the evil . . . is in what the advocate finds himself compelled to *refrain* from doing." *Id*. As the Eighth Circuit noted in *United*

[9] In *Strickland v. Washington,* 466 U.S. 668, 688–89 (1984), the United States Supreme Court noted that the ABA Standards - Defense Function reflect prevailing norms of practice and serve as a guide to determine whether defense counsel's actions were reasonable in ineffective assistance of counsel claims.

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States v. Unger, 665 F.2d 251, 255 (8th Cir. 1981), an "actual conflict"[10] occurs when counsel cannot use his or her best efforts to exonerate one defendant for fear of implicating the other. Defense counsel should not be in a situation of either pursing or abandoning defenses and tactics that would help one defendant because it would hurt the other. *United States v. Auerbach,* 745 F.2d 1157, 1162 (8th Cir. 1984).

Plea negotiations are particularly fraught with conflicts when there is joint representation of codefendants. Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct*, 39 St. Mary's L. J. 717, 758 (2008); 19 William A. Knox, Mo. Prac., *Criminal Practice & Procedure*, Section 6:6 (3d ed.) The level of culpability of a defendant is often a major bargaining point in plea negotiations where there are multiple defendants. When the attorney represents codefendants the attorney's hands are bound from addressing differing levels of culpability by his or her duty of loyalty to each client. *Holloway,* 435 U.S. at 490-91 (1978). Commentators and courts have routinely acknowledged this fact. See John

[10] For Sixth Amendment purposes, an "actual conflict of interest" arises "if, during the course of the concurrent representation, the defendants' interest diverge with respect to a material factual or legal issue or to a course of action." *State v. DePriest,* 510 S.W.3d 331, 338 (Mo. banc 2017). It differs from a "potential conflict" which occurs almost any time "when one counsel represents two or more criminal defendants facing charges arising out of the same facts and circumstances." *Id.* A potential conflict is not sufficient to render a guilty plea unknowing, involuntary, or unintelligent. *Id.*

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Stewart Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities*, 62 Minn. L. Rev. 119, 125 (1978) (Differences in the levels of codefendants' culpability creates a conflict of interest in plea negotiations); Brian R. Means, *Postconviction Remedies,* Ineffective Assistance of Counsel, Section 35:31 (June 2021) ("At the plea-bargaining process, a conflict based on concurrent representation may prevent defense counsel 'from effectively engaging in any separate plea negotiations on one party's behalf without determinately affecting codefendants.'")

For example, in *United States v. Allen,* 831 F.2d 1487, 1496 (9th Cir. 1987), defense counsel for seventeen defendants devised a "culpability list" for purposes of plea bargaining which listed each defendant and the sentence defense counsel was requesting based upon what the prosecution knew about each defendant. The Ninth Circuit explained that such "culpability list" played one defendant against another and as a result created an "actual conflict." *See also Camera v. Fogg,* 658 F.2d 80 (2d Cir. 1981) (Different degrees of culpability resulted in attorney for codefendants being unable to raise different defenses for the codefendants.); *United States v. Almany*, 621 F. Supp. 2d 561, 575 (E.D. Tenn. 2008) (Differences in culpability put counsel in the position of constantly evaluating how any argument he made would affect both his clients and created conflict).; *State v. Duffy*, 453 P.3d 816, 827 (Ariz. Ct. App. 2019) (An actual conflict existed when one attorney simultaneously represented two codefendants where one was placed at odds with the other more culpable codefendant).

In *LaFrance v. State,* 585 S.W.2d 317 (Mo. Ct. App. W.D. 1979), the Missouri Court of Appeals, Western District, addressed this issue. In this case, the State charged

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four inmates with second-degree murder with one public defender representing all four defendants. The defendants had varying degrees of culpability (one admitted stabbing the deceased causing his death, one admitted hitting the deceased with a golf club, one admitted hitting the deceased with a mop handle, and movant admitted that he swung at the deceased with a knife but denied making contact). The prosecutor made a plea offer to dismiss the charges against three of the defendants if one of them would plead guilty. Movant initially claimed he acted in self-defense but eventually pled guilty. He later sought to set aside the plea. The court found that a conflict existed because the public defender could not pursue movant's claim of self-defense without bringing attention to the other defendants' more culpable actions.

Likewise, when there is joint representation, "package plea offers" where both defendants must plead to the same disposition create conflicts of interest if there are differences in the defendants' culpability. See *DePriest v. State*, 510 S.W.3d 331, 341 (Mo. banc 2017). [11] With group package plea offers, counsel cannot advise the less

[11] This Court's decision is based upon David and Natalie DePriests' Rule 24.035 Motions in their underlying criminal cases. This Court presumed the facts alleged in the DePriests' amended Rule 24.035 Motions were true as the Motion Court had denied the DePriests an evidentiary hearing. This Court remanded the cases to the Motion Court for an evidentiary hearing on the issue. As discussed in the Fact section of this Brief, the Prosecutor refused to schedule the hearing and the DePriests reached an agreement with the Prosecutor to plead to the same crimes as previously pled for time served.

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culpable defendant to reject the offer without potentially harming the defendant who would fare worse if the matter went to trial. "The result may be that one or more of the defendants will be the sacrificial lambs of a package deal." See Geer, *supra,* at 126. Thus, the attorney may end up putting pressure on one defendant to accept the plea agreement so that the other defendant receives the benefit of a favorable offer. *Thomas v. Foltz*, 818 F.2d 476, 482 (6th Cir. 1987).

Respondent's representation of the DePriests was laden with conflicts from the outset. The first actual conflict arose based upon the difference in the levels of culpability of the DePriests. Mr. DePriest had a much higher level of culpability than Ms. DePriest. The police found the marijuana plants and the illegal gun in Mr. DePriests' bedroom. **App. 53 (Tr. 101).** Early in the representation, the DePriests advised Respondent that Mr. DePriest had been the one growing the marijuana and the illegal gun belonged to him. **App. 55 (Tr. 110); 130; 139.** Respondent also knew from early on in the representation that the growing operation and gun were found in Mr. DePriest's bedroom. **App. 55 (Tr. 110); 130; 139.**

In his communications to the DePriests, Respondent discussed the differing levels of culpability. For example, in a March 2, 2013, email to the DePriests, Respondent advised that while both parties could take their cases to trial, he believed it would be difficult and dangerous for Mr. DePriest to do so. He noted that the police found most of the evidence in Mr. DePriest's bedroom. **App. 139.** On March 7, 2013, Respondent wrote to the DePriests and advised, among other things, that he did not think the Prosecutor had any case against Ms. DePriest for cultivation and the case against her for possession was

very weak. **App. 141-42.** On May 29, 2013, Respondent again advised Ms. DePriest that he did not think she was guilty of any felony charges. **App. 153-54.**

In his May 9, 2013, letter to the Prosecutor, Respondent acknowledged the difference in the level of culpability of his clients. He pointed out that there was no evidence that Ms. DePriest participated in the growing of the marijuana and asserted that the firearm belonged to Mr. DePriest. **App. 145-46.** Respondent's actions violated his duty of loyalty to Mr. DePriest because, in effect, he pointed out to the Prosecutor that Mr. DePriest was guilty of the crimes charged as there was no one else living in the condominium.

Actual conflicts arose when the Prosecutor made group plea offers to the DePriests before Ms. DePriest was jailed on the bad check charge.[12] These group plea offers were more favorable to Mr. DePriest as it was more likely he would be convicted if they went to trial. Ms. DePriest's best strategy would have been to go to trial and place blame on her brother. **App. 139-40.** As a result, Respondent had a conflict regarding whether he should recommend the two accept any of the plea offers. In all cases, Respondent recommended that they reject the offers. **App. 129-30; 139-40.**

A conflict arose when the Prosecutor threatened to make an offer whereby Ms. DePriest would have to testify against her brother. **App. 152.** When this issue arose, Respondent could not advise Ms. DePriest about the wisdom of testifying against her

[12] The Prosecutor made group plea offers on March 19, 2012, and March 2, 2013. **App. 129-31; 139-40.**

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brother given his duty of loyalty to Mr. DePriest. Even though Ms. DePriest advised Respondent at the beginning of the representation, that she did not want to testify against her brother, she was entitled to competent, honest advice from her counsel about the possible benefits of doing so. **App. 50 (Tr. 90); 74 (Tr. 188).**

Finally, the fourth conflict arose after the court revoked Ms. DePriest's bond and placed her in the county jail. Ms. DePriest was desperate to get out of the county jail. The Prosecutor began making plea offers that required Mr. DePriest to plead guilty in order for the Prosecutor to recommend the reinstatement of Ms. DePriest's bond. **App. 157-58.** This pitted Ms. DePriest's best interests against those of her brother's.

In fact, this situation is very similar to the facts of *Ford v. Warden,* 749 F.2d 681 (1985). In the *Ford* case, up to the day of trial, one defendant wished to go to trial and his codefendant/brother wanted to plead guilty. The Eleventh Circuit noted that their attorney "however good his intentions, could not have represented both of these codefendants" because it was "obvious that the two defendants had divergent interests." *Id.* at 682-83.

Respondent's duty of loyalty to Ms. DePriest prevented Respondent from advising Mr. DePriest about the ramifications of his pleading guilty to assist his sister. On August 16, 2013, Respondent was given five minutes to decide whether he would plead guilty. **App. 41 (Tr. 55); 58 (Tr. 122); 69 (Tr. 168); 169.** If he did not, the Prosecutor would not consent to the reinstatement Ms. DePriest's bond. Mr. DePriest asked Respondent what he should do. **App. 58 (Tr. 122).** Instead of advising Mr. DePriest about the ramifications of pleading guilty, Respondent just shrugged his shoulders. **App. 58 (Tr.**

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122). Because of his duty of loyalty to Ms. DePriest, Respondent could not advise Mr. DePriest that he was giving up the right to appeal on the grounds of an illegal search and seizure. **App. 58 (Tr. 122).** This was an issue that Mr. DePriest felt strongly about. Like the attorney in the *Ford* case, it should have been obvious to Respondent that his two clients had divergent interests.

It is clear that multiple conflicts existed with Respondent representing the DePriests. Respondent has asserted that even if conflicts existed the DePriests waived them when they signed the Waivers. Rule 4-1.7 permits an attorney to obtain a waiver of a conflict of interest in certain circumstances. Subsection (b) of the Rule 4-1.7 provides that notwithstanding the existence of a concurrent conflict of interest a lawyer may represent a client if :

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) each affected client gives informed consent, confirmed in writing.

For a client to waive a conflict, the waiver must be knowing, intelligent, and voluntary. *In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. 1992). This is a very high standard to meet, especially in a criminal case where a defendant's Sixth Amendment right to effective assistance of counsel comes into play. One cannot waive what one does not know. *Hoffman v. Leeke*, 903 F.2d 280, 289 (4th Cir. 1990). To provide a valid waiver, the client must be aware of the conflict, realize the consequences to his or her defense if he or she continues with conflicted counsel, and be aware of his or her right to obtain

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other counsel. *United States v. Levine, 794 F.2d 1203, 1206* (7th Cir. 1986). It is not enough for an attorney to warn his clients that there are potential conflicts and ask them to waive them. The attorney must explain in detail the pitfalls that may arise in the case which would make it desirable for the clients to have separate counsel. *In re Clauss,* 711 N.W. 2d 1, 3 (Iowa 2006). Comment 18 to Rule 4-1.7 spells out these requirements. It provides that when representing multiple clients in a single matter the possible effects on loyalty, confidentiality, and the attorney-client privilege must be discussed with the codefendants along with the advantages and risks of the dual representation. The codefendants should also have the advice of independent counsel before agreeing to waive a conflict. *State v. McShane,* 87 S.W.3d 256, 263 (Mo. banc 2002).

The Waivers the DePriests signed did not constitute "informed consent" as required by Rule 4-1.7(b). Respondent did not advise the DePriests that they should consult with another attorney before signing the Waivers. **App. 55 (Tr. 109).** The DePriests did not "know" when conflicts might arise in their cases. Thy had no legal training, little experience with the criminal justice system and little to no experience in hiring an attorney. **App. 45 (Tr. 71); 55 (Tr. 109).** The Waivers did not disclose that different levels of culpability or group plea offers create conflicts. **App. 125-28.** The Waivers did not address the pitfalls that occur with joint representation or address possible effects on loyalty, confidentiality, or the attorney-client privilege. **App. 125-28.** The Waivers only reference testimony against the other codefendant or cooperation with the police or prosecution as creating conflicts. **App. 125-28.** In addition, the letter Respondent sent with the Waivers led the DePriests to reasonably believe that no conflict would

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develop unless they decided they wanted to turn on each other. **App. 36-37 (Tr. 36-37); 55 (Tr. 110); 123-24.**

At the hearing, Respondent claimed that even if assuming *arguendo* conflicts had existed and the Waivers were insufficient, he should not be disciplined because he did not know conflicts existed. Respondent even asserted that he had researched whether differences in culpability and/or group plea offers created conflicts and there was no authority for such in Missouri. **App. 68 (Tr. 161-62); 73.**

Respondent is wrong in his assertion. First, lawyers should not be allowed to avoid discipline for ethical lapses simply by claiming they did not know of a particular rule or its interpretation. To allow such would make the Rules of Professional Conduct impossible to enforce. *In re Johnson,* 84 P.3d 367, 641 (Mont. 2004). Ignorance of the Rules of Professional Conduct is no defense to their violation. Lawyers admitted to practice in a state are deemed to know the Rules of Professional Conduct and must act in conformity with the rules. *Attorney Grievance Com'n of Maryland v. Stein,* 819 A.2d 372, 379 (Md. 2003).

Second, a Missouri Court had addressed the issue in *LaFrance v. State,* 585 S.W.2d 317 (Mo. Ct. App. W.D. 1979). Third, Comment 23 to Rule 4-1.7 and the ABA Standards - Defense Function provided notice to Respondent that he should avoid representing criminal codefendants. Fourth, as discussed above, numerous commentators and courts from other jurisdictions had opined that different levels of culpability and group plea bargains created conflicts of interest. Because the DePriests' right to effective assistance of counsel was at stake, Respondent should have looked to federal case law.

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Finally, the conflicts should have been obvious to Respondent. By definition, a conflict of interest is "a situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially adverse interest of both parties." If Respondent had merely analyzed the situation he should have realized that his clients' interests were at odds with each other. If it is better for one defendant to go to trial and the other to plead guilty, it should be apparent to an attorney that the clients have divergent interests and a conflict exists.

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ARGUMENT

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST THAT SUSPENSION IS AN APPROPRIATE LEVEL OF DISCIPLINE FOR AN ATTORNEY WHO KNOWS OF A CONFLCIT OF INTEREST AND DOES NOT FULLY DISCLOSE TO THE CLIENT THE POSSIBLE EFFECT OF THAT CONFLICT AND THE ATTORNEY CAUSES INJURY OR POTENTIAL INJURY TO THE CLIENT.

When determining an appropriate penalty for the violation of the Rules of Professional Conduct, this Court assesses the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Since its decision in *In re Storment,* 873 S.W.2d 227 (Mo. banc 1994), this Court has often turned to the ABA Standards for Imposing Lawyer Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose. ABA Standard 3.0 states that a court should look at four primary factors in determining which sanction is appropriate. The factors are: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the conduct; and (4) aggravating and mitigating circumstances.

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ABA Standard 4.3 governs sanctions for conflict of interest violations. Informant believes ABA Standard 4.32 is most applicable. It provides that absent aggravating or mitigating circumstances, 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.[13] Under this standard, the accused does not have to be aware that his or her conduct violates a disciplinary rule. *In re Schenck*, 194 P.3d 804, 815 (Or. 2008). "Knowingly" includes situations where the attorney acts with "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Definitions of ABA Standards. "In other words, the accused must know the essential facts that give rise to the violation." *Id.*

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[13] It differs from Standard 4.33 which suggests a reprimand is generally appropriate when the lawyer is negligent in determining whether the representation of a client may be materially affected by another client. The ABA Standards define "negligence" as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.* The ABA Standards are consistent with this Court's holding in *In re Howard,* 912 S.W.2d 61 (Mo. banc 1995), regarding the level of discipline appropriate for conflicts of interest. This Court noted that in conflict of interest cases a reprimand is appropriate only if the attorney's actions were negligent. *Id.* at 64.

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Here, Respondent clearly was aware that: (1) he was representing criminal codefendants, (2) there was a difference in their culpability levels, and (3) the Prosecutor was making plea offers that required them to both plead guilty to the same crimes. Moreover, Respondent knew that on August 16, 2013, (1) Mr. DePriest did not want to plead guilty, (2) Ms. DePriest wanted to get out of the county jail, and (3) the only way that the Prosecutor would agree to the release of Ms. DePriest from the county jail was if both Mr. and Ms. DePriest pled guilty to the drug crimes. Thus, Respondent knew of the essential facts giving rise to the violation and accordingly he acted "knowingly."

The ABA Standards define "injury" as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct." Definitions of ABA Standards. The ABA Standards defines "potential injury' " as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id.*

Respondent's conduct caused either injury or potential injury to the DePriests. As the United States Supreme Court has noted when an attorney represents multiple defendants in a plea agreement and the defendants' interests diverge, prejudice or harm to the defendants is presumed. *DePriest v. State,* 510 S.W.3d 331 (Mo. 2017). This is because the conflict affects the defendant's right to effective assistance of counsel. So, at a minimum, there was potential harm to the DePriests.

Next, it is necessary to consider mitigating and aggravating factors. Mitigating factors do not serve as a defense to a finding of misconduct, but they may justify a

downward departure from the presumptively proper discipline.[14] *In re Farris,* 472 S.W.3d 549, 562 (Mo. banc 2015). During the hearing, Respondent provided evidence of his good character in the legal community as a mitigating factor. **App. 64-66 (Tr. 148-54).** Informant did not contest Respondent's evidence.

At the hearing, Respondent argued delay in the proceedings was a mitigating factor. Informant does not believe there was undue delay in the proceedings so as to create a mitigating factor. While Respondent's conduct occurred in 2012 and 2013, it took several years for the cases to move through the post-conviction appellate process. This Court issued its opinion in 2017. The issue still was not ripe for action by Informant until the parties reached a new plea deal in April 2018 and the underlying matter was concluded. Informant brought this action in September 2020. Informant asserts that his office acted in a reasonable amount of time.

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[14] ABA Standard 9.32 sets forth the following mitigating factors: (a) absence of prior disciplinary records; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify the consequences of misconduct; (e) full and free disclosure to the disciplinary board or cooperative attitude toward the proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency when certain conditions are met; (j) delay in disciplinary proceedings; (k) interim rehabilitation; (l) imposition of other penalties or sanctions; (m) remorse; and (n) remoteness of prior offenses.

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There are several aggravating factors.[15] Two of which are particularly troubling to Informant. The first is Respondent's refusal to acknowledge that conflicts of interest arise when codefendants have different levels of culpability and/or a prosecutor offers group pleas. **App. 68 (Tr. 161-62); 75 (Tr. 191); 73 (Tr. 183-84).** In Informant's opinion, this increases the chance that Respondent will engage in repeated behavior in the future. Secondly, the DePriests were very vulnerable in that they were facing felony charges, had little to no experience with the criminal justice system, and they depended upon Respondent to provide the best representation possible. **App. 34-35 (Tr. 28-29); 53 (Tr. 103).** Because Respondent was operating under numerous conflicts of interest he could not provide the representation they were entitled to under the Sixth Amendment.

[15] ABA Standard 9.22 sets forth the following aggravating factors: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of the conduct; (h) vulnerability of the victim; (i) substantial experience in the practice of the law; and (j) indifference to making restitution.

There are two other aggravating factors. Respondent has received and accepted four prior admonitions, one of which involved a conflict of interest.[16] **App. 7-8; 21; 91-98.** Respondent also has substantial experience in the law as he has been licensed since 1986 and has practiced almost exclusively in the criminal justice system since licensure. **App. 8; 20; 66 (Tr. 156).**

When both mitigating and aggravating factors are considered, Informant asserts that suspension is the appropriate discipline. Informant suggests that this Court should indefinitely suspend Respondent's license with no leave to reapply for six months.

[16] The July 31, 2020, admonition which addressed a conflict of interest related to conduct that occurred in 2016. This was after Respondent represented the DePriests.

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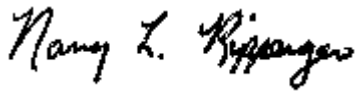
CONCLUSION

For the reasons set forth above, this Court should find that Respondent violated Rules 4-1.7, indefinitely suspend Respondent's license with no leave to reapply for six months, and impose the $1,000 fee and costs provided for by Rule 5.19(h) against Respondent.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2021, a copy of Informant's Brief is being served upon Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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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. The brief was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 11,088 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Nancy L. Ripperger