IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
MARC S. BURSTEIN,	**)**	**Supreme Court # SC87088**
	)	
Respondent.	**)**	

RESPONDENT'S BRIEF

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ATTORNEY FOR RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent joins and adopts the jurisdictional statement of the Informant.

PROCEDURAL HISTORY

Respondent will hereby supplement Informant's procedural history so that the Court has all relative information.

After conducting its investigation into the matter, all counts against Respondent were dismissed by The Region X Disciplinary Committee. On May 10, 2003, the Committee sent a letter stating in part:

> "The members of Division IV of the Region X Disciplinary Committee have reviewed Mr. McCulloch's complaint and the information gathered in their investigation. They have determined that there is not probable cause to believe that Mr. Burstein has violated the Missouri Supreme Court Rules of Professional Conduct and should have his license disciplined in some way. Accordingly, the complaint is dismissed and the file is closed."

S. App. 1. Thereafter, on June 6, 2003, Complainant McCulloch sent a letter to the Committee critical of the decision. S. App. 2. In that letter, Complainant McCulloch did not request a review of the dismissal of the complaint. Complainant McCulloch did not intend his letter to be a request for further review.

Q. Okay. Did he indicate to you that he was going to appeal?

A. He actually said he was not going to appeal. He just wrote a letter, I guess, expressing his disappointment in their decision.

Q. So to your knowledge it wasn't even his intention to appeal the finding?

A. Correct.

S. App 13 - APA Pat Richmond Depo. (p. 38 ln 19 - p. 39 ln 1).

Despite Complainant's lack of a request for review of the decision dismissing the complaint in its entirety against Respondent, Ms. Adrienne E. Anderson of the Region X Disciplinary Committee, on June 18, 2003, wrote a letter to Complainant McCulloch stating in part:

> "I interpret your letter of June 6, 2003 as a request for review of the dismissal of your complaint by our committee. Therefore, I have forwarded your letter to the Missouri Supreme Court Advisory Committee, which reviews dismissed complaint files when the complainant disagrees with that result."

S. App. 18.

Then, on June 30, 2003, Sara Rittman of the Missouri Supreme Court Advisory Committee sent a letter to Complainant McCulloch stating in part:

> "This acknowledges your letter dated June 18, 2003, requesting the Supreme Court Advisory Committee to review the determination made on your complaint."

S. App. 19 However, Complainant McCulloch never sent a letter on June 18, 2003, nor on any other date, requesting the Supreme Court Advisory Committee, nor anyone else, to review the dismissal of the complaint against Respondent. No such letter existed because McCulloch never intended to appeal the dismissal of the complaint against Respondent.

On November 22, 2004, Sara Rittman of the Missouri Supreme Court Advisory Committee sent another letter to Complainant McCulloch stating in part:

> "As you requested, the Advisory Committee has reviewed your complaint against Marc Burstein and the decision of the Region X Disciplinary Committee. Pursuant to Missouri Supreme Court Rule 5.12, the Advisory Committee is referring the matter to the Office of Chief Disciplinary Counsel (OCDC) for further consideration."

S. App. 20. Again, McCulloch never made any such request and never intended to appeal the dismissal.

On December 7, 2004, Jan Oehrle of the OCDC, sent another letter to McCulloch, stating in part:

> "Pursuant to your request, the aforementioned matter has been referred to me for further investigation. This letter is to advise you that the matter will be reopened for possible violation of rules 4-3.5(b), 4-8.4(c) and possibly 4-8.4(d) of the Rules of Professional Conduct."

S. App. 21. McCulloch never made any such request and never intended to do so.

A hearing was conducted June 24, 2005 and the Disciplinary Panel issued its decision on July 8, 2005. App. 14-23. The Panel dismissed Count II - Rule 4-8.4(c), dismissed Count III - Rule 4-8.4(d), but found a violation in Count I - Rule 4-3.5(b). Id. The Panel recommended that Respondent receive a written admonition for violation of Rule 4-3.5(b). Id.

Although all of the charges against Respondent were dismissed by the Region X Committee, and although Complainant McCulloch did not seek review of that decision,

Respondent chose to end the nearly two year long saga by accepting the Panel's written admonition pursuant to Rule 5.19(b).

Over three years after the occurrence, Informant, not satisfied with the findings of the Panel, filed its papers with this Court seeking further review of the complaint.

STATEMENT OF FACTS

To the extent Informant incorporates and restates the factual findings of the Panel in Informant's Statement of Facts on pages 6 through 8 of its brief, Respondent objects because the Panel's findings are not ultimate facts but are only advisory in nature.

To the extent Informant neglected to provide this Court with relevant facts in the record, Respondent will supplement with the following additional facts.

The original complainant, Robert McCulloch, has never met Respondent, has never spoken to Respondent, has never had any direct dealings with Respondent on any cases, and has no personal knowledge of the events complained of. App. 51.

On October 8, 2002, Respondent went to Division 43 of the Circuit Court of St. Louis County as defense counsel on two misdemeanor criminal cases. App. 80. One case was *State vs. Ring* which involved a charge of passing a $14 bad check to Great Clips. Id. The other case was *State vs. Manney* which involved a misdemeanor DWI. Id. Respondent was the attorney of record on the *Ring* case, but was covering the *Manney* case for another attorney who was in trial. Id. Both cases were set on the court's docket that morning. Id.

APA Pat Richmond was in Division 43 that morning on behalf of the State. S. App. 5. Both Respondent and APA Richmond testified that there were only two prosecutors in the courtroom, APA Richmond and APA Lenny Kagan. S. App. 12, App. 81. However, APA Lenny Kagan stated there were four prosecutors in the courtroom. S. App. 23.

APA Richmond was the last attorney, prior to October 8, 2002, to sign a pleading on behalf of the State in the *Ring* matter. S. App. 33. On September 24, 2002, the prior docket

date, both Respondent and APA Richmond signed and filed with the Court the pleading setting the *Ring* matter for trial in Division 43 on October 8, 2002. Id. APA Sheila Whirley never entered her appearance nor filed any pleadings in the *Manney* matter and never filed an Entry of Appearance in the *Ring* matter. S. App. 54 - 74, 24 -53. Respondent testified that he never saw APA Sheila Whirley inside or outside the courtroom on October 8, 2002. App. 81.

APA Pat Richmond stated that it "has NEVER been the policy of this office for a docket attorney to take another prosecutor's file and discuss it with the court." S. App. 75. Complainant Robert McCulloch also testified the prosecutors are not "team members." App. 56. APA Sheila Whirley testified that prosecutors are "encouraged to be team players and work with each other, so that's a given. We definitely cover for one another." App. 68. APA Pat Richmond covers cases "assigned" to APA Sheila Whirley in Division 43. S. App. 15, 78 - 84, 88 - 97. APA Richmond has signed Pleas of Guilty and Judgments and Sentences on behalf of APA Sheila Whirley in Division 43. S. App. 78 - 84, 88 - 97. Other prosecutors cover cases for each other as well in Division 43. S. App. 120 - 128. APA Richmond subsequently testified that he and APA Sheila Whirley were "docket partners" and that it was "not unusual at all" for him to cover her cases for her. S. App. 15.

Both Respondent and APA Richmond testified that Respondent approached APA Richmond in the courtroom on October 8, 2002 and requested that he pull the State's files on the *Ring* and *Manney* matters. App. 81, S. App. 6. However, APA Lenny Kagan testified that Respondent approached APA Ethan Corlija, not APA Richmond, to pull the files and

discuss the recommendations. App. 76. Respondent testified that he never saw APA Ethan Corlija inside or outside the courtroom on October 8, 2002. App. 81. No other witness claimed Respondent spoke to APA Ethan Corlija on October 8, 2002.

Both Respondent and APA Richmond testified that APA Richmond did pull the State's files and then had a discussion with Respondent regarding the State's recommendation for disposition of both cases. App. 81, S. App. 6. Both Respondent and APA Richmond testified that Respondent requested that APA Richmond amend the State's recommendations to a slightly less severe punishment. App. 81, S. App.6. APA Richmond refused. S. App. 6.

Respondent testified that he then requested APA Richmond accompany him to see the judge in chambers on both matters. App. 41. APA Richmond stated that Respondent "never told me that he was in the process of going back to see the judge in his chambers." S. App. 130. APA Richmond subsequently testified that Respondent, in fact, did ask APA Richmond to accompany him back to the judge's chambers. S. App. 10. APA Richmond also subsequently testified that he saw Respondent in line to see the judge. S. App. 8.

APA Richmond refused to accompany Respondent to see the judge. App. 85. Respondent proceeded to enter "blind pleas" of guilty on both cases. Respondent presented the judge with the State's recommendation for sentencing on both cases and Respondent requested a different sentence on both cases. App. 82. The judge entered judgment on both blind pleas of guilty. App. 83.

Respondent testified that when he returned to the courtroom from the judge's

chambers, APA Lenny Kagan was the only prosecutor left in the courtroom. App.83. APA Lenny Kagan also stated that Respondent came back into the courtroom and approached him, not APA Richmond. S. App. 132. APA Richmond stated that when Respondent came back into the courtroom, APA Richmond was standing at the counsel table and Respondent approached him. S. App. 130.

Respondent testified that he asked APA Kagan if he wanted to write "State Opposed" on the forms and sign them. App. 83. APA Lenny Kagan stated that Respondent misled him because Respondent told him it was common practice for prosecutors to write "State Opposed" and he was therefore misled due to the fact that prosecutors never write "State Opposed" on the forms and never sign the forms. S. App. 22. Respondent testified that he never told APA Kagan that APA Richmond had authorized him to sign the forms. app. 83. APA Lenny Kagan did sign both forms and wrote "State Opposed" on both forms. App. 24-27.

APA Lenny Kagan stated that prosecutors never write "State Opposed" on blind pleas and Judgments and never sign the forms. S. App. 23. APA Pat Richmond stated that "it has never been a practice of this office to write 'State Opposed' on Pleas of Guilty or Judgment and Sentence forms when a judge undercuts our recommendation. In the five years I have been in the office, I have never done that." S. App. 76. APA Lenny Kagan subsequently testified that "Actually, also we write, State opposed, when the recommendations are cut by the judge. That's why we write them in there if we ever did." App. 77. APA Richmond has written "Blind, State Opposed" on blind pleas and judgments. S. App. 85 - 86. Other

prosecutors routinely write “State Opposed” or similar language on blind plea judgments in Division 43. S. App. 98 - 120.

APA Richmond stated: “In conclusion, I ***do not*** feel that it is [Respondent’s] discussion with the judge that is inappropriate in this case.” S. App. 131 (emphasis added).

Judge Jamison in Division 43 routinely assesses less punishment in cases than the prosecutors recommend. S. App. 7.

POINTS RELIED ON

I. RESPONDENT DID NOT VIOLATE RULES 4-3.5(b) AND 4-8.4(d) BECAUSE RESPONDENT FOLLOWED THE PROPER PROCEDURES IN THAT COURT AND HIS OPPOSING COUNSEL HAD NOTICE AND OPPORTUNITY TO OBJECT BUT FAILED OR REFUSED TO ATTEND THE HEARING AND WAIVED PARTICIPATION IN THE HEARING.

In re Littleton, 719 S.W.2d 772 (Mo. banc 1986)

Colla v. Colla, 614 S.W.2d 9 (Mo. App. E.D. 1981)

State ex rel. Gardiner v. Dickmann, 157 S.W. 1012, 1015 (Mo.App. 1913)

In re Anonymous, 729 N.E.2d 566, 567 -568 (Ind. 2000)

II. THIS COURT SHOULD ADOPT THE HEARING PANEL'S DISMISSAL OF COUNT TWO BECAUSE RESPONDENT DID NOT VIOLATE RULE 4-8.4(c) IN THAT RESPONDENT DID NOT MISREPRESENT TO APA LENNY KAGAN THAT HIS SUPERVISING ATTORNEY HAD AUTHORIZED HIM TO SIGN THE PLEA FORM.

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

III. RESPONDENT SHOULD NOT BE PUBLICLY REPRIMANDED BECAUSE

HE DID NOT MAKE A MISREPRESENTATION TO THE PROSECUTOR AND HE DID NOT HAVE IMPROPER EX PARTE CONTACT WITH THE JUDGE AND HIS CONDUCT WAS NEITHER NEGLIGENT NOR PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

IV. THE SUPREME COURT SHOULD NOT REVIEW THE PANEL'S ISSUANCE OF AN ADMONITION TO RESPONDENT BECAUSE RULE 5.16 DOES NOT PROVIDE FOR SUCH REVIEW, BUT RATHER ONLY PROVIDES FOR REVIEW OF DISMISSED COUNTS, AND THE PANEL HAD AUTHORITY TO ISSUE AN ADMONITION.

Rule 5.19

ARGUMENT

I. RESPONDENT DID NOT VIOLATE RULES 4-3.5(b) AND 4-8.4(d) BECAUSE RESPONDENT FOLLOWED THE PROPER PROCEDURES IN THAT COURT AND HIS OPPOSING COUNSEL HAD NOTICE AND OPPORTUNITY TO OBJECT BUT FAILED OR REFUSED TO ATTEND THE HEARING AND WAIVED PARTICIPATION IN THE HEARING.

A. Standard of Review

A violation must be shown by a preponderance of the evidence. *In re Littleton,* 719 S.W.2d 772, 775 (Mo. banc 1986). The Disciplinary Hearing Panel's "recommendations are advisory in nature. This Court reviews the evidence *de novo,* determines independently the credibility, weight, and value of the testimony of the witnesses, and draws its own conclusions of law." *In re Oberhellmann,* 873 S.W.2d 851, 852 (Mo. banc 1994). This Court may take the stipulated facts as true and apply a de novo standard of review to determine the proper sanction. *In re Frick,* 694 S.W.2d 473, 474 (Mo. banc 1985). *In re Crouppen,* 731 S.W.2d 247, 249 (Mo. banc 1987).

B. Argument

COUNT I - RULE 4-3.5(b) - EX PARTE CONTACT

Respondent did not engage in improper ex parte contact with Judge Jamison in violation of Rule 4-3.5(b) because opposing counsel had proper notice and opportunity to object. Informant incorrectly argues that Respondent's entering of "blind pleas" on the *Ring* and *Manney* matters consisted of impermissible ex parte contact with Judge Jamison. Rule

4-3.5(b) states that a lawyer shall not:

"communicate ex parte with such a person *except as permitted by law.*"

Rule 4-3.5(b) (emphasis added).

Informant argues that Respondent should have dealt with *only* APA Sheila Whirley on October 8, 2002 because her office "assigned" the case to her. Infrmt. Brf., p. 16-18. Informant suggests that because APA Sheila Whirley was "assigned" to the files in question by her office, Respondent must dispense with normal procedure and operate solely pursuant to whatever internal office policies the prosecutor's office dictates. Informant suggests that all attorneys should be familiar with the internal office policies of the St. Louis County Prosecuting Attorney's office regarding its "assignment" of cases to specific prosecutors, despite Missouri Rules of Procedure. Informant ignores the Missouri Supreme Court Rule regarding notice to "attorneys of record." Rule 20.04(b)

> **(b) Service--Upon Attorney.** When under these rules, or any of the statutes of this state, service is required or permitted to be made upon a party represented by an *attorney of record*, service shall be made upon the attorney, unless service upon the party himself is ordered by the court. *When a party is represented by more than one attorney service may be made upon any such attorney.*

Missouri Rule of Criminal Procedure 20.04(b) (emphasis added).

Informant ignores the fact that APA Sheila Whirley *never* filed any pleadings nor filed an Entry of Appearance in the *Manney* matter and was thus *not an attorney of record* even

though the Complaint was filed on July 15, 2002, nearly three months prior. S. App. 54 - 74. Informant ignores the fact that APA Sheila Whirley *never* filed an Entry of Appearance in the *Ring* matter. S. App. 24 - 53. Informant ignores the fact that the Complaint in the *Manney* matter was signed by APA Marilyn Ruemmler. S. App. 73. Informant ignores the fact that the initial Complaint was the only thing filed by the State in the *Manney* matter before APA Lenny Kagan entered his appearance on October 8, 2002. S. App. 54 - 73. Informant ignores the fact that both Respondent and APA Richmond testified that APA Sheila Whirley was not in the courtroom.

APA Richmond was an Attorney of Record

Respondent's communications were permitted by law because he gave APA Richmond notice and opportunity to object before entering the blind pleas in the *Ring* and *Manney* matters on October 8, 2002. APA Pat Richmond, the admitted senior APA in the courtroom on October 8, 2002, was the last attorney, prior to October 8, 2002, to sign a pleading on behalf of the State on the *Ring* matter. S. App. 33. In fact, on September 24, 2002, it was APA Richmond and Respondent who both signed and filed with the court the pleading setting the *Ring* matter for trial on October 8, 2002, *not* APA Sheila Whirley. Id. APA Richmond was an attorney of record in the case. Also, APA Richmond and APA Kagan were the only prosecutors in the courtroom when Respondent was there on the *Ring* and *Manney* matters. S. App. 12 - APA Pat Richmond Depo, p. 36, ln 13-15. As a matter of fact, had Respondent given notice to APA Sheila Whirley on the *Manney* matter, it would have been a legal nullity because APA Whirley never filed an Entry of Appearance nor any

other pleading in that matter and thus was not even an attorney of record.

"An 'attorney of record' means an attorney who has filed an appearance or pleading in the cause and is therefore presumed to have authority to bind his client ..." *Colla v. Colla*, 614 S.W.2d 9, 11 (Mo. App. E.D. 1981) (citations omitted). *See also, e.g., State ex rel. Big Bend Quarry Co. v. Wurdeman*, 274 S.W. 380,383 (Mo.1925) (emphasis added) ("It may be noted that, while Ralph & Baxter managed the injunction suit throughout, they were not attorneys of record. So far as the record shows here, their names do not appear to any pleadings in the case, although they were recognized by the court as conducting it. For our purpose here we may say that Adam Henry Jones, being attorney of record, is the ***only*** attorney to be recognized as having any authority in the case."); *Ex parte Rountree,* 694 So.2d 13, 16 (Ala.Civ.App.1997) ("An 'attorney of record' means an attorney who has filed an appearance or pleading in the cause and is therefore presumed to have authority to bind his client by acceptance of service."); *Caplan v. Harte*, 131 Ariz. 357, 358 (Ariz. App. 1982) ("The term "attorney of record" means the one appearing in the specific action.").

It was Common Practice for APA Richmond to Cover APA Sheila Whirley's "Assigned" Cases in Division 43

As stated above, this Court should find, based on Missouri Procedure alone, that Respondent gave notice to the proper attorney and thus there was no violation. But he also gave notice in conformance with *actual* standard operating procedures of the prosecuting attorneys in Division 43. However, Informant argues that:

"Respondent's position appears to be that by asking someone/anyone from the

> prosecutor's office to go to see the judge with him, he complied with his obligation and that the prosecution declined the opportunity to appear in chambers with him. The fallacy of his argument is that he was aware that neither of the lawyers he talked to had authority to handle the cases in question; neither were *assigned* to the matters"

Infrmt. Brf., p. 17-18 (emphasis added).

Respondent did not ask "someone/anyone from the prosecutor's office." He asked APA Richmond, the most senior prosecuting attorney in the courtroom and an attorney of record who regularly covered APA Sheila Whirley's "assigned" files in Division 43. APA Pat Richmond testified at his deposition:

> Q. The *only prosecutors in the courtroom* were you and Mr. Cagen?
>
> A. Correct.

S. App. 12 - APA Pat Richmond, Depo, p. 36, ln 13-15. Further APA Richmond, in his December 23, 2002 letter to Adrienne Anderson with the Region X Disciplinary Committee, wrote:

> "At the time in question, Sheila Whirley and Ethan Corlija were *outside of the courtroom* when [Respondent] approached *me*."

S. App. 129.

Informant seems to base its argument on initial material statements made by prosecutors in this matter that they "NEVER" cover cases for each other and that Respondent must have known that APA Richmond could not cover a file "assigned" to APA Sheila

Whirley. However, as demonstrated herein, the initial key material statements made by the APAs were proved to be false. The APAs also attempted to subsequently qualify other initial material false statements, but only after being confronted on cross-examination with direct contradictory evidence which forced their hands. Further, as demonstrated herein, the material factual recitations of the various APAs involved in this matter and of the complainant, McCulloch, are completely contradictory.

In order to make a credibility determination of which version of the *actual* normal operating procedures of prosecuting attorneys in Division 43 is to be believed, *i.e.* Respondent's version or the versions of the APAs, it is important to compare the prosecutors' initial material statements regarding their procedures with later contradictory testimony and direct contradictory evidence. This will reveal to this Court the *true* procedures in Division 43 and it will reveal that the alleged internal office policies of the St. Louis County Prosecuting Attorney's office are not actually followed by their own attorneys. The importance of this Court having a clear view of the actual setting in which the events occurred is critical. Once the Court reviews the normal course of action in Division 43, then reviews the APAs' wholly inconsistent statements and testimony, it will reveal that Respondent's facts are more credible and that no violation of ethical rules occurred.

The first material statement made by the prosecutors in this matter concerned whether they routinely cover each other's "assigned" files. Informant argues that APA Richmond did not have authority to handle APA Sheila Whirley's files which were "assigned" to her. Infrmt. Brf., p. 18. Informant obviously bases its argument on material statements by the

APAs.

For instance, in his January 24, 2005 letter to Jan Oehrle of the OCDC, APA Richmond wrote:

> "It has NEVER been the policy of this office for a docket attorney to take another prosecutor's file and discuss it with the court."

S. App. 75. Again, this is an important material statement because it goes to the heart of whether APA Richmond was an attorney who would routinely cover the blind plea hearings on the cases at issue if other prosecutors were busy. In his letter to OCDC above, he states that it "NEVER" happens. At the June 24, 2005 hearing, Complainant McCulloch also echoed APA Richmond's statement above:

> Q. ***But all these prosecutors are team members, aren't they? They' all there together? They're team members***?
>
> A. ***No, they're not.*** Lenny was there with Pat Richmond, and Ethan is there with Sheila Whirley. Next door it would have been two other lawyers, at least two other lawyers, and I think Lenny and Ethan were the only ones we were training at the time. So next door in Division 42 there would have been two other lawyers.

App. 56 - Testimony of Complainant Robert McCulloch (p. 59 ln 24 - p. 60 ln 8) (emphasis added). However, in direct contradiction of both APA Richmond's statement and Complainant McCulloch's testimony, APA Sheila Whirley testified at the June 24, 2005 hearing as follows:

Q. (BY MR. LAPP) Do assistant prosecutors ever cover matters for one another?

A. ***Absolutely. We're encouraged to be team players and work with each other, so that's a given. We definitely cover for one another.***

App. 68 - Testimony of APA Sheila Whirley (p. 106 ln 13 - 17) (emphasis added).

In fact, on the *Ring* matter, although he claims the case was "assigned" to APA Sheila Whirley, it was APA Richmond as the attorney for the State who signed and filed with the court the pleading setting the matter for trial on October 8, 2002. S. App. 33. In addition, on cross examination, Respondent's counsel presented APA Richmond with several exemplar files from Division 43 which plainly show that APAs routinely cover each other's files and sign pleadings and judgments for one another (and specifically that APA Pat Richmond routinely signed APA Sheila Whirley's cases), just as Respondent testified. *See, e.g.,* the following:

S. App.78 - 81 (*State vs. Charles Mitchell*, cause # 01CR-3133, Division 43. The State's 10/18/01 recommendation letter was from ***APA Sheila Whirley***. However the 11/20/01 Judgment & Sentence was signed by ***APA Pat Richmond*** and the 11/20/01 Plea of Guilty was signed by ***APA Pat Richmond***);

S. App. 82 - 84. (*State vs. Michael Kaemmer*, cause # 01CR-2056, Division 43. The State's 06/25/01 recommendation letter was from ***APA Sheila Whirley.*** However, the 08/14/01 Judgment & Sentence was signed by ***APA Pat Richmond*** and the 08/14/01 Plea of Guilty was signed by ***APA Pat Richmond "for Sheila Whirley"***);

S. App. 88 - 90. (*State vs. Dwayne Perozzo*, cause # 01CR-4292, Division 43. The State's 03/19/02 Judgment and Sentence was signed by APA Pat Richmond. On the 03/19/02 Plea of Guilty, it states that the State appears through ***APA Sheila Whirley*** although it was ***signed by APA Pat Richmond.***)***;***

S. App. 91 - 94. (*State vs. Christina Diaz*, cause # 01CR-2216, Division 43. On the 06/18/02 Judgment and Sentence, it states that the State appears through ***APA Sheila Whirley*** although it was signed ***by APA Pat Richmond*** and on the 06/18/02 Plea of Guilty, it states that the State appears through ***APA Sheila Whirley*** although it was signed by ***APA Pat Richmond.***)

S. App. 95 - 97. (*State vs. Dawn Morgan*, cause # 01CR-4997, Division 43. The 06/11/02 Judgment & Sentence was signed by APA Pat Richmond. On the 06/11/02 Plea of Guilty, it states that the State appears through ***APA Sheila Whirley,*** but it was signed by ***APA Pat Richmond "for Sheila Whirley"***);

S. App. 123 - 125. (*State vs. Derrick Hicks*, cause # 01CR-3496, Division 35. On the 01-29-03 Judgment & Sentence, it states that the State appears through APA Andrew Hale but was signed by ***APA Marlo M. Lamb "for Andy Hale."*** On the 01-29-03 Plea of Guilty, it states that the State appears through APA Andrew Hale but was signed by ***APA Marlo M. Lamb "for Andy Hale"***);

S. App. 126 - 128. (*State vs. Gregory Davis*, cause # 01CR-1564, Division 43. The 11/08/01 - Judgment & Sentence was ***signed by APA Cleveland Tyson "for C.C.W."*** The

11/08/01 - Plea of Guilty - State appears through APA Carolyn Woods - ***Signed by APA Cleveland Tyson "for C.C.W."***).

When confronted on cross examination with the files, APA Pat Richmond then changed his story:

> Q. Well, keep looking.
>
> A. The second one here is a case Sheila Worley, *it looks like I covered for her, which isn't unusual. She was my docket partner.* I didn't write state opposed on there.
>
> Yeah, *another case of Sheila Worley's that I covered, which is not unusual. She was my docket partner.*
>
> And this one looks like it was just – oh, okay. Okay. *Sheila made the recommendation. I covered. I mean, that's not unusual at all.*

S. App. 15 - APA Pat Richmond, Depo, p. 48 ln 3 - 12.

Clearly, the initial statements and testimony of APA Richmond and Complainant McCulloch cannot be harmonized with this direct contradictory evidence and subsequent testimony. The fact is that APA Pat Richmond routinely covered cases that were "assigned" to APA Sheila Whirley and this was the *actual* setting and routine procedure in Division 43. It was normal routine and everyone knew it, including Respondent.

Informant ignores the fact that both APA Richmond and Respondent both testified that the only prosecutors in the courtroom were APA Richmond and APA Kagan. Informant ignores the fact that the standard practice in Division 43 was that prosecutors routinely cover

each other's cases and sign pleas and judgments for other prosecutors. Informant ignores the fact that APA Richmond testified that he and APA Sheila Whirley were "docket partners" and it is "not unusual at all" for him to cover her cases. This, in fact, was the *true* normal procedure in Division 43 and Respondent followed it.

Thus, Informant's argument that Respondent "was aware that neither of the lawyers he talked to had authority to handle the cases in question; neither were *assigned* to the matters" and that Respondent should have only dealt with APA Sheila Whirley is without basis in law, fact or reality.

Respondent gave Notice to Opposing Counsel

An ex parte ethical violation occurs when there is no notice to the adverse party. "A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, *and without notice to*, or contestation by, any person adversely interested." *State ex rel. Gardiner v. Dickmann*, 157 S.W. 1012, 1015 (Mo.App. 1913) (emphasis added & citation omitted).

The Indiana Professional Conduct Rule 3.5(b) is identical to Missouri Rule 4-3.5(b). "Indiana Professional Conduct Rule 3.5(b) provides that '[a] lawyer shall not communicate *ex parte* with [a judge, juror, prospective juror or other official] except as permitted by law.' A communication is *ex parte* if made by a party *outside the record without giving other parties notice or an opportunity to contest*." *In re Anonymous*, 729 N.E.2d 566, 567 -568 (Ind. 2000) (emphasis added). "*Ex parte* communication between the prosecution and the court, *without notice to opposing counsel of record*, should not be done as matter of course."

Matter of Atanga, 636 N.E.2d 1253, 1257 (Ind.1994) (emphasis added).

Respondent gave notice to APA Richmond. Respondent testified:

Q. Mr. Burstein, when you went back to see Judge Jamison, was the door of the chambers open?

A. It was.

Q. Okay. Were there other lawyers going into the judge's office that were not accompanied by a prosecutor?

A. Yes.

Q. Did you give Mr. Richmond the opportunity to come back to the judge's chambers with you?

A. Yes.

Q. Did Mr. Richmond indicate to you that he was not going to go back with you because the judge was going to do what you wanted anyway?

A. Correct.

Q. Was it the practice in Division 43 back then that the lawyers would go back to see Judge Jamison on matters?

A. Yes.

Q. In fact, didn't Mr. Richmond indicate that he saw you, his testimony today that you watched, that he saw you back with Judge Jamison?

A. Correct.

Q. He knew you were back there?

A. He did.

Q. And he chose not to go back there with you.

A. That's correct.

App. 85 - Testimony of Marc Burstein (p.174 ln 21 - p. 176 ln 4).

Again, however, Informant's argument seems to be based on initial material statements made by the APAs regarding whether Respondent gave notice of his intention to see Judge Jamison. As demonstrated below, these initial material statements were, again, subsequently proved false by later contradictory testimony and statements.

In his initial December 23, 2002 letter to Adrienne Anderson of the Region X Disciplinary Committee, APA Pat Richmond wrote:

> "Mr. Burstein *never* told me that he was in the process of going back to see the judge in his chambers."

S. App. 130. (emphasis added). This, indeed, is a critical material statement going to the heart of the charge against Respondent regarding whether he gave notice to APA Richmond. APA Richmond gave subsequent conflicting testimony and statements regarding this issue. In his deposition which was taken on June 20, 2005, APA Richmond testified:

Q. Okay. You also indicate on this letter that Mr. Burstein in fact did ask you to accompany him back to the judge's chambers?

A. Correct.

S. App. 10 - APA Pat Richmond (Depo, p. 26 ln 9 - 12). In his January 24, 2005 letter to Jan Oehrle of the OCDC, APA Richmond wrote:

"I also believe that Mr. Burstein stated he would just go see the judge on his own to which I replied that I would be surprised if the judge would discuss the cases without a prosecutor present."

S. App. 76. Note that APA Richmond, in this statement, says that he would be "surprised" if the judge would discuss the cases, not that he told Respondent he objected to Respondent seeing the judge. APA Richmond further testified in his June 20, 2005 deposition:

Q. And you indicated in Division 43 on the date in question that you saw Mr. Burstein and you thought he had gone back to get in line?

A. Correct.

Q. Okay. Is there a line of people waiting to get in to see a judge on a bolt (sic -"bulk") docket?

A. Sometimes there is. Sometimes there's a line of attorneys waiting to have files signed off on that have already been – like a traffic file that has been amended by me as the traffic prosecutor. So sometimes there is a line of people waiting to see the judge to get his signature.

Q. And the judge's door is open?

A. Yes.

S. App. 8 - APA Pat Richmond, Depo, p. 20 ln 25 - p. 21 ln 13.

As can be seen above, APA Richmond's initial material statements which formed the basis of the alleged ex parte contact with Judge Jamison were contradicted by his later testimony and statements made to the OCDC in which he finally admitted that Respondent

gave notice to him and requested him to see the judge with Respondent.

Further, Informant ignores the fact that both the *Ring* and *Manney* matters were set on the court's docket in Division 43 on the morning of October 8, 2002 and that all parties had notice thereof. Informant ignores the fact that Respondent approached APA Richmond, in the courtroom on October 8, 2002. APA Richmond then presented the State's files to Respondent and discussed both cases with him. Respondent then asked APA Richmond for an amended recommendation, and when he refused, he asked Richmond to accompany him to see the judge for the purpose of entering blind pleas. Informant ignores the fact that, despite such notice, APA Richmond refused to accompany Respondent to see the judge. Informant ignores the fact that APA Richmond subsequently testified that Respondent, did in fact, ask him to accompany Respondent to see the judge. Informant ignores the fact that APA Richmond subsequently testified that he saw Respondent in line waiting to see the judge and made no objection thereto.

To violate Rule 4-3.5(b), it requires ex parte contact "*without notice to,* or contestation by, any person adversely interested." *State ex rel. Gardiner v. Dickmann*, 157 S.W. 1012, 1015 (Mo.App. 1913). Because the cases were properly on the docket that day, because Respondent gave notice to the proper prosecuting attorney, and because he refused to appear or object after having an opportunity to do so, there was no violation.

Opposing Counsel Consented to Respondent's Contact with the Judge

Although notice and opportunity to object are all that is required, opposing counsel can also *explicitly* waive objection to both parties appearing before the judge. APA

Richmond did explicitly waive his objection. Respondent testified:

Q. But he didn't want to come with you. Or he refused to come with you?

A. I – actually, I asked him to come back with me, and he adamantly refused to come back. And he further said that the judge would probably do what I asked him to do. And that was common practice in 43. So it's not something that I did wrong.

Q. I'll get back to common practice in a minute. Did you use the words, Mr. Richmond, do I have your permission to go back and talk to the judge without you? Did you use those words?

A. I don't recall that. Those specific words, I don't recall.

Q. Do you recall using the word "permission"?

A. I asked Mr. Richmond to come back to see the judge with me.

Q. Okay.

A. And he refused to come back.

Q. At that time –

A. And he said that the judge, again, would go – *I don't care if you go back because the judge is going to do what you want anyways.*

App. 81 - Testimony of Marc Burstein, p/161 ln 1 - 24 (emphasis added). Again, Judge Jamison was known for routinely undercutting the State's recommendations. APA Pat Richmond's version of the conversation is as follows:

Q. Okay. You also indicated on this letter that Mr. Burstein in fact did ask

you to accompany him back to the judge's chambers?

A. Correct.

Q. *And I think you said in direct testimony that you might have said offhandedly, you know, he's going to change it anyway, I'm not going back with you?*

A. *Yeah, I said the judge will probably give you what you want, but all you need to do is grab Sheila out in the hallway.*

Q. And you said grab Sheila, in spite of the fact that Sheila didn't make the rec?

A. I'm sure Sheila made this rec. Ethan might have typed it up and signed off on it, but Sheila I'm sure made the rec and had it approved by John –

S. App. 10 - APA Pat Richmond depo (p. 26, ln 9 - p. 27 ln 3) (emphasis added).

Informant concedes that the issue regarding this point is one of credibility. In its brief, Informant states:

> "Respondent asserts that assistant prosecuting attorney Patrick Richmond said, 'I don't care if you go back because the judge is going to do what you want anyways.' ***A more plausible explanation for what occurred was related by APA Richmond***. He testified that he told Respondent, '. . .maybe you could talk with Sheila and the judge and the judge will probably make the changes that you're looking for because he undercut us on a regular basis. But I told him they're not my cases, I'm not going to go talk to the judge with you

because they're not my files.'"

Infrmt. Brf., p. 17 (emphasis added). Informant thus concedes that the issue comes down to which version was "more plausible." As demonstrated throughout this brief, many of APA Richmond's material statements that he made were proved false. The fact is that APA Richmond routinely covered APA Whirley's files, despite his initial statements that this "NEVER" happens. It is also a fact that APAs also routinely write "State Opposed" on blind pleas after a judge cuts their recommendations, despite APA Richmond's initial statements that this "never" happens. It is also a fact that APA Richmond, himself, has signed a blind plea "State Opposed," despite his statement that he had "never" done that. It is also a fact that APA Richmond finally admitted that Respondent did, in fact, ask him to see the judge, despite his initial statement that "Respondent *never* told me that he was in the process of going back to see the judge in his chambers." *In fact, APA Richmond testified that he did not have a problem with Respondent seeing the judge without a prosecutor present*. S. App. 11 - APA Pat Richmond depo, p. 31 ln 2 - 6.

Informant concedes that communications that day may not be fully reflected in this case. Informant argues:

> "Nevertheless, in the busy environment as described in the courtroom that day, it may have been possible for Respondent to jump to the incorrect assumption that he had permission to have ex parte contact, based on Richmond's response to him."

Infrmt. Brf. p. 29. So which version is more plausible? Respondent asserts that based on

the lack of credibility of APA Richmond (based on his numerous contradictory statements) combined with the fact that APA Richmond testified that he "didn't have a problem" with Respondent seeing the judge that day, and combined with the fact that APA Richmond routinely covered cases which were "assigned" to APA Whirely, clearly shows that Respondent did not have improper ex parte contact with Judge Jamison. Moreover, Informant cannot show by a preponderance of the evidence that APA Richmond did not waive objection to Respondent seeing the judge.

Responent does *not* believe it is appropriate to have ex parte contact with judges

Informant next makes over-the-top and erroneous statements in its brief that somehow Respondent believes ex parte contact is permissible because "everybody else is doing it." Infrmt. Brf., p. 19. Contrary to Informant's inflammatory argument, Respondent does not believe it is acceptable to have ex parte conversations with judges. Respondent does believe it is acceptable to conduct a hearing with a judge when a case is properly on the docket that day, when you have properly noticed an attorney of record for the opposing party of your intentions, and when the attorney of record for the opposing party fails or refuses to appear with you before the judge. The latter is what happened in this case and it was not improper ex parte contact.

To try to bolster its case, Informant also alleges that Respondent engaged in improper ex parte contacts in 2005 by getting a bond reduction allowing a 10% cash deposit, without having a prosecutor present. Infrmt. Brf., p. 19, 30. Informant ignores the fact that there has been a standing order since July 22, 2004 in the Circuit Court of St. Louis County, which

states:

> "A 10% cash deposit shall be allowed on any bond issued on a pending complaint, information or indictment on a misdemeanor, C Felony or D Felony, unless otherwise ordered by the court. On any other case, including a probation revocation, a 10% bond is only authorized upon a specific court order."

S. App. 143. Thus, Respondent did not need a judge or a prosecutor for this request and Informant's citation of this event is illusory.

It is readily apparent that Respondent was in no way attempting to accomplish ex parte contact without notice. He notified APA Pat Richmond, the last attorney of record to sign a pleading for the State, and the most senior APA in the courtroom. APA Richmond refused to appear despite said notice. Had Respondent truly desired to engage in improper ex parte communications, he would have never asked APA Richmond to accompany him to see the judge. Also, the normal and routine procedure in Division 43 was for prosecutors to cover each other's files. APA Richmond did this routinely for APA Whirley. Informant's argument that APA Richmond had no authority to handle the files because they were not "assigned" to him dispenses with the reality of what actually occurs on a routine basis in Division 43. Moreover, Respondent followed proper procedures as dictated by the Missouri Rules of Procedure.

Informant has not established by a preponderance of the evidence that Respondent violated Rule 4-3.5(b), nor could it because there is no basis in fact or law to support such

a conclusion. It should also be noted that Informant completely ignores the fact that APA Richmond, the senior docket attorney who arguably had the most personal involvement in this matter and knows first-hand what really goes on in Division 43, stated to the Region X Committee, "In conclusion, I ***do not*** feel that it is [Respondent's] discussion with the judge that is inappropriate in this case." S. App. 131.

Therefore, Count I should be dismissed in its entirety.

COUNT II - RULE 4-8.4(d)

PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

Informant argues:

> "Respondent's conduct in obtaining a judge's signature on orders outside of the established court procedures set by law to resolve contested matters was prejudicial to the administration of justice, in violation of rule 4-8.4(d)."

Infrmt. Brf., p. 20. Thus, despite the fact that the Panel found no violation of this rule, Informant seeks to bootstrap this charge to the underlying ex parte charge, discussed above. Tellingly, Informant does not identify what "established court procedures set by law" Respondent allegedly failed to follow. Informant cannot do this because Respondent did, in fact, follow proper procedure.

Respondent incorporates herein his argument, above, relative to Count I. As demonstrated above, Respondent did not obtain "a judge's signature on orders outside of the established court procedures set by law to resolve contested matters" and thus did not engage in conduct that was prejudicial to the administration of justice in violation of Rule 4-8.4(d).

Respondent gave proper notice to the proper attorney and that attorney refused to appear. As a matter of fact, had Respondent given notice to APA Sheila Whirley on the *Manney* matter, it would have been a legal nullity because APA Whirley never filed an Entry of Appearance nor any other pleading in that matter and thus was not even an attorney of record.

It appears that Informant confuses "established court procedures set by law" with the prosecuting attorneys' internal office policies – which are not even followed by their own attorneys.

Because Informant fails to establish a violation of Rule 4-8.4(d) by a preponderance of the evidence, Count II should be dismissed in its entirety.

ARGUMENT

II. THIS COURT SHOULD ADOPT THE HEARING PANEL'S DISMISSAL OF COUNT TWO BECAUSE RESPONDENT DID NOT VIOLATE RULE 4-8.4(c) IN THAT RESPONDENT DID NOT MISREPRESENT TO APA LENNY KAGAN THAT HIS SUPERVISING ATTORNEY HAD AUTHORIZED HIM TO SIGN THE PLEA FORM.

A. Standard of Review

A violation must be shown by a preponderance of the evidence. *In re Littleton,* 719 S.W.2d 772, 775 (Mo. banc 1986). The Disciplinary Hearing Panel's "recommendations are advisory in nature. This Court reviews the evidence *de novo,* determines independently the credibility, weight, and value of the testimony of the witnesses, and draws its own conclusions of law." *In re Oberhellmann,* 873 S.W.2d 851, 852 (Mo. banc 1994). This Court may take the stipulated facts as true and apply a de novo standard of review to determine the proper sanction. *In re Frick,* 694 S.W.2d 473, 474 (Mo. banc 1985). *In re Crouppen,* 731 S.W.2d 247, 249 (Mo. banc 1987).

B. Argument

Respondent did not violate Rule 4-8.4(c) because he did not misrepresent to APA Lenny Kagan that APA Pat Richmond authorized him to sign the blind pleas.

As demonstrated below, APA Lenny Kagan gave numerous misrepresentations in both his statements and testimony in this matter. Those misrepresentations were contradicted by subsequent and conflicting evidence.

APA Lenny Kagan made a material misrepresentation when he stated to OCDC that Respondent misled him due to the fact that prosecutors never write "State Opposed" on blind pleas and never sign the forms

Respondent urges the Court to look carefully at APA Lenny Kagan's January 25, 2005 letter to Jan Oehrle of the OCDC, in which he wrote:

> "Mr. Burstein next approached me and *told me that it was a common practice for prosecutors to write 'State Opposed'* and since I was a new prosecutor and still being trained, I felt Mr. Burstein would not take advantage of me. I was clearly misled by Mr. Burstein *due to the fact that prosecutors never write 'State Opposed' on blind pleas and never sign these forms*."

S. App. 22 (emphasis added). Curiously, now APA Kagan changes his allegation against Respondent. He first alleged he was misled because Respondent *told him APA Richmond authorized him to sign the forms*. Now, over two years later, APA Kagan complains that Respondent misled him because Respondent told him *"it was a common practice for prosecutors to write 'State Opposed'"* and that he felt misled *"due to the fact that prosecutors never write 'State Opposed' on blind pleas and never sign these forms*." This is materially different than saying that he was misled because Respondent told him APA Richmond authorized him to sign the forms.

Indeed, the prosecuting attorneys' *alleged* office procedure to not write "State Opposed" on blind pleas is APA Kagan's stated reason for why he feels Respondent misled him. APA Pat Richmond echoed APA Kagan's reasoning when wrote in his December 23,

2002 letter to Adrienne Anderson of the Region X Committee:

> "In my opinion, Mr. Burstein took advantage of Mr. Kagan and *his unfamiliarity with our office procedures* wen he asked Mr. Kagan to sign the forms."

S. App. 131 (emphasis added).

To bolster his reasoning, in his January 24, 2005 letter to Jan Oehrle at the OCDC, APA Pat Richmond also echoed APA Kagan's recitation of the *alleged* office policies of the prosecuting attorney when he wrote:

> "In addition, it has *never* been a practice of this office to write "State Opposed" on Pleas of Guilty or Judgment and Sentence forms *when a judge undercuts our recommendation*. In the five years I have been in the office, *I have never done that."*

S. App. 76 (emphasis added). However, in direct contradiction of these statements and of the *alleged* office policies, APA Lenny Kagan subsequently testified at the June 24, 2005 hearing:

> Q. And why would it have been necessary for you to write, State opposed, to cover yourself?
>
> A. At that time I had no idea. I mean, in case somebody came back and said, why'd you do it. *Actually, also we write, State opposed, when the recommendations are cut by the judge. That's why we write them in there if we ever did*.

App. 77 - Testimony of APA Lenny Kagan (p. 145 ln 4 - 12) (emphasis added). Further, in direct contradiction of APA Richmond's statement above, that it has "never" been a practice of his office to write "State Opposed" on plea and judgment forms and that he had "never done that," it cannot be disputed that his statements were, at best, negligent misrepresentations. *See, e.g.,* S. App. 85 - 87. (*State vs. Dominic Brady*, cause # 01TR-2640, Division 43 wherein a 05/23/01 ***"Blind" Plea, Judgment & Sentence was signed by APA Pat Richmond "Blind, State Opposed."***).

Further, in direct contradiction of both APA Kagan and Richmond and of the *alleged* office policy, it is clear that it is the usual and customary practice for APA's to write "State Opposed" on blind pleas and judgments and to sign those forms. Again, Respondent's counsel presented several exemplar files from Division 43 in which multiple prosecutors signed off on pleas and judgments and wrote "State Opposed" or similar language. *See, e.g.*, the following:

S. App.98 - 100. (*State vs. Tanner Clark*, cause # 02CR-002493, Division 43. The 10/24/02 Judgment & Sentence was signed by APA John DeVouten ***"Over State's objection"***);

S. App. 101 - 103. (*State vs. Michael Jackson*, cause #01TR-11536, Division 43. The 01/07/02 Judgment & Sentence was signed by APA Tim Lemen ***"State Opposed"*** *and the 01/07/02* ***"Blind" Plea of Guilty signed by APA Tim Lemen***);

S. App. 111 - 113. (*State vs. William Hodge*, cause # 01CR-3971, Division 43. The 11/20/01 Judgment & Sentence was signed by APA Sheila Whirley ***"Blind plea - Opposed"***

and the 11/20/01 Plea of Guilty was signed by APA Sheila Whirley ***"Blind Plea - Opposed"*****;**

S. App. 114 - 116. (*State vs. Edward Hayes*, cause # 99CR-5019, Division 43. The 01/13/00 Judgment & Sentence was signed by APA Karen Souls ***"Over State's objection"***);

S. App. 120 -122. (*State vs. William Uptegrove*, cause # 98CR-5568, Division 43. The 09/26/02 Judgment & Sentence was signed by APA Teresa P. Bomkamp ***"Over State's objection"***);

S. App. 133 - 135. (State vs. Dennis A. Roussel, cause # 01TR-5881, Division 43. The 10/30/01 - Judgment & Sentence was signed by APA Sheila Whirley ***"Opposed"*** and the 10/30/01 - ***Plea of Guilty was signed by APA Sheila Whirley "Opposed"*****;**

S. App. 136 - 138. (*State vs. Pompey Ejidal*, cause # 04TR-18811, Division 35. The 12/07/04 Judgment & Sentence was signed by APA Marlo M. Lamb ***"State's rec not followed"*** and the 12/07/04 ***"Blind" Plea of Guilty was signed by APA Marlo M. Lamb***);

S. App. 139 - 141. (*State vs. Michael Turner*, cause # 02CR-3461, Division 43. The 10/17/02 Judgment & Sentence was signed by APA Teresa P. Bomkamp ***"State opposed"***).

As can be seen in the above signed plea forms and through APA Kagan's subsequent contradictory testimony at the June 24, 2005 hearing, it is, in fact, common practice for prosecutors to write "State Opposed" on blind pleas and to sign the forms. It cannot be disputed that this practice is the normal and usual custom of the St. Louis County Prosecuting Attorney's office when judges undercut their recommendations. As seen above, even APA

John Devouton, who is APA Richmond's supervisor, signed off on a Judgment & Sentence and wrote in "Over State's Objection." S. App. 98 - 100.

Thus, by asking APA Kagan if he wanted to write "State Opposed" on the forms, Respondent did not mislead APA Kagan in any way. As shown above, this indeed was normal procedure for prosecutors in Division 43. Respondent argues that he did not tell APA Kagan that it was common practice to write "State Opposed." Rather Respondent states that he asked APA Kagan if he wanted to write "State Opposed." But even if APA Kagan's testimony that Respondent told him it was common practice to write "State Opposed" is believed, Respondent has committed no violation because that was a truthful statement.

APA Lenny Kagan stated that Respondent Approached APA Ethan Corlija, <u>Not</u> APA Pat Richmond, and APA Kagan admitted that he did not have personal knowledge of the allegations he made against Respondent

To determine his credibility, this Court should weigh the credibility of all APA Kagan's statements and testimony in this matter and compare it with the contradictory evidence. Because so much of APA Kagan's story is contradicted by his own subsequent testimony, by contradictory testimony from other prosecutors, by direct contradictory evidence and by Respondent's testimony, this Court should find that he materially misrepresented his conversation with Respondent and that he was not misled.

One such example concerns testimony and statements made by APA Pat Richmond and APA Lenny Kagan throughout this case, wherein APA Kagan gives contradictory testimony as to who Respondent initially approached on October 8, 2002 regarding the

State's recommendations on the *Ring* and *Manney* matters. APA Kagan's testimony is contrary to the testimony of both APA Richmond and Respondent. No other witnesses agreed with APA Kagan's testimony.

In his initial October 8, 2002 memo to Supervising Prosecuting Attorney John Devouton in which he set forth his version of what occurred on October 8, 2002, APA Lenny Kagan stated:

> "Mark Berstein lied to Ethan Corlija, Pat Richmond and me.
>
> Mark asked to see a recommendation from ***Ethan*** on a DWI file. After seeing the recommendation, Mark told ***Ethan*** that he would continue the case to try and get a better recommendation. Instead of continuing the case, Mark filled out a Guilty Plea form and a Judgment and Sentencing form with a different recommendation than was originally given to Mark.
>
> Mark next proceeded to see Judge Jamison ex-parte, and had the judge sign these forms without ever letting a Prosecutor agree to the changed conditions."

S. App. 132 (emphasis added). However, on cross examination, APA Kagan testified that he did not have personal knowledge of the statements in the above memo:

> Q. Okay. You're saying here [Respondent] asked to see a recommendation with ***Ethan***?
>
> A. Mm-hmm.
>
> Q. Okay. Now, there's no testimony that he asked Ethan. Could that have been Pat Richmond that he asked for, to see the recommendation?

A. ***No, he asked Ethan for a recommendation pursuant to Ethan. That's what Ethan told me.***

Q. So if Mr. Richmond said that Marc had asked him to see the recommendation, that would be incorrect?

A. ***I don't know. I wasn't there. I was assuming***.

Q. So you were assuming?

A. Yeah. As far as who he asked, but I thought it was – it was either Ethan or Pat, but I wasn't there when he did it.

Q. Either Ethan or Pat. Okay. And then you have in here in the first paragraph, you said, Marc Burstein lied to Ethan, Pat Richmond, and me.

A. Yeah.

Q. What lie would he have told Ethan?

A. ***I don't know. It's what Ethan told me, Marc lied to him as well, but I don't know what that was.***

Q. Okay. We don't have any affidavits or testimony from Ethan.

A. Okay. I don't know.

Q. Okay. And then you said here that he asked to see Ethan, filled out a guilty plea form and – instead of continuing the case. Okay. Is it your testimony that Marc asked that the case be continued?

A. ***No, it's based on what Ethan told me.***

Q. Again, Ethan?

A. Sure.

Q. And Ethan's not here and Ethan's not testifying, correct?

A. Right.

Q. At least as far as what Mr. Lapp said. If Mr. Richmond testified that he had no recollection of Marc asking that the case be continued, would you have a reason to disagree with that?

A. No. I mean, if he had personal knowledge --

Q. So Ethan's wrong about that?

A. I don't know if he's wrong or not. He may not have known what Patrick was doing. I can't testify.

Q. Then you say, instead of continuing the case. But the only evidence you have or the only basis you have of saying that is that Ethan told you that he tried to continue the case?

A. Yeah.

Q. Okay. Now, Ethan, he was hired the same time as you?

A. Same day. Same time.

Q. Why would Mr. Burstein have been talking to Ethan?

A. Because Ethan was being trained by Sheila Whirley, and she was the one that made the recommendations on these cases, but Ethan is the one who sent the recommendations out.

Q. So there's nothing wrong with talking to somebody who's in training per se?

A. No.

Q. Marc can talk to you?

A. Sure.

Q. Marc filled out a guilty plea form and a judgment and sentencing form with a different recommendation than was originally given to Marc. That's not really accurate, is it? The judge filled out a sentence that was different from the recommendation?

A. ***I assume so. I can't testify to the truth of that. I'm not sure, I'm just telling you what I was told through Ethan.*** When I look at these –

Q. The sentence is different that the rec, we understand that.

A. Right.

Q. But there's no evidence that you know of that Marc told the judge that the State's recommendation was any different that what the State's recommendation was?

A. ***I have no idea about that.***

Q. Marc next proceeded to see Judge Jamison ex parte. Again, that's something that you were told?

A. Yes.

Q. You testified you don't even know that.

A. Right. That's true.

Q. But that's what you put in your memo.

A. Sure.

Q. You didn't say, I was told that he went to see Judge Jamison ex parte, you didn't say, Ethan told me, you just said, Marc saw the judge ex part. Right?

A. Right. Based on what Ethan and –

Q. Right. And had the judge sign these forms with ever letting a prosecutory agree to the change conditions. Right?

A. Right.

App. 76 - Testimony of APA Lenny Kagan (p. 138 ln 25 - p. 143 ln 3) (emphasis added). APA Kagan further admitted that his allegations against Respondent were based on what APA Ethan Corlija allegedly told him:

Q. Then you have a lot of statements in here that you talked with Ethan about the case. Did – after Richmond talked to you, did you then go talk to Ethan or –

A. After Pat confronted me with why you signed this, I went to Ethan and said, did you change the rec or was that okay, and he said no. Basically what it says there. And Ethan told me his version, and his version as far as the recommendations and as far as Marc Approaching him or not,

I wasn't there. ***So a lot of that letter is based on what Ethan told me.***

App. 78 - Testimony of APA Lenny Kagan (p. 147 ln 11-22) (emphasis added). So, if APA Kagan's testimony is to be believed, that would mean that either APA Ethan Corlija or APA Pat Richmond is not being truthful.

APA Kagan's October 8, 2002 memo, discussed above, was the impetus for the entire investigation into the complaint against Respondent. No other witnesses, including Respondent, ever stated that Respondent had any communications with APA Ethan Corlija on October 8, 2002. APA Kagan's statements and testimony, above, are also directly contradictory to APA Richmond's statements. In his December 23, 2002 letter to Adrienne Anderson of the Region X Committee, APA Richmond stated:

> "At the time in question, Sheila Whirley and Ethan Corlija were *outside of the courtroom* when Mr. Burstein approached *me*."

S. App. 129 (emphasis added). In his October 9, 2002 memo to APA John Devouton, APA Richmond stated:

> "While *I* was in the courtroom, [Respondent] approached and inquired about two cases. . . *I* told [Respondent] that *I* would help him"

S. App. 142 (emphasis added). So APA Richmond does not agree with APA Kagan's testimony that Respondent approached APA Ethan Corlija.

As shown above, because APA Kagan made so many allegations against Respondent without any personal knowledge as to the truth of the allegations, and because his testimony on numerous issues materially conflicts with other witnesses, this Court should find his

allegations against Respondent are not credible.

APA Lenny Kagan and APA Pat Richmond also have conflicting testimony regarding which one of them Respondent approached *after* seeing Judge Jamison

Not only does APA Kagan's testimony conflict with APA Richmond's testimony regarding who Respondent *initially* approached to discuss the State's recommendations, APA Kagan's testimony also conflicts with APA Richmond's testimony regarding who Respondent contacted immediately *after* he left Judge Jamison's chambers.

In his October 8, 2002 memo to APA John Devouton detailing his version of the events of October 8, 2002, APA Kagan wrote:

> "[Respondent] *then went back into the Courtroom and came to me* while I was working on another matter. [Respondent] asked me to sign these forms."

S. App. 132 (emphasis added).[1] However, this is in direct contradiction to statements and

[1] Although APA Kagan initially stated that Respondent approached him in the courtroom while he was "***working*** on another matter," he gave subsequent conflicting testimony that: "I was standing talking to other attorneys, ***just socializing***, I guess, and when they were – when we were done talking, Marc approached me and asked me if I would sign off on a couple pleas." App. 73 - Testimony of APA Lenny Kagan (p. 127 ln 22 - p. 128 ln 1) (emphasis added). While this may not be a *material* contradiction, it is further evidence of APA Kagan's faulty memory throughout this proceeding.

testimony by APA Richmond. In his December 23, 2002 letter to Adrienne Anderson, APA Richmond wrote:

> "After I left the clerk's office, I was standing in division 43 near the attorney's table in the middle of the courtroom. Mr. Burstein approached and showed me that the judge had signed off on the Plea of Guilty and Judgment and Sentence forms for both of the aforementioned cases.
>
> * * *
>
> After some additional conversation on the matter, Mr. Burstein asked me to sign the forms."

S. App.130.

Not only can Informant's witnesses not agree on which APA Respondent approached, they cannot agree on where the APAs were at the time. Complainant McCulloch testified at the June 24, 2005 hearing:

> Q. Mr. Kagan was in the hallway or in the courtroom?
>
> A. *No, I think Kagan was in the hallway when he went up to him and had him sign the form.*

App. 57 - Testimony of Complainant Robert McCulloch (p. 64 ln 16 - p. 65 ln 9) (emphasis added). Complainant McCulloch's testimony is in direct contradiction to APA Lenny Kagan's testimony:

> Q. Here you are, new prosecutor, you're one month in, in the hallway talking –

A. *I was in the courtroom.*

Q. I'm sorry, and Mr. Burstein approaching you and says, you know, it's okay to sign this. Had anything like that ever happened before or had you ever seen defense lawyers come up to prosecutors and say, hey, sign this, I've already seen the judge?

A. I can't recall seeing that.

App. 78 - Testimony of APA Lenny Kagan (p. 147 ln 23 - p. 148 ln 7) (emphasis added). Again, this may seem like minutia, but the issue boils down to specifics, *i.e.*, exactly what statement Respondent made to APA Kagan when he asked him to sign the forms. Respondent asserts that at no time did he represent that APA Richmond authorized APA Kagan to sign the forms, but rather he only asked if APA Kagan *wanted* to sign them and write "State Opposed." The fact that Informant's witnesses cannot even agree on who Respondent spoke to, and when and where he spoke to them, raises serious doubts as to whether any of those witnesses can accurately reflect conversations they had with Respondent.

APA Lenny Kagan gives conflicting testimony about which prosecutors where in the courtroom

The issue of which prosecutors where actually in the courtroom on October 8, 2002 is also a material issue because it goes to the heart of why Respondent approached APA Richmond, the senior prosecutor in the courtroom, regarding the *Ring* and *Manney* files. Respondent asserts that APA Whirley and APA Corlija were not in the courtroom.

Respondent testified:

Q. Was Prosecutory Whirley present on October 8, 2002, in Division 43?

A. When I was there, she was not in the courtroom.

Q. Where was she when you saw her?

A. I didn't see her in the courtroom. I didn't know where she was.

Q. You didn't see her in the hallway, you didn't see her at any time? You didn't know whether she was there or not?

A. *No, I did not see her anyplace.*

App. 81 - Testimony of Marc Burstein (p. 158 ln 6 - 18) (emphasis added). Respondent further testified:

Q. So the only one you saw that day was Prosecutor Richmond and Prosecutor Kagan?

A. *Those two were in the courtroom inside Division 43, correct.*

App. 81 - Testimony of Marc Burstein (p. 159 ln 24 - p. 169 ln 2).

However, in contrast to Respondent's testimony, in his January 25, 2005 letter to Jan Oehrle at the OCDC, APA Lenny Kagan wrote:

"There were 4 prosecutors in the Courtroom on that particular morning, Ms. Whirley, and Mr. Ethan Corlija for the criminal docket and Mr. Richmond and I for the traffic docket."

S. App. 23. And in the June 24, 2005 hearing APA Lenny Kagan testified:

Q. On October 8, 2002, where were you that day?

A. In the morning, Division 43, Judge Jamison's court, and Patrick Richmond and I were in there. He was doing traffic and I was traffic, and Sheila Whirley, who was training Ethan Corlija at the time, she was in there doing criminal cases and he was sitting there watching her.

App. 73 - Testimony of APA Lenny Kagan (p.127 ln 5-13). However, in direct contradiction of this statement, APA Pat Richmond testified at his deposition:

Q. The *only prosecutors in the courtroom* were you and Mr. Cagen?

A. Correct.

S. App. 12 - APA Pat Richmond, Depo (p. 36, ln 13-15). Further APA Richmond, in his December 23, 2002 letter to Adrienne Anderson with the Region X Disciplinary Committee, wrote:

"At the time in question, Sheila Whirley and Ethan Corlija were *outside of the courtroom* when [Respondent] approached *me*."

S. App. 129.

This is yet another example of APA Kagan's misrepresentation of the events that occurred on October 8, 2002 and the Court should find that his testimony is not credible.

Why would APA Lenny Kagan state the Respondent told him it was OK to sign

In his January 25, 2005 letter to Jan Oerhle, APA Lenny Kagan states:

"As a prosecutor in training, I would ***never*** sign any forms without first asking my supervisor."

S. App. 23 (emphasis added). Since APA Richmond and APA Kagan both testified they

were in the courtroom and APA Kagan stated he "would ***never*** sign any forms" without asking his supervisor, why would APA Kagan not have simply asked APA Richmond if he was authorized to sign the forms? The answer is that APA Kagan was covering himself, after-the-fact, by saying that Respondent told him it was authorized, because APA Kagan found out he may not have complied with his own office policy. Instead, he sought to shift the blame to Respondent. APA Kagan testified:

Q. So Marc told you that the State was opposed?

A. He told me to write, State opposed, to cover myself.

Q. To cover yourself?

A. Yes.

Q. And that's why you did it?

A. ***Absolutely***.

Q. And why would it have been necessary for you to write, State opposed, ***to cover yourself?***

A. At that time I had no idea. I mean, in case somebody came back and said, why'd you do it. ***Actually, also we write, State opposed, when the recommendations are cut by the judge. That's why we write them in there if we ever did***.

App. 77 - Testimony of APA Lenny Kagan (p. 144 ln 21 - p. 145 ln 12) (emphasis added). Indeed, APA Kagan went to great lengths to "cover himself." APA Kagan further testified:

Q. So when Mr. Richmond said, why did you sign this, did you feel you

were in trouble? That there was going to be, from the head up, that maybe something was going to come down on you?

A. Not really. ***I dictated just to cover myself*** because I signed something that I thought was okayed, so just to let everyone know I didn't do this on my own.

App. 78 - Testimony of APA Lenny Kagan (p. 147 ln 2 - 10) (emphasis added). The memo to which APA Kagan is referring is the October 8, 2002 memo he sent to Supervising Prosecuting Attorney John Devouton. As discussed above, he subsequently testified that *"a lot of that letter is based on what Ethan told me."* With regard to that memo, APA Kagan further testified:

Q. You just went on your own and dictated a memo to your supervisor, or did somebody ask you?

A. Pat Richmond said, why did you sign this memo? When I was going down the escalator for lunch, he was coming up, he said, why did you sign this memo? And I said, well, Marc said you said it was okay. And he said, no, I didn't tell him it was okay.

So When I got back to the office for lunch, *I wanted to see Pat to make sure I wasn't in trouble because I did something wrong* and Pat said, well, you're not supposed to be signing these things and I never told Marc that it was okay. It was not an agreed upon thing on either of these cases.

So that's when I sat down and I wrote out a memo to my supervisor, to John Devouton, and said, look, Marc told me my supervisor said it was okay. *I don't want to get in trouble for something that's not my fault.*

App. 75-76 - Testimony of APA Lenny Kagan (p137 ln 11 - p. 138 ln 3) (emphasis added). What better way to avoid trouble than to attempt to shift the blame on someone else. When asked why he signed the memo, APA Kagan testified:

Q. What do you do when signing – what are you doing signing these without experience or not your cases, why did you feel you wanted to do that?

A. I didn't think somebody would lie to me, no offense, but I didn't think somebody would lie to me or misrepresent this to me. I didn't know what would happen. ***I <u>thought</u> Marc was telling me that*** – I knew Marc was telling me Pat Richmond, my supervisor, said it was okay to do it, the judge has already signed it, so I just – I relied on Mar's representation.

App. 73 - Testimony of APA Lenny Kagan (p. 129 ln 6 -17) (emphasis added).

As shown above by his testimony, APA Kagan does not seem sure of anything that happened on October 8, 2002. Almost everything he stated regarding the occurrences on October 8, 2002 was contradicted by other prosecutors, by other evidence and by Respondent. His statements regarding: (1) the alleged office procedures of never writing "State Opposed"; (2) the number and identities of prosecutors in the courtroom; (3) which

prosecutor Respondent initially approached; and (4) which prosecutor Respondent approached after seeing Judge Jamison were contradicted by other witnesses. He made material allegations against Respondent in a memo to his supervisor and he later testified that the allegations were not based on his personal knowledge, but instead were things he was told by APA Ethan Corlija despite the fact that no other witness in this case said Respondent had any contact with Ethan Corlija. He contradicted himself numerous times in subsequent testimony. His stated reason as to why he felt misled was that Respondent told him that it was common practice to write "State Opposed." He said he was misled because that is not common practice. It is. He admitted that he dictated the memo to John Devouton to "cover himself" because he did not want to get "in trouble."

Respondent asserts APA Kagan's allegations that Respondent misled him are false and that APA Kagan's statements are not credible. This was a prosecutor who was seeking to keep himself out of trouble by shifting the blame to someone else. Informant cannot show by a preponderance of the evidence that Respondent violated 4-8.4(c) because no such violation occurred at all.

Therefore, Count III should be dismissed in its entirety.

III. RESPONDENT SHOULD NOT BE PUBLICLY REPRIMANDED BECAUSE HE DID NOT MAKE A MISREPRESENTATION TO THE PROSECUTOR AND HE DID NOT HAVE IMPROPER EX PARTE CONTACT WITH THE JUDGE AND HIS CONDUCT WAS NEITHER NEGLIGENT NOR PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

A. Rule 4-8.4(c) Knowing Misrepresentations

Respondent incorporates herein his arguments under Point II of his brief. As the basis for its charge, Informant argues:

> "Respondent knowingly misrepresented to Lenny Kagan that Patrick Richmond had agreed that Kagan could sign the pleas form in question."

Infrmt. Brf., p. 26. Again, Respondent disputes this. By APA Lenny Kagan's own statements, he said the basis for why he felt Respondent misled him was:

> "Mr. Burstein next approached me and *told me that it was a common practice for prosecutors to write 'State Opposed'* and since I was a new prosecutor and still being trained, I felt Mr. Burstein would not take advantage of me. I was clearly misled by Mr. Burstein *due to the fact that prosecutors never write 'State Opposed' on blind pleas and never sign these forms*."

S. App. 22 (emphasis added). APA Kagan complains that Respondent misled him because Respondent told him *"it was a common practice for prosecutors to write 'State Opposed'"* and that he felt misled *"due to the fact that prosecutors never write 'State Opposed' on blind pleas and never sign these forms*." This is materially different than saying that he was misled

because Respondent told him APA Richmond authorized him to sign the forms.

As demonstrated in Point II of Respondent's brief, and in direct contradiction of both APA Kagan and APA Richmond's statements to the contrary, it is indeed common for prosecutor's to write "State Opposed" on blind pleas. Respondent maintains that APA Lenny Kagan was the only attorney in the courtroom when he returned from Judge Jamison's chambers and that he asked APA Kagan if he wanted to write "State Opposed" and sign the forms. However, even if APA Kagan's statement above is believed that Respondent told him it was "common practice" to write "State Opposed," there was no misrepresentation because it was common practice.

Informant also engages in inflammatory argument when it states:

> "Respondent refused to go to the *assigned* prosecutor, Sheila Whirley, another indication of his knowing and conscious intent to 'shop' for prosecutors who would let him slip this recommendation through without following proper procedures."

Infrmt. Brf., p. 26 (emphasis added).

Respondent incorporates herein his arguments under Point I of his brief. First, Respondent approached APA Pat Richmond, the most senior APA in the courtroom. APA Richmond is also senior to APA Sheila Whirley. This can hardly be construed as "shopping" for prosecutors. Second, there is no evidence that APA Richmond gave better recommendations that APA Whirley. Third, if Respondent were "shopping" for prosecutors, why would he end his shopping spree with the senior prosecutor that refused to amend the

recommendation? Why would Respondent have not then gone to APA Whirley or APA Ethan Corlija? As demonstrated in Point I of this brief, the fact is that APAs Whirley and Corlija were nowhere to be found and it was routine practice for APA Richmond to cover their "assigned" files.

By arguing that Respondent refused "to go to the *assigned* prosecutor," Informant again ignores the fact that APA Whirley never filed any pleadings nor an Entry of Appearance in the *Manney* matter and thus was not an attorney of record. Informant ignores the fact that APA Whirley never filed an Entry of Appearance in the *Ring* matter and that it was Respondent and APA Richmond, not APA Whirley, who signed and filed with the court the pleading setting the matter for trial on October 8, 2002. Informant ignores the fact that both Respondent and APA Richmond testified that APA Richmond and APA Kagan were the *only* prosecutors in the courtroom.

Again, Informant does not allege what "proper procedure" Respondent failed to follow. Informant must believe that "proper procedure" is the alleged internal office policies of the prosecutor's office — which are not followed by their own attorneys. Informant must believe these alleged procedures trump Missouri Supreme Court rules regarding notice to "attorneys of record.". If Informant's position were accepted, this would mean that all attorneys must ascertain office policies of their opposing counsel, even if another attorney is an attorney of record, and attempt to decipher the policy and notify whoever is "assigned" to the file even if that person does not appear in court on a properly noticed docket. What would happen if opposing counsel was a firm like Bryan Cave or Thompson Coburn, both

of which have hundreds of attorneys? The fact is that those firms would need to comply with Missouri Supreme Court Rules by properly entering their appearances as attorneys of record and showing up for scheduled court dockets, just as the St. Louis County Prosecuting Attorney's office should do. The answer is not to punish Respondent for the shortcomings of the prosecutor's office.

Respondent did not make a knowing misrepresentation to APA Kagan. Respondent did not "shop" for a prosecutor and did not "slip" anything by anyone. Respondent complied with Missouri Rules of Procedure and complied with the prosecuting attorneys' routine procedure in Division 43, and thus did not violate Rule 4-8.4(c). As the Panel found, there is no evidence, and certainly not a preponderance of evidence, that Respondent violated this rule and therefore he should not be punished in any way.

B. Rule 4-3.5(b) Negligent Ex Parte Contact

Respondent incorporates his argument from Point I of his brief herein. Respondent did not have improper ex parte contact with Judge Jamison.

It is readily apparent that Respondent was in no way attempting to accomplish ex parte contact without notice. He notified APA Pat Richmond, the last attorney of record to sign a pleading for the State, and the most senior APA in the courtroom. APA Richmond refused to appear despite said notice. Had Respondent truly desired to engage in improper ex parte communications, he would have never asked APA Richmond to accompany him to see the judge. Also, the normal and routine procedure in Division 43 was for prosecutors to cover each other's files. APA Richmond did this routinely for APA Whirley. Informant's

argument that APA Richmond had no authority to handle the files because they were not "assigned" to him dispenses with the reality of what actually occurs on a routine basis in Division 43. Moreover, Respondent followed proper procedures as dictated by the Missouri Rules of Procedure.

Informant has not established by a preponderance of the evidence that Respondent violated Rule 4-3.5(b), nor could it because there is no basis in fact or law to support such a conclusion. It should also be noted that Respondent completely ignores the fact that APA Richmond, the senior docket attorney who arguably had the most personal involvement in this matter and knows first-hand what really goes on in Division 43, stated to the Region X Committee, "In conclusion, I ***do not*** feel that it is [Respondent's] discussion with the judge that is inappropriate in this case." S. App. 131.

Because Informant has failed to prove, by a preponderance of the evidence, any violation, no punishment is warranted.

IV. THE SUPREME COURT SHOULD NOT REVIEW THE PANEL'S ISSUANCE OF AN ADMONITION TO RESPONDENT BECAUSE RULE 5.16 DOES NOT PROVIDE FOR SUCH REVIEW, BUT RATHER ONLY PROVIDES FOR REVIEW OF DISMISSED COUNTS, AND THE PANEL HAD AUTHORITY TO ISSUE AN ADMONITION.

A. Rule 5.19

Informant concedes there is no express Rule authorizing Informant to challenge the Panel's decision to issue a written admonition to Respondent. *See* Informt. Brf., pp. 31-34. Informant seeks to avoid the express language of Rule 5.19(d)(1). Indeed, Rule 5.19(d)(1), under which Informant is proceeding, does not allow such a result. The Panel issued a written admonition against Respondent and Respondent accepted it pursuant to Rule 5.19(b).

As a basis for further review, Rule 5.19(d)(1) provides:

"The chief disciplinary counsel does not concur in the panel's decision to *dismiss* the information;"

Because an admonition is not a "dismissal," Informant is proceeding without any authority and this matter should be dismissed in its entirety and, although Respondent believes no violation occurred, the Panel's decision should stand.

B. Rule 5.16

In arguing that the Panel did not have the authority to issue a written admonition in this case, Informant now seeks to also avoid the explicit language of Rule 5.19(a) and (b). Rule 5.19(a) and (b) clearly provides that the Panel can issue written admonitions:

(a) After a hearing, a disciplinary hearing panel may find that the information should be dismissed, a *written admonition* should be administered to the respondent, or that further proceedings are warranted.

(b) If a *written admonition* is administered to the respondent, it shall be served upon the respondent as provided in Rule 5.18.

Within fifteen days of the receipt of the *admonition*, the respondent so admonished shall accept or reject the admonition in writing. If accepted, the written *admonition* shall become part of the record. Failure of the respondent to timely respond in writing is an acceptance of the *admonition*.

If the *admonition* is rejected, the disciplinary hearing panel shall render a written decision within fifteen days of receipt of the rejection or within the time provided for a decision in Rule 5.16, whichever is later. The decision shall include the findings and recommendations required by Rule 5.16.

If the *admonition* is rejected, the *admonition* shall not be used as evidence or otherwise for any purpose, except as provided in Rule 5.31.

Rule 5.19(a) and (b) (emphasis added).

Because the Rule is clear that the hearing Panel had authority to issue an admonition and because the Rule is clear that Informant is not proceeding under any authority, this

matter should be dismissed in its entirety.

CONCLUSION

Based on the foregoing, Respondent asserts that this Court should find that Respondent did not violate any ethical rules, or in the alternative, this Court should find that Informant was without authority to bring this case, and therefore the Panel's decision should stand.

Respectfully submitted,

SCHLUETER, MANDEL & MANDEL

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the above and foregoing document and computer disk containing same has been mailed, postage prepaid, this 19th day of December, 2005, to:

Maridee Edwards
3335 American Ave.
Jefferson City, MO 65109

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this brief includes the information required by Rule 55.03; Complies with the limitations in Rule 84.06; contains 14,273 words, according to WordPerfect 10, which is the word processing system used; and that Norton Anti-Virus software was used to scan the disk and the disk is virus free.

_____

Alan S. Mandel