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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction in this case involving the ethical conduct of an attorney by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, common law and Section 484.040 RSMo 1994.

STATEMENT OF FACTS

Respondent agrees with the statement of facts in the Informant's brief with a few additions. Those additions are as follows: Respondent testified at the time the hearing was held he was still sending out some form of solicitation letter other than exhibit two, the advertisement which was the subject of the complaint. **T.** 26. Respondent stopped sending out exhibit two in October 1998 when a friend told him it was offensive but not false or misleading. **T.** 38.

One and one-half years after Respondent stopped using the advertisement a complaint letter dated March 28, 2000, signed by Marty Robinson of the Office of the Public Defender system was mailed to the Chief Disciplinary Counsel. **T.** 23, 60, 61.

The Respondent, Mr. Horan, testified that he was not comparing himself with the public defender in the sentence of his reply letter that says he made a comparison under the rule and there is a factual basis. **T.** 21, 22, 37 **Ex.** 3b.

Mr. Horan testified at the hearing before the panel that he did not compare himself to public defenders and had no intent to do so. **T.** 21, 22, 24, 26, 32, 39, 40. Mr. Horan testified at the hearing, over objection, various ways to factually substantiate and verify statements including; calling the public defender's office, talking to people in jail, having a free consultation with Mr. Horan, observing in the courthouse, getting recommendations from other people, and searching public records. **T.** 33, 34, 54, 55.

Mr. Daniel Gralike, an attorney at the public defender's office testified at the hearing before the panel on behalf of the Informant. **T.** 55. Mr. Gralike testified over the objection of Respondent. **T.** 56-58. Mr. Gralike received a subpoena and attended a deposition, but left the deposition before it was completed. **T.** 57. A motion to compel Mr. Gralike to complete the deposition was filed and denied by the Presiding Hearing Officer Mr. Casey. **R. Ex. C.** Mr. Gralike testified he though the advertisement made a comparison and disparaging inferences with regard to the work at the public defender. **T.** 63. A report about the public defender's office was offered by Mr. Gralike and admitted . **Ex.** 7. The report contained statistics such as the average case -load per year of an attorney in the office. **T.** 72. During the hearing Mr. Gralike testified he has no experience with advertising and does not know Mr. Horan. **T.** 66, 68. Mr. Gralike testified that a person who received this advertisement could call the public defender's office and ask questions, could talk to other people and receive recommendations, and could read the report about the public defender's office. **T.** 66, 67, 68, 69.

Mrs. Terri Johnson, a former public defender and a member of the firm Gillespie, Hetlage and Coughlin testified on behalf of the Respondent. Mrs. Johnson testified the public defender case- load of 220 cases a year stated in exhibit seven is accurate. **T.** 88. Mrs. Johnson testified about the ways in which a high case -load and high job turnover could negatively impact an attorney's ability to adequately represent clients. **T.** 88, 97, 98, 99, 100. Mrs. Johnson testified the average accused would not be misled by the advertisement. **T.** 102. Mrs. Johnson

testified that clients could get information about the difference between public and private attorneys by talking to others who are incarcerated, or sitting in the courthouse waiting their turn, or from family members. **T.** 106.

Mr. Clinton Wright, a former public defender and a member of the firm Rosenblum, Schwartz, & Rogers testified on behalf of Mr. Horan. Mr. Wright testified that Mr. Horan is a big supporter of the public defender system and that Mr. Horan does an excellent, conscientious job as an attorney. **T.** 114, 116. Mr. Wright testified that a larger case load in the public defenders office meant less time spent with each client. **T.** 118. Mr. Wright observed public defenders meeting their clients for the first time when the client was making a plea in court. **T.** 119.

Mr. Ronnie Henderson testified on behalf on Mr. Horan at the hearing. Mr. Henderson is a member of the public who has been arrested in the past and he has been defended by both the public defender and Mr. Horan. **T.** 125-126. Mr. Henderson testified his lawyer from the public defender's office did not return all of his telephone calls, never visited him while he was in jail, and did not get him out of jail. **T.** 126, 127. Testimony from Mr. Henderson indicated he talked to people in jail about lawyers, his girlfriend hired Mr. Horan, and Mr. Horan got him out of jail after 45 days of incarceration. **T.** 128, 129. When asked if Mr. Horan did a better job for him than his public defender Mr. Henderson said yes. **T.** 129.

Kristi Hartz, Katie Engle, and Linda Anthony appeared by affidavits to testify that Mr. Horan is an attorney of excellent character and ethical. **Ex.** D, E, F.

POINT RELIED ON

I.

**THE HEARING PANEL ERRED IN FINDING THE RESPONDENT
GUILTY OF VIOLATING RULE 4-7.1(d) BECAUSE THE EVIDENCE
PRESENTED AT THE HEARING DOES NOT MEET THE NECESSARY
PREPONDERANCE OF EVIDENCE STANDARD, IN THAT THERE IS
NOT ENOUGH EVIDENCE THAT THE ADVERTISING
COMMUNICATION COMPARED MR. HORAN'S LEGAL SERVICES
WITH THOSE OF THE PUBLIC DEFENDER.**

Rule 4-7.1(d)

In re Mirabile, 975 S.W. 2d 936 (Mo. banc 1998)

In re Oberhellmann, 873 S.W. 2d 851 (Mo. banc 1994)

In re Gray, 813 S.W. 2d 309 (Mo. banc 1991)

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

In re Weier, 994 S.W. 2d 559 (Mo. banc 1999)

POINT RELIED ON

II.

THE HEARING PANEL ERRED IN FINDING THE RESPONDENT GUILTY OF VIOLATING RULE 4-7.1(E) BECAUSE THE EVIDENCE PRESENTED AT THE HEARING DOES NOT MEET THE NECESSARY PREPONDERANCE OF EVIDENCE STANDARD, IN THAT THERE WAS NO EVIDENCE PRESENTED THAT THE STATEMENTS MADE IN THE ADVERTISEMENT WERE NOT FACTUALLY SUBSTANTIATED AND THAT THE STATEMENTS MADE WERE NOT SUSCEPTIBLE TO REASONABLE VERIFICATION BY THE PUBLIC.

Rule 4-7.1(e)

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

In re Elliott, 694 S.W.2d 262 (Mo. banc 1985)

In re Harris, 890 S.W. 2d 299 (Mo. banc 1994)

In re Mirabile, 975 S.W. 2d 936 (Mo. banc 1998)

In re Griffey, 873 S.W. 2d 600 (Mo. banc 1994)

Stiffelman v. Abrams, 655 S.W. 2d 522 (Mo. banc 1983)

State v. Windmiller, 579 S.W. 2d 730 (Mo. App. 1980)

POINT RELIED ON

III.

THE HEARING PANEL'S DECISION THAT AN ADMONITION WAS THE APPROPRIATE PUNISHMENT WAS CORRECT, BECAUSE THIS VIOLATION DOES NOT WARRANT A MORE SEVERE PUNISHMENT, IN THAT RESPONDENT HAS NO PREVIOUS RULE VIOLATIONS THAT MAY BE CONSIDERED AS AGGRAVATING CIRCUMSTANCES AND MITIGATING CIRCUMSTANCES JUSTIFYING THIS SANCTION EXIST IN THE RECORD.

State ex rel. Anderson v. Witthaus, 102 S.W. 2d 99 (Mo. banc 1937)

Spontak v. Public Service Commission, 73 Pa. Super 219

Rule 5.31(b) 1. 2. 3.

Rule 5.19

Rule 5.20

Rule 5.21

Rule 5.23

Rule 5.24

Rule 5.31(d)

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

Rule 4-7.2

In re Weier, 994 S.W. 2d 554 (Mo. banc 1999)

POINT RELIED ON

IV.

THE HEARING PANEL'S DECISION THAT AN ADMONITION WAS THE APPROPRIATE PUNISHMENT WAS CORRECT, BECAUSE THIS VIOLATION DOES NOT WARRANT A MORE SEVERE PUNISHMENT, IN THAT THE PURPOSE OF DISCIPLINE IS NOT TO PUNISH BUT TO PROTECT THE PUBLIC AND THAT PURPOSE WILL BE SERVED BY THE SANCTION IMPOSED BY THE HEARING PANEL.

A.B.A. Standards for Imposing Lawyer Sanctions (1986 ed.)

Kentucky Bar Ass'n v. Gangwish, 630 S.W. 2d 66 (Ky. 1982)

In re Harris, 890 S.W. 2d 299 (Mo. banc 1994)

In re Carranchini, 956 S.W. 2d 910 (Mo. banc 1997)

In re Kopf, 767 S.W. 2d 20 (Mo. banc 1989)

In re Coe, 903 S.W. 2d 916 (Mo. banc 1995)

In re Westfall, 808 S.W. 2d 829 (Mo. banc 1991)

In re McBride, 938 S.W. 2d 905 (Mo. banc 1997)

ARGUMENT

I.

THE HEARING PANEL ERRED IN FINDING THE RESPONDENT GUILTY OF VIOLATING RULE 4-7.1(d) BECAUSE THE EVIDENCE PRESENTED AT THE HEARING DOES NOT MEET THE NECESSARY PREPONDERANCE OF EVIDENCE STANDARD, IN THAT THERE IS NOT ENOUGH EVIDENCE THAT THE ADVERTISING COMMUNICATION COMPARED MR. HORAN'S LEGAL SERVICES WITH THOSE OF THE PUBLIC DEFENDER.

The Chief Disciplinary Counsel alleges that Respondent violated Rule 4-7.1, Communication Concerning a Lawyer's Services. The Information alleged that Respondent violated this rule in the text of a one-page advertisement he used for only five weeks in 1998. This rule states that lawyers are prohibited from making false and misleading statements. A statement is false and misleading if it compares a lawyers services with other lawyers' services, unless the comparison can be factually substantiated. *Missouri Supreme Court Rules, Bar and Judiciary 4-7.1(d)*. It is not clear from the Information, or the transcript of the hearing before the Hearing Panel which part of the advertisement the Chief Disciplinary Counsel (hereinafter CDC) considers a rule violation. However, in its statement of facts and first point relied upon, counsel for the Informant mentions the first paragraph of Mr. Horan's letter. This paragraph discusses the services of Mr. Horan and mentions the public defender's office in a series of five rhetorical

questions and two statements. At the hearing, counsel for the Informant, Kimberly Bettisworth, asked that Mr. Horan be suspended. She argued that the panel did not have the power to recommend an admonition. The decision of the hearing panel however, was to recommend that Mr. Horan be given an admonition. The CDC now appeals that decision and at this time asks that Mr. Horan be given a public reprimand.

The standard of review for a finding of probable cause to believe misconduct has been committed in a hearing is preponderance of the evidence. *In Re Mirabile*, 975 S.W.2d 936, 937 (Mo. banc 1998). The *Mirabile* case holds that if the CDC does not prove that respondent committed professional misconduct by a preponderance of the evidence, then the Court can dismiss the information. The Hearing Panels findings of fact, conclusions of law and recommendations are advisory in nature. *In re Oberhellmann*, 873 S.W. 2d 851, 852-53 (Mo. banc 1994). The Court respects the work of the Panel but reviews the evidence de novo in determining credibility, weight, and value of the witness testimony. *In re Gray*, 813 S.W. 2d 309 (Mo. banc 1991). In determining those facts the Court draws its own conclusions of law. *In re Gray*, 813 S.W. 2d 309, 310 (Mo. banc 1991).

Respondent contends that the CDC did not present sufficient evidence to prove by a preponderance of the evidence that misconduct was committed. Respondent contends that his testimony, the evidence presented, and the testimony of every witness at the hearing, save one, supports his position that he neither

maligned the public defender's office nor compared himself to any other lawyer. Respondent contends that an examination of the evidence will lead the Court to dismiss this Information against him in its entirety.

Testimony that Mr. Horan holds the public defender in high regard and that he had no intention of comparing himself to them was unchallenged. The statements in the advertisement were rhetorical questions that were to be answered by the public based on their experience in life, not comparisons or factual statements. The two statements in the disputed paragraph are meant to be light-hearted puns. Although perhaps a poor choice of words, they do not rise to the level of misconduct.

In order to make their case against Respondent, the Informant seems to rely primarily on the testimony of Respondent, Mr. Horan. As would be expected, the testimony of the Respondent does not help her case. Other than Mr. Horan, Counsel for the Informant, Kimberly Bettisworth, called only one witness. That witness, Mr. Gralike, works at the Office of the Public Defender. Mr. Gralike was called to testify, but the Panel's decision does not mention the substance of his testimony in their decision, other than to say Mr. Gralike testified. (hearing panel decision p. 3)

Importantly, Mr. Gralike testified over objection. Mr. Gralike received a valid notice of deposition in the form of a subpoena. In spite of the subpoena, Mr. Gralike left the deposition while it was in progress. (transcript p.56). It is problematic when the premiere representative for the Office of the Public

Defender, himself an attorney, ignores a valid subpoena. This calls into question the validity of his testimony. The Presiding Hearing Officer, Mr. Casey, denied a Motion to Compel Mr. Gralike's testimony holding that a four- hour deposition was per se oppressive. Mr. Gralike had no knowledge at the time of the deposition that he would be excused from the subpoena. Additionally, the Presiding Hearing Officer's finding that a four- hour deposition meets the standards for clear error.

Respondent contends that the CDC did not have sufficient evidence to prove its case. The consequences of allowing the CDC to try and make its case using the Respondent as their chief witness are dire. Respondent contends the CDC should not be allowed to proceed in this manner since there was not sufficient evidence to support a finding of probable cause at the close of Informant's case. Even though Informant's case was not submissible, Respondent presented evidence that further attenuates Informant's case.

Respondent has always and consistently contended that he was not making comparisons between himself and the public defender's office. In his letters to the CDC, in the deposition taken by the attorney for the CDC, and in his testimony at the hearing, he repeatedly said he was not comparing his services to the public defender. (transcript p. 19, 21, 22, 23, 24, 25, 26, 39, exhibit 3B). He further noted that he works regularly with attorneys from that office and consults with them often. (transcript p. 35, exhibit 3B). Under repeated questioning from the CDC, Mr. Horan explained, in great and laborious detail that each sentence complained about does not compare his services to that of any other attorney.

Additionally he testified before the Hearing Panel that he did not intend to compare his services or defame anyone. (transcript p. 42). Mr. Horan also testified that persons arrested may receive as many as seven to ten of these advertisements a day and that testimony bolsters the view that people who read this advertisement would not be misled by it. (transcript p. 25, 47, 48). The Panel made no specific findings regarding the credibility or weight they gave Mr. Horan's testimony. In order to reach this decision, they would have had to discard his testimony in toto. If properly considered, Mr. Horan's testimony yields a finding of no probable cause to believe misconduct was committed.

In addition, two attorneys, both former public defenders, came to the hearing and testified about Mr. Horan. Mr. Clinton Wright is a member of the law firm of Rosenblum, Schwartz & Rogers and formerly a special public defender in the City of Saint Louis for four years testified on behalf of Mr. Horan. (transcript p. 112, 113). Mrs. Terri Johnson, an attorney who is a member of the law firm of Gillespie, Hetlage and Coughlin worked for the public defender for nine and one half years also testified on behalf of Mr. Horan. (transcript p. 85).

Mr. Wright, an attorney, met Mr. Horan in 1992 when Mr. Wright began his career as an attorney in the offices of the public defender. (transcript p. 114). Mr. Wright testified that he found the allegations by the CDC ironic since Mr. Horan was a big supporter of the public defender system. Mr. Wright also testified that Mr. Horan was very helpful to him while he worked at the public defender's office. Additionally, Mr. Wright testified that Mr. Horan's professional conduct in

dealing with his clients was excellent. (transcript p. 115). He even went so far as to say that Mr. Horan sometimes deferred to the expertise of the public defender's office on certain kinds of cases.

Since he represented hundreds, "possibly 1,000 clients" who had been arrested during his tenure as a public defender, Mr. Wright is in an excellent position to speak to the issues of the intent and the level of sophistication and knowledge of the very public this advertisement was sent to. (transcript p. 121). Unfortunately the Panel would not let Mr. Wright discuss those issues, nor did they give Mr. Wright's testimony any weight. (hearing panel decision p. 4).

In a de novo review, Respondent requests the Court give Mr. Wright's testimony the weight and credibility it deserves. In the context of this case, culpability and intent of the attorney is a crucial factor in determining if there is enough support for a finding of probable cause. *A.B.A. Standards for Imposing Lawyer Sanctions*, § 4.33; *In Re Weier*, 994 S.W.2d 559 (Mo. banc 1999); *In re Howard*, 912 S.W.2d 61, 63-54. In the case at issue Mr. Wright's testimony that Mr. Horan was a supporter of the public defender system makes it unlikely he made, or intended to make, a derogatory statement about them. Mr. Horan's testimony that he was not comparing his services to the public defender is further bolstered by the testimony of Mr. Wright. If the panel had given Mr. Wright's testimony the weight it deserved there would be no finding of misconduct.

Terri Johnson, an attorney who worked at the public defender's office for nine and one-half years said she knew Mr. Horan well. (transcript p. 86-89). She

observed his legal practice and indicated he does a good job for his clients and is attentive to their needs. Ms. Johnson said Mr. Horan consulted with her while she was in the public defender's office about cases on many occasions. (transcript p. 89). That testimony flies in the face of a finding that Mr. Horan intended to make or did make a derogatory statement about the services of the public defender's office but the Panel does not mention this testimony its decision.

Ms. Johnson said that she reviewed the advertisement for the proceedings but she was not allowed to testify that Mr. Horan was not making a comparison. (transcript p. 94-95). She was not allowed to testify that clients of the public defender's office would not think a comparison was being made. She testified in summary manner that clients would not be misled by this advertisement. (transcript p. 102). Ms. Johnson dealt with many of the advertisements target audience while she was tenured in the public defender's office. These clients, although people of moderate means, were often very sophisticated about the criminal system and advertising. Although the Panel notes that Ms. Johnson testified, they specifically gave no weight to the testimony. (hearing panel decision p. 4) If the testimony of Ms. Johnson is given the proper weight and credibility, a finding of no probable misconduct will ensue.

Ms. Johnson asked the Hearing Panel not to "sell the clients short". (transcript p. 108). I hope the Court will not "sell the public short" and agree that even members of the public that do not possess the education, resources, and knowledge of the Court can think for themselves. This advertisement, along with

all the other mailings they receive after arrest, do not offer anything derogatory about the public defender, rather it encourages criminal defendants to think about the options before making a choice.

Mr. Ronnie Henderson, a member of the targeted audience because he had been arrested, testified to just those things at the hearing. Mr. Henderson, although he did not receive this specific advertisement, is a member of the same target audience by virtue of the fact that he was arrested in the City of Saint Louis. Although not allowed to testify fully, he would have said that he thought the ad was a simple solicitation and would discounted any discussion of the public defender's office. Presiding Officer Casey asked if Mr. Henderson received the specific advertisement complained about in the hearing. When I replied that "he was not one of the people who received it, but he's certainly a member of the public who was in the same situation," Presiding Hearing Officer Casey said, "That's not good enough." (transcript page 130).

The Hearing Panel did not give Mr. Henderson's testimony the weight it deserved. Additionally the Hearing Panel's decision notes they relied primarily on the advertisement itself in making its determination. If the purpose of the advertising rules is for protection of the public, should not the members of the public who receive those advertisements be the definitive voice on how they should be interpreted? If a man who is member of the class who would have been the target audience of this advertisement says it does not compare services is he not the best possible witness in this case? I believe he is and his testimony should

have been allowed and then given more weight by the Panel. Giving his testimony the weight and credibility it deserves will lead to a finding that there was no misconduct on the part of Respondent.

ARGUMENT

II.

THE HEARING PANEL ERRED IN FINDING THE RESPONDENT GUILTY OF VIOLATING RULE 4-7.1(E) BECAUSE THE EVIDENCE PRESENTED AT THE HEARING DOES NOT MEET THE NECESSARY PREPONDERANCE OF EVIDENCE STANDARD, IN THAT THERE WAS NO EVIDENCE PRESENTED THAT THE STATEMENTS MADE IN THE ADVERTISEMENT WERE NOT FACTUALLY SUBSTANTIATED AND THAT THE STATEMENT MADE WERE NOT SUSCEPTIBLE TO REASONABLE VERIFICATION BY THE PUBLIC.

The second act of misconduct the CDC charged Respondent with is a violation of rule 4-7.1(e). The CDC asserts that the advertisement is false and misleading because it contains a representation, or intimation, regarding the quality of the legal services provided by the public defender's office and that those representations or implications are not susceptible to reasonable verification by the public. There is no guidance in the rule about how a lawyer must factually substantiate this comparison or how the public can reasonably verify any statements made about the public defender.

Respondent contends that he never stated or implied anything about the quality of services provided by the public defender. Respondent further contends that if the CDC argues Respondent made this statement it can be substantiated.

Additionally, if Respondent said or implied that the public defender was not a good lawyer, any member of the public could verify that information. In fact Respondent argues that testimony presented at the hearing serves to verify and substantiate those statements.

The standard of review for determining whether or not there is probable cause to believe the Respondent committed misconduct is preponderance of the evidence. *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995); *In re Elliott*, 694 S.W.2d 262, 263 (Mo. banc 1985); *In re Harris*, 890 S.W. 2d 299, 299 (Mo. banc 1994).

Review before the Supreme Court is de novo and any findings before the case reaches the Court, although helpful, are advisory in nature. *In re Mirabile*, 975 S.W. 2d 936, 941 (Mo. banc 1998); *In re Griffey*, 873 S.W. 2d 600, 601 (Mo. banc 1994). With the application of these standards the Respondent requests that the Supreme Court dismiss this information and refund all associated costs.

Respondent contends the CDC did not present any evidence that would show the statements were not true or verifiable, other than one bald statement by Mr. Gralike that they were not. (transcript p. 64). Allegations of misconduct do not create a presumption of guilt. Rather the CDC has the burden to prove the statements were not factually substantiated or verifiable with persuasive evidence from some source. *In re Mirabile*, 975 S.W. 2d 936, 943 (Mo. banc 1998).

Respondent noted, in a letter sent to Adrienne Anderson before the Information was filed, that lawyers do not have to factually substantiate claims

made in their advertisements. (Exhibit 3a). If the Court agrees with this contention, then Respondent met his burden by demonstrating, albeit reluctantly, that he could factually substantiate the questions he posed in his advertisement.

Respondent also argues that there is a plethora of evidence suggesting a public defender might be less qualified, have less experience, have less time to devote to their clients and have a higher caseload than Respondent. Mrs. Johnson testified there was a 30 to 50% turnover in employment during her nine and one-half year tenure at the public defender's office. (transcript p. 88). She testified that the higher caseload a public defender carries would negatively impact that lawyer's ability to represent their clients. (transcript p. 97). She said a high case load can mean less attention to detail, less time to spend visiting clients and a lower number of bond reviews. (transcript p. 97). In fact, Mrs. Johnson testified she saw public defenders meeting with their clients for the first time at a preliminary hearing or when they arrived to plead their client guilty. (transcript p. 97). Interviews of clients were handled by law students, not lawyers, and moreover bond commissioners told her that they were more likely to let a client represented by a private attorney out on bail because it was their opinion that private attorneys kept better track of their clients. (transcript p. 99, 100).

Mr. Wright and Mr. Henderson also testified to some of the same instances. Mr. Wright, himself a veteran of the public defender's office and also an experienced private practice attorney, compared the amount of time a private practitioner has to spend with clients. Mr. Wright testified that a public defender

has less time to spend with each client because of a larger case load and the fact that more of your clients in the public defender's office are in jail. (transcript p. 118) He, too, saw public defenders meeting their clients for the first time during a critical period in their cases, such as a when they were entering a plea. (transcript p. 119). Although Ms. Bettisworth objected to many questions she did not rebut any of the evidence presented by Mr. Wright during cross examination, nor did she present any witness in her case in chief who successfully addressed these issues.

Mr. Henderson presented no studies or reports but he did present testimony about his own experience with the public defender's office. Mr. Henderson's own experience provides ample information to answer any questions about the quality of the public defender's legal services. The public defender never visited him, did not return all of his telephone calls and did not get him out on bail. (transcript p. 126-127). Mr. Henderson was in jail for 45 days and he could not get released until he hired Mr. Horan. Ms. Bettisworth asked no questions of this witness so his testimony stands unrebutted. (transcript p.131).

The hearing panel afforded this witness no weight in their decision. (hearing panel decision p. 3). Respondent argues that this witness has the most to offer since he is in the same class as the target audience of the advertisement. Also, he has past and present experience of the public defender, and he has present experience with Mr. Horan. Further, Mr. Henderson's testimony is unrefuted so the CDC has not met their burden.

The CDC brief argues that Respondent has no factual studies or data to support such a claim, but the CDC themselves presented evidence, in the form of Mr. Gralike's testimony, that proves the public defender carries a higher caseload than Respondent. (Informant's brief p. 5, transcript p. 72). The CDC further bolsters Respondent's case by admitting exhibit 7 which is a report generated by the Office of Public Defender and available to the public which says the average case load of a public defender is 220. Mr. Horan testified his average case load is 75. (transcript p. 60, 70, 72-73). The CDC's argument is that no reports exist so Respondent should be disciplined flies in the face of exhibit 7.

All of this testimony from witnesses leads to the conclusion that even if Respondent made such a statement it could be factually substantiated. And if the CDC's point is that Respondent generated no reports they themselves provided a report at the hearing that supports Respondent.

The next prong of the test in 4-7.1(e) requires that any statements about legal services be susceptible to reasonable verification by the public.

Respondent's position as to this prong of the test is unchanged, he asserts he did not, and would not, make derogatory statements about the public defender.

Nonetheless, he is obligated to defend himself and he presented evidence that members of the public could verify any statement made in the advertisement in many ways.

Testimony from Mr. Horan included testimony about his own experience, which is not as vast as those lawyers who testified about the public defender, but is

significant. He said he had personal experience in his practice because he had been hired by clients previously represented by the public defender, he had personal experience with prosecutors, he has seen clients receive as many as 10 similar letters a day. (transcript p. 33, 34, 47, 48). Mr. Horan also gave examples of ways the in which the public could verify statements; asking other people, personal experience; family members input; with a free consultation; a telephone call to the public defender or Mr. Horan; and even a search of courthouse records. (transcript p. 53, 54, 55). Mr. Gralike, who was a witness for the CDC, said the public could telephone, watch trial in the courthouse, get the public defender's annual report, or receive recommendations from other. (transcript p. 66-68). Mrs. Johnson, Mr. Wright, and Mr. Henderson all testified to various ways someone could discuss their options when hiring an attorney and verify any statements in advertisements.

Additionally, there was testimony that those persons who received the advertisements were fairly sophisticated in terms of ferreting out information about lawyers. Are we now saying the public is so thick they must be protected from any communication by attorneys who are advertising? It is clear from a review of the transcript that if Mr. Horan and other attorneys are not allowed to advertise, or if a chill on advertising results from Mr. Horan's discipline, then people like Mr. Henderson would likely remain in jail. Additionally, people like Mr. Henderson will not know they have more than one choice. Having one choice will defeat the purpose of approving advertising in the first place because people

will not have information. And just because evidence is anecdotal does not mean the rule would have no substantive effect under *Stiffelman v. Abrams*, 655 S.W. 2d 522, 531 (Mo. banc 1983), *Cf. State v. Windmiller*, 579 S.W. 2d 730, 732 (Mo. App. 1980). Respondent asserts the testimony at the hearing and the anecdotal evidence fit nicely under the Comment to Rule 4-7.1 referencing “underlying studies or other data”.

The hearing panel made no finding on section (e) and specifically says they make no finding or conclusion about the legal services of the Respondent or the public defender. (hearing panel decision p. 4).

ARGUMENT

III.

THE HEARING PANEL'S DECISION THAT AN ADMONITION WAS THE APPROPRIATE PUNISHMENT WAS CORRECT, BECAUSE THIS VIOLATION DOES NOT WARRANT A MORE SEVERE PUNISHMENT, IN THAT RESPONDENT HAS NO PREVIOUS RULE VIOLATIONS THAT MAY BE CONSIDERED AS AGGRAVATING CIRCUMSTANCES AND MITIGATING CIRCUMSTANCES JUSTIFYING THIS SANCTION EXIST IN THE RECORD.

Respondent contends that the hearing panel decision was correct when they did not consider any prior discipline that Respondent received and in giving the admonition on a finding of probable cause that misconduct exists. Under the rules, the Supreme Court can ratify the decision of the hearing panel and let the admonition stand.

Respondent received private admonitions in 1993 and 1995 for advertising violations. A private admonition is a creature that no longer exists in the discipline system. When it did exist, Respondent contends that the practice and procedure of the CDC was to keep those admonitions that were private on file for three years. If Respondent had no violations for three years then they disappear. They were not considered by CDC in imposing new discipline, so the CDC should not now be allowed to utilize those records that were closed.

As to the argument presented by the CDC that rule 5.31 (b) and (d) define closed records, Respondent contends that records of previous discipline are exactly those contemplated and discussed in the rule. There is nothing in the ABA Standards which indicates that records closed under previous rules should now be open and considered. Cases cited in Informant's brief which define "public" have nothing to do with disciplinary proceedings and nothing to do with the interplay between rules that have been changed. They should not be persuasive to the Court as to this case. *State ex rel. Anderson v. Witthaus*, 102 S.W. 2d 99, (Mo. banc 1937); *Spontak v. Public Service Commission*, 73 Pa. Super. 219.

A record of a private admonition fits the categories enumerated in rule 5.31(b) and so should be excluded. A private admonition would not be a public record because it was developed before a Disciplinary Hearing Panel made a finding that a lawyer violated rule 4, before an information was filed with the Court. *Missouri Supreme Court Bar and Judiciary Rules 5.31(b) 1.2.3., 5.19, 5.20, 5.21, 5.23, 5.24.* Although the Court has since dispensed with private admonitions they were exactly that: "private", and not available to determine discipline in this case.

The Respondent and Informant agree that Rule 5.31(d) says letters of admonition are closed and not available to the public after three years from the date the lawyer accepted the admonition. Under Respondent's interpretation of this rule any discipline he received would also qualify as a closed record.

Respondent believes the purpose of this rule is different than Informant.

Respondent asserts that the purpose of this rule, adopted after changes in the disciplinary system, was to extend the time frame of an admonition for longer than three years if a lawyer was disciplined before the three- year time frame expired. Now if a lawyer has an admonition pending and receives another one within three years, it extends the period of the first admonition from the date the admonition was filed through the date the second admonition is filed. That situation does not apply here since Respondent's previous violations are more than six or eight years old. It is also worth mentioning that his previous admonitions concern a different rule than 4-7.1. The purpose of this Rule 5.31 should not be to control admissibility of prior discipline at hearings. Respondent's prior discipline would still be a closed record under this reasoning. Also, subsection (e), says the chief disciplinary counsel can waive the confidentiality of records in four situations, none of which apply in the case at hand.

Although the ABA Standards and the Missouri rules clearly contemplate hearing panels and disciplinary bodies having information other members of the public do not have access to Respondent asserts his prior discipline is not one of those records and the hearing panel was correct in disregarding any previous discipline.

If we assume that Respondent's disciplinary history should be considered by the hearing panel and the Court, we should also examine the consequences of that consideration. A reversal of the hearing panel's decision could lead to a re-examination of all cases handled by the Office of the Chief Disciplinary Counsel

since the private admonition was abolished. Does this mean that private admonitions are no longer private? Should lawyers like Mr. Horan, who may have accepted discipline without comment, precisely because they understood the discipline would be private now be stopped from practicing law?

Even if the Court and the hearing panel were to examine the previous discipline, the circumstances of that discipline should not change the discipline imposed. Mr. Horan received an advertising violation for sending out a business card, a letter, and a magnet. Unfortunately, the magnet did not have his name on it. He sent all of these items out together but the CDC asked him to take a private admonition for violation of rule 4-7.2 since his name was not on the magnet. He also sent out a letter that said Horan Law Offices but did not have his name "Robert Horan" on the letterhead. This was deemed to be a violation of 4-7.2. He accepted the rule violation without argument and has not violated 4-7.2 since then. Respondent contends that failing to put his name on a magnet and stationary designed years ago was not the kind of conduct Standard 9.22 contemplates when it recognizes prior disciplinary offenses as a pattern of misconduct. Thus a reprimand is too severe a punishment in this instance. Further, Respondent hopes the Court does not see this previous discipline as constituting an aggravating circumstance.

The stigma and shame Respondent will receive from this public airing of his discipline should make an admonition ample punishment in this instance. *In re Weier*, 994 S.W. 2d 554, 560 (Mo. banc 1999).

ARGUMENT

IV.

THE HEARING PANEL'S DECISION THAT AN ADMONITION WAS THE APPROPRIATE PUNISHMENT WAS CORRECT, BECAUSE THIS VIOLATION DOES NOT WARRANT A MORE SEVERE PUNISHMENT, IN THAT THE PURPOSE OF DISCIPLINE IS NOT TO PUNISH BUT TO PROTECT THE PUBLIC AND THAT PURPOSE WILL BE SERVED BY THE SANCTION IMPOSED BY THE HEARING PANEL.

The final issue to be decided by the Court is whether the punishment of an admonition is proper given the facts and circumstances in this case. Respondent contends that an admonition is the most severe punishment he should be given assuming for the sake of argument that the Court agrees with a finding of misconduct. The *A.B.A. Standards for Imposing Lawyer Sanctions*, §4.33 (1986) provides that a 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 cause injury or potential injury to a client". Those same standards say an admonition is generally appropriate when a lawyer engages in an isolated instance of negligence by improperly communicating with an individual in the legal system and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding. The A.B.A. Standards § 9.32 and § 9.22 also recognize that mitigating

factors may justify reducing the degree of discipline imposed and aggravating factors may justify increasing the degree of discipline imposed. Respondent contends that admonition is appropriate in this circumstance since aggravating factors do not exist and mitigating factors are present.

The CDC argues in its brief that Respondent has a continued pattern and practice of violating the disciplinary rules. Because Respondent has received previous private admonitions he should receive a public reprimand. As noted previously, Respondent contends those sanctions are not properly considered in this case. Moreover, these previous violations are far removed in time. A Kentucky case held a public reprimand was proper when a lawyer who advertised a 20% discount when he had been previously warned that discount fees were improper. *Kentucky Bar Ass'n v. Gangwish*, 630 S.W. 2d 66 (Ky. 1982). In the case before the Supreme Court Respondent received a letter from Russell Willis in 1999 regarding an advertisement that was identical to the one before the court, with the exception of the first paragraph. (Respondent's exhibit A). The letter from Mr. Willis informs Mr. Horan that his advertisement is not false and misleading. The letter also recommends Mr. Horan change the type size on the advertising disclaimer and clarify the statement "I am your lawyer" which appears in the advertisement. Mr. Horan immediately changed the type size and put spaces between the statement "I am your lawyer." and the rest of the text as the Committee recommended. He changed the first paragraph of the letter and sent it out. Then, counsel for the Informant claimed some of the language previously

approved by Mr. Willis was objectionable under the rules. (transcript p. 134-139). Respondent hopes the Court will curb the broad brush with which the Informant charges misconduct or there may be continued inconsistency in the enforcement of the Court's rules. What the CDC sees as an aggravating factor, the fact that a Committee addressed most of the text of the advertisement at issue previously, Respondent argues is a mitigating factor. Respondent's cooperation with disciplinary authorities should be a mitigating factor in assessing the degree of discipline. *In re Harris*, 890 S.W. 2d 299, 301-302 (Mo. banc 1994).

Other mitigating factors in Respondent's favor are the fact that he sent the advertisement out for only five weeks in 1998 and pulled the advertisement after a discussion with a colleague. (transcript p. 16, 23, 24-25). The advertisement was voluntarily taken off the market long before the complaint was filed in 1999. Additionally Respondent, unlike the attorney involved in the *In re Caranchini*, 956 S.W. 2d 910, 919 (Mo. banc 1997) expresses that he takes the disciplinary process seriously and is remorseful that his statements have been so misconstrued.

Another argument for upholding the admonition is there were no clients who suffered any harm as a result of this advertising. In fact, there are no clients complaining at all. When no one suffers harm as a result of an attorney's actions that is a mitigating circumstance. *In re Kopf*, 767 S.W. 2d 20, 23 (Mo. banc 1989).

The Supreme Court has given attorneys who have been previously disciplined a reprimand for behavior much more egregious and offenses more

numerous than Respondents. *In re Coe*, 903 S.W. 2d 916 (Mo. banc 1995). In the *In re Coe* case, the Court notes that the primary purpose of a disciplinary action is not to punish the offender, but to protect the public. *In re Harris*, 890 S.W. 2d 299, 302 (Mo. banc 1994); *In re Westfall*, 808 S.W. 2d 829, 836 (Mo. banc 1991). If the Court imposes a harsher punishment on Mr. Horan how will that protect a public that has not been harmed?

Finally, the Respondent demonstrates no intent to harm and therefore does not meet the negligent or intentional standard necessary for a public reprimand. Respondent has a successful practice, he is well thought of by his peers and clients, and he had plenty of evidence that he is a person of excellent reputation and outstanding moral character. (Respondent's exhibits D, E, and F). He is clearly fit to practice law under the standard outlined in, *In re McBride*, 938 S.W. 2d 905, 907 (Mo. banc 1997). Further, there simply is no evidence that he intentionally or negligently maligned anyone. Any comparison of his services to the public defender was unintended and indirect at best. The comparisons complained of are not statements of fact but rhetorical questions meant to be answered and decided by the public based on their own reason and experience. No purpose is served by vacating the punishment of the hearing panel and imposing a harsher sanction. This particular attorney does not need to be deterred from conduct he long ago stopped and other attorneys are unlikely to make the same mistake he made after reading the opinion of this Court in this case. Contrary to Informant's contention at the hearing Respondent find no authority in the Rules

which says there is no admonition available as punishment at the Information level. (transcript p. 136).

Use of current case law and the A.B.A. Standards lead us to believe if there is no pattern of misconduct or other aggravating circumstances and there are many mitigating circumstances the degree of punishment should be mild. If the Court decides to punish Respondent an admonition is appropriate in this instance.

CONCLUSION

The evidence presented to the Hearing Panel does not prove the Respondent committed a violation of rule 4-7.1(d)(e) so Respondent respectfully requests the Information be dismissed. In the alternative if the Court finds Respondent has committed a violation of rule 4-7.1(d)(e) an admonition is the appropriate sanction since there are mitigating, but no aggravating, circumstances.

Respectfully Submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2001, two copies of Respondent's Brief have been sent via first class mail to:

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Karolin Solorzano Walker

CERTIFICATION: SPECIAL RULE NO. 1(c)

I hereby 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 Special Rule No. 1 (b);
3. Contains 7,035 words, according to Microsoft Word 97, which is the word processing system used to prepare this brief, and
4. Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Karolin Solorzano Walker