IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Procedural History

The Region X Disciplinary Committee investigated this complaint filed by St. Louis County Prosecuting Attorney Robert B. McCulloch, concluding its investigation in or about May 2003. The Advisory Committee to the Supreme Court ordered further investigation by the Office of Chief Disciplinary Counsel of the matter on November 22, 2004. **App. 2**.

On February 15, 2005, an Information was served on Respondent, **App. 3-9**, and on March 14, 2005, he filed an answer. **App. 10-13**. A hearing took place before a disciplinary hearing panel on June 24, 2005. A decision was rendered on July 8, 2005. **App. 14-23**.

Respondent was licensed as an attorney in Missouri on October 4, 1996. His date of birth is August 12, 1970. His license is in good standing. He has no prior discipline.

The Information in this matter involved three counts, all relating to a single incident which occurred on October 8, 2002, in Division 43 of the Circuit Court for the County of St. Louis, pertaining to Respondent's communications with the judge and prosecutors regarding two matters on the docket before the court that day. Respondent was attorney of record in one matter, *State v. Kelly Ring*, Case No. 01CR-5117 and was covering the other, *State v. Reginald Manney*, Case No. OOTR-8868, for another attorney. At the time of the incident Respondent had been practicing mainly criminal

defense for about five or six years and had significant experience in the area. **App. 85 (T. 177)**.

The charges included violations of Rules of Professional Conduct 4-3.5(b) (ex parte contact with a judge); 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation); and 4-8.4(d) (prejudice to the administration of justice).

The hearing panel found that Respondent violated Rule 4-3.5(b) by communicating ex parte with the judge "to obtain changes in the blind plea without the county prosecutor being present in chambers." [1] **App. 18**. The hearing panel did not find a violation of Rules 4-8.4(c) (dishonesty), and the panel did not find a violation of Rule 4-8.4(d) (prejudice to the administration of justice). **App. 20**. The panel recommended that an admonition "be administered to the Respondent pursuant to Rule 5.19(b)." **App. 20**. The Informant and the Respondent did not file a concurrence to the panel's decision.

Findings By the Disciplinary Hearing Panel

The hearing panel found the following facts in their decision: (*The number references are to the paragraphs of the written decision.)*

4. On October 8, 2002, Respondent appeared in Division 43 of the Circuit Court in St. Louis County to handle two matters which were on the docket that day. These two cases were *State v. Kelly Ring*, Case No. 01CR5117, in which Respondent was

[1] Testimony was received that a "blind plea" is a term used loosely, but in this context meant a defendant pleading guilty without the assurance of a mutually agreed upon sentence recommendation. **App. 47 (T. 23-24).**

the attorney of record; the other matter was *State v. Reginald Manney*, Case No. 00TR8868, which Respondent was covering for attorney Kenneth Schwartz. **App. 16**.

5. When Respondent arrived in Division 43 on October 8, 2002, he approached St. Louis County Assistant Prosecuting Attorney Patrick E. Richman, (hereinafter "Richman") (sic- Note-*the correct name is Richmond*), who was one of four prosecutors assigned to handle the docket of cases in Division 43 on that date, and requested that Richman (sic) show him the prosecutor's letters of recommendation in the *Ring* and *Manney* matters. Respondent was informed that he needed to contact Sheila Whirley, the prosecutor assigned to this case, in order to discuss any kind of amendment to the recommendation of conditions supplied earlier. **App. 16**.

6. After reviewing the letter of recommendations in the two cases, Respondent asked Patrick Richman (sic) if he could change the recommendation made in the case. **App. 16.**

7. Richman (sic) informed Respondent that he would not do so, and again told him to speak to prosecutor Whirley who was assigned to handle the matter. **App. 16.**

8. Respondent asked Richman (sic) to accompany him into the judge's chambers to discuss these two cases. APA Richman replied that he would not do that because the cases had not been assigned to him and that he was not familiar with the facts in the case. **App. 16.**

13. After being told that he should find the prosecutor to whom the case was assigned, Respondent did not do so and proceeded to go to Judge Michael Jamison's chambers in Division 43 to obtain the judge's signature on the blind plea form. The blind

plea's terms were favorable to the defendant, were different from what the state had proposed, and the state did not have the opportunity to present their case to the judge in chambers, before the judge's signature was obtained. **App. 17**.

14. Testimony from all witnesses showed that once an order is signed by the judge it is valid, regardless of whether or not a prosecutor has signed off on the case. **App. 17**.

Other Facts in the Record

Respondent testified that Richmond told him he didn't care if he spoke to the judge because he would probably make the changes anyway. **App. 81 (T. 161)**. Richmond testified he told Respondent that he would have to talk to Sheila Whirley out in the hallway and he said "maybe you could talk to Sheila and the judge and the judge will probably make the changes that you're looking for …" **App. 38**.

After Respondent had obtained the judge's signature on the Blind Plea form, Richmond testified that Respondent again approached him. Respondent testified he did not recall further conversation and disputes Richmond's version of events. **App. 83 (T. 167)**. Richmond testified that Respondent had a smile on his face, and waved the forms in the air and then showed them to Richmond with the changes made to the recommendations. Richmond testified he expressed surprise that the judge would do so without a prosecutor present. He testified that Respondent asked him to sign the forms at that time and he refused. Richmond again told Respondent that he would have to talk to

Sheila Whirley out in the hallway but there was no way she would sign off on them. **App. 39, 40**.

At some point after talking to the judge, Respondent approached APA Lenny Kagan (hereinafter "Kagan"), a new prosecutor, to obtain his signature. **App. 73 (T. 127)**. Kagan had been on the job with the St. Louis County Prosecutor's Office for about one month. **App. 73 (T. 126)**. Kagan was standing talking and socializing with other attorneys when Respondent approached. **App. 73 (T. 127).** Based upon representations made by Respondent that it was permissible for Kagan to sign, Kagan signed the Blind Plea form notating "state opposed" at Respondent's suggestion, next to his signature. **App. 73 (T. 128, 129)**. Kagan was later advised that he was not authorized to sign the form. **App. 75 (T. 137)**. The Plea form and the Judgment and Sentence form on the Kelly Ring case has the name of Lenny Kagan on the line for "The State of Missouri appears by the Assistant Prosecuting Attorney," which was written in by Respondent and the name is misspelled. **App. 61-62 (T. 80-83); 74 (T. 130); 84 (T. 170)**.

The evidence at the hearing showed and the hearing panel found that although it is preferred policy of the St. Louis County Prosecutor's office to have a prosecutor sign off on Blind Plea forms, that occasionally the prosecutor's signature is omitted. **App. 59-60 (T. 73-76); 63 (T. 88)**. It does not change the validity of the order, as the witnesses all testified that once a judge's signature is on a sentence and judgment form, it is valid. **App. 59 (T. 73)**.

Sheila Whirley was the prosecutor assigned to both the *Ring* and *Manney* matters. Whirley had spoken to her supervisor, John DeVouton, about the recommendations on

these files and the extent of her authority to offer a plea was notated in the files. **App. 28-34; 67 (T. 102)**. Whirley testified that she spoke to Respondent about the recommendation in the *Ring* case at some time prior to the October 8, 2002, court date. **App. 67 (T. 103)**. Whirley was working in Division 43 on October 8, 2002. **App. 67 (T. 104)**. Whirley recalls that during this conversation, Respondent wanted the case dismissed as nolle prossed. **App. 68 (T. 109)**. She told him he'd have to talk to John DeVouton. Whirley was in and out of the courtroom on that day. **App. 67 (T. 105)**. She saw Respondent Burstein that day. **App. 68 (T. 107)**. At some points during the day she was in the hallway outside the courtroom, talking to witnesses. Whirley did not agree to the changes in the recommendations suggested by Respondent, and Respondent did not ask her to go see the judge that day. **App. 68 (T. 108)**. Whirley did not give Respondent permission to speak to the judge alone. **App. 68 (T. 108)**. The sentencing recommendation Whirley was authorized to make was reflected in her file and was shown to Respondent in the courtroom by Richmond prior to his going to the judge. **App. 36**. The prosecutor's recommendation was more stringent than the recommendation requested by Respondent

On October 8, 2002, Whirley was supervising a new attorney, Ethan Corlija whom she was training. Corlija had been with the office about one month. Corlija had come on at about the same time as Lenny Kagan. **App. 67 (T. 102)**. Corlija had written a letter with the plea offer in the *Ring* matter on October 4, 2002, reflecting these terms, as part of the training he was receiving from Sheila Whirley. **App. 69 (T. 113)**. At no

time during October 8, 2002, either before or after speaking to the judge, did Respondent speak to either Sheila Whirley or Ethan Corlija. **App. 84 (T. 173)**.

The changes to the sentencing recommendations requested by Respondent dealt with the number of hours of community service, whether the probation was to be county supervised or court supervised, and in the case of Kelly Ring, to maintain full time employment. The judge's orders on both cases adopted Respondent's recommendations. **App. 80-81 (T. 157-158)**. In the case of Kelly Ring, the terms were reduced to court supervised probation and restitution. There was no employment condition or community service ordered. **App. 80 (T. 156)**. In the *Manney* case, the community service hours were reduced from the recommendation of 40 to 20 hours. The order indicated that SATOP, (a substance abuse program) was completed, while the prosecutor's recommendation lists SATOP and does not indicate it has been completed. **App. 26-27; 31-34**.

Respondent testified that ex parte contact with judges was common and he thinks it's "okay" to do so if they (the prosecutors) "refuse to come." **App. 85 (T. 175); 87 (T. 183)**. Respondent acknowledged making an ex parte appearance before a judge without consent of opposing counsel 2005 on a bond memo when the prosecutor would not leave her office to accompany him after he appeared at the prosecutor's office and asked the receptionist to summon the assigned attorney. **App. 87 (T. 182-183)**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BURSTEIN FOR VIOLATIONS OF RULES 4-3.5(b) AND 4-8.4(d) BECAUSE HE ENGAGED IN EX PARTE CONTACT WITH A JUDGE THAT AFFECTED THE ADMINISTRATION OF JUSTICE, BY ACTING IN A MANNER INCONSISTENT WITH PROCEDURAL RULES.

In the Matter of Carmick, (2002) 146 Wash 2d 582, 48 P.3d 311

In the Matter of Lacava, (Ind. 1993) 615 N.E. 2d 93

In re Friedman, (Alaska 2001) 23 P.3d 620

Rule 4-3.5(b)

Rule 4-8.4(d)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD FIND THAT IN ORDER TO ADD LEGITIMACY TO THE IMPROPERLY OBTAINED ORDER, RESPONDENT VIOLATED RULE 4-8.4(c) BY MISREPRESENTING TO APA LENNY KAGAN THAT HIS SUPERVISING ATTORNEY HAD AUTHORIZED HIM TO SIGN THE PLEA FORM, AND THEREFORE THE COURT SHOULD NOT ADOPT THE HEARING PANEL'S REASONING ON COUNT TWO.

Rule 4-8.4(c)

POINTS RELIED ON

III.

RESPONDENT SHOULD BE PUBLICLY REPRIMANDED FOR HIS KNOWING MISREPRESENTATION TO THE PROSECUTOR AND HIS EX PARTE CONTACT WITH THE JUDGE, WHICH WAS AT LEAST NEGLIGENT CONDUCT AND WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

In the Matter of Carmick, (2002) 146 Wash 2d 582, 48 P.3d 311

State of Nebraska ex rel. Nebraska State Bar Association v. Owens, 615 N.W.2d 489 (Neb. 2000)

Mississippi Bar v. Logan, (MS 1998) 726 So.2d 170

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-3.5(b)

Rule 4-8.4(c)(d)

POINTS RELIED ON

IV.

THE SUPREME COURT SHOULD REVIEW THE PANEL'S ISSUANCE OF AN ADMONITION TO RESPONDENT BECAUSE OF THE IMPORTANCE TO THE ATTORNEY DISCIPLINE SYSTEM OF IMPOSING THE APPROPRIATE SANCTION IN THAT REVIEW OF PANEL ISSUED ADMONITIONS SHOULD NOT BE PRECLUDED BY AN UNREASONABLE INTERPRETATION OF RULE 5.16, IN THE EVENT DISCIPLINARY COUNSEL DOES NOT CONCUR WITH THE PANEL'S ADMONITION.

Jones v. Jackson County Circuit Court, 162 S.W.3d 53 (Mo. App. 2005)

In re Conner, 207 S.W.2d 492 (Mo. banc 1948)

Rule 5.16

Rule 5.19

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BURSTEIN FOR VIOLATIONS OF RULES 4-3.5(b) AND 4-8.4(d) BECAUSE HE ENGAGED IN EX PARTE CONTACT WITH A JUDGE THAT AFFECTED THE ADMINISTRATION OF JUSTICE, BY ACTING IN A MANNER INCONSISTENT WITH PROCEDURAL AND ETHICAL RULES.

A. Count One Rule 4-3.5(b)

Ex Parte Contact

The hearing panel found that Respondent engaged in ex parte contact with Judge Jamison on October 8, 2002, when he went into chambers without the prosecutor to talk about the disposition of two matters. The panel found a violation of Rule 4-3.5(b). Respondent did not notify Sheila Whirley, the assigned prosecutor, that he was going to present his position to the judge, and did not discuss his proposed amendment to the sentence with her that day before going to see the judge alone.

Rule 4-3.5 states that a lawyer *shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law and he shall not:*

(b) communicate ex parte with such a person except as permitted by law.

The hearing panel correctly concluded that Respondent's action of going to Judge Jamison's chambers, discussing sentencing dispositions, and asking him to sign orders on

two contested matters without the presence or consent of opposing counsel constituted an ex parte communication and there was no exception permitted by law.

Respondent suggests there was an exception in this situation because either (1) he had "permission" from the prosecutor's office to speak to the judge alone, (2) he gave notice to the prosecutor's office of his intention, or (3) everybody else was doing it, and it was an accepted custom and practice in division 43. None of these excuses are "exceptions permitted by law," and none of them are meritorious defenses.

Respondent maintains that he had permission to speak to the judge alone because other members of the prosecutor's office -- who were not assigned to the case and were not familiar with the facts of the case or reasons for the recommendation determined by the assigned prosecutor, -- "refused" to speak to the judge with him. 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." **App. 81 (T. 161)**. 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." **App. 38**.

A second theory that Respondent implies is that he "gave notice" to the prosecutor's office by talking to other representatives of the office. 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; and one was an uninitiated member of the prosecution team, who was not even allowed to handle any cases on his own yet. Lenny Kagan was the young attorney who Respondent persuaded to sign the form as a representative of the prosecutor's office, after he had procured the judge's signed order. Kagan testified he had only been on the job a month and didn't have any responsibilities delegated to him. "My only job was to follow Pat Richmond around, who was training, in the criminal docket, traffic docket, and petitions for review docket" and that no cases were assigned to him at that time. **App. 73 (T. 126)**.

Respondent's true motivation in going to see the judge ex parte was for his own convenience and expedience. Respondent characterized assistant prosecuting attorney Richmond's refusal to go back to speak with the judge on these two cases, which were not assigned to him, as a form of prosecutor "stonewalling."

> **Q: I understand that. You chose to go into the judge's chambers and speak with him about the disposition of the Ring and Manney cases; is that right?**
>
> A: I did, after Mr. Richmond refused to go back into the room. I can't prevent somebody from – I mean, nothing's ever going to get done – I can't force somebody to come back and talk to me. The prosecutor's office, they're known to stonewall people, at least me specifically, and refuse to come back. If somebody refuses to come back …"

App. 82 (T. 163).

Later in the hearing, during questioning by a panel member, Respondent testified:

Q: I think you testified you felt you were regularly stonewalled by the prosecutor's office?

A: I have been stonewalled in the past, correct. Yes, ma'am.

Q: Could you tell me a little more what you mean by that?

A: Sure. For example, if I asked let's go talk to the judge, for example, they would say, no, we're not going to talk to the judge. Well, if they're stonewalling you, how else are you supposed to do anything? Back then, and it was just Judge Jamison's practice to come back and talk to him.

App. 86 (T. 178).

Respondent gave another recent example from 2005 of asking a receptionist to call a prosecutor out of her office to spontaneously drop what she was doing and go and talk to a judge with him about a bond memo. **App. 86 (T. 179)**. Respondent's definition of "stonewalling" appears to mean any other attorney's refusal to drop what they are doing to accommodate him. Respondent continues to assert that if he perceives a prosecutor is "stonewalling" he can go to the judge directly. **App. 87 (T. 183).**

Respondent's third theory of excusing his conduct is that it was the custom and practice in Division 43 for lawyers to have ex parte contact with the judge. The prosecutors refute Respondent's perception that "everybody else is doing it." They are not aware of any such custom in the absence of specific consent by the opposing party to

do so. Alleged local customs do not supercede the Rules of Professional Conduct. *In the Matter of Carmick*, (2002) 146 Wash 2d 582, 48 P.3d 311,319.

B. Count Three Rule 4-8.4(d)

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).

The "prejudice" referred to in the rule is not a showing of individual prejudice to a party as in the context of an appealable issue, i.e., reversible error. It is the conduct of the attorney, not the outcome of the proceeding that determines a violation of the Rule. *In the Matter of Lacava*, (Ind. 1993) 615 N.E. 2d 93, 96. The rule contemplates conduct which impedes or subverts the process of resolving disputes. *In re Friedman*, (Alaska 2001) 23 P.3d 620. Respondent circumvented the administration of justice and the right of his opposing party to speak to the judge on an equal footing.

The hearing panel found no violation of Rule 4-8.4(d) (prejudice to the administration of justice) because it mistakenly based its logic on the question of whether a prosecutor's signature was necessary on the Blind Plea form. **App. 19**. With all respect to the disciplinary hearing panel, Informant asserts that the issue of the timing of when the order was valid, or whether a prosecutor's signature was necessary to make it valid, is a red herring.

The charge of prejudice to the administration of justice as pled in Count Three of the Information is:

By engaging in ex-parte communication with a judge concerning pending criminal matters, by soliciting a judge to make changes in the recommendation made by a county prosecutor outside the presence of the prosecutor and by making misrepresentations to a prosecutor in order to obtain his signature on Plea of Guilty and Judgment and Sentence forms in the same pending criminal matters, Respondent engaged in conduct that was prejudicial to the administration of justice in violation of Rules 4-8.4(d) of the Rules of Professional Conduct.

App. 7-8.

The violation of Rule 4-8.4(d) is established by the potential effect on the administration of the system of justice when a lawyer does not follow the rules of order set up within the court system to maintain the integrity of the adversary system of justice we abide by in this country.

ARGUMENT

II.

THE SUPREME COURT SHOULD FIND THAT IN ORDER TO ADD LEGITIMACY TO THE IMPROPERLY OBTAINED ORDER, RESPONDENT VIOLATED RULE 4-8.4(c) BY MISREPRESENTING TO APA LENNY KAGAN THAT HIS SUPERVISING ATTORNEY HAD AUTHORIZED HIM TO SIGN THE PLEA FORM, AND THEREFORE THE COURT SHOULD NOT ADOPT THE HEARING PANEL'S REASONING ON COUNT TWO.

The Disciplinary Hearing Panel mistakenly concluded that the focus of the wrongdoing in obtaining Lenny Kagan's signature on the judge's order was based on whether there was a need for a prosecutor's signature in order to make the order valid. Their focus was misplaced. The misconduct is based on Respondent's misrepresentation to Lenny Kagan that his supervising attorney, Patrick Richmond, who had already refused to participate in changing the recommendation, had indicated that it was "OK" for Kagan to sign on behalf of the prosecutor's office. This was not true.

The Disciplinary Hearing Panel erred in finding that there was no violation of Rule 4-8.4(c) in Count II. The panel was wrong in concluding that "… the issue of obtaining the signature of Lenny Kagan, since it did not affect the validity of the order, can (not) serve as grounds for a disciplinary measure. The panel finds that the

Respondent did not engage in conduct involving dishonesty, fraud, deceit and misrepresentation as set forth in rule 48.4(c) of the Rules of Professional Conduct." **App. 19-20**.

At the hearing, during questioning by Informant's counsel, Kagan testified that the following exchange occurred between him and Respondent after Respondent had obtained the judges' signatures on the pleas:

> **Q: Did he give you any explanation about what these were or why you should sign?**
>
> A: I told Marc at the time that, first of all, they're not my cases, and two, I'm being trained so I have no idea what I'm signing, even if I should be signing anything. He should probably talk to Pat Richmond who is my personal supervisor, and that was that.
>
> **Q: Did he make any representation to you about Pat Richmond's permission to sign these?**
>
> A: Well, at the time he just said Pat Richmond was too busy, he had already talked to Pat, the judge had signed off on these things, it wasn't a big deal, Pat said, fine, you can do it. Just to cover yourself, write State opposed, but the judge already signed it, it's no big deal.

App. 73 (T. 128).

Kagan also testified that he relied on Respondent's representation that Pat Richmond had said it was okay to do so. The fact is that Pat Richmond did not tell Respondent that it was okay for Kagan to sign, declined to sign off on them himself when

asked, and did not agree to the disposition or to Respondent obtaining the orders without participation by the prosecutor's office. Respondent's actions in getting the young prosecutor, Kagan, who was still in training and didn't know any better, to sign these pleas was accomplished by misrepresenting facts to Kagan and was dishonest.

Richmond testified that Respondent again approached him at counsel table after he had seen the judge that day and related his recollection that "he has kind of a smile on his face and he's holding the forms up." **App. 39**. Richmond testified that he expressed to Respondent that he was surprised to learn that that the judge had done so without a prosecutor being there and "at least having our say." **App. 39-40**. Respondent then asked Richmond to go ahead and sign them at this point and he responded no, saying:

> "I'm not going to sign them, they're not my files, which I told him before. I told him you can go see Sheila Worley (sic) out in the hallway, they are her files, but I know that there is no way she'll sign off on them. That's basically where I left it."

So after Respondent asked Richmond to participate in changing the recommendations, and after having been refused by Richmond, Respondent approached the new guy in the office and persuaded him to place his signature on them in order to give the appearance that the orders were obtained with participation of the prosecutor's office. This is the essence of the dishonest conduct that Respondent engaged in. It is irrelevant that the orders were valid immediately upon the judge's signature. It is the act of misrepresenting to Kagan that this was a mere formality that had been approved by his supervising attorney.

ARGUMENT

III.

RESPONDENT SHOULD BE PUBLICLY REPRIMANDED FOR HIS KNOWING MISREPRESENTATION TO THE PROSECUTOR AND HIS EX PARTE CONTACT WITH THE JUDGE, WHICH WAS AT LEAST NEGLIGENT CONDUCT AND WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

Rule 4-8.4(c) Knowing Misrepresentations

In analyzing the disciplinary sanction to be imposed under the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), one looks to the most severe conduct first. In this instance, the dishonesty to Lenny Kagan would be the most serious conduct because it reflects most strongly on the integrity of the attorney and his fitness to practice. Under Standard 5.1 – *Failure to Maintain Personal Integrity*, heightened sanctions of disbarment or suspension are suggested for dishonest acts which involve criminal conduct. This is not criminal conduct, therefore the appropriate sanction is 5.13, which addresses situations other than criminal conduct.

ABA Standard 5.13 states:

> Reprimand is generally appropriate when a lawyer knowingly[2] engages in any other conduct that involves dishonesty, fraud, deceit, or

[2] The ABA Standards analyze discipline levels under three different mental states. The mental states in order of severity are intentional, knowing, and negligent.

misrepresentation and that adversely reflects on the lawyer's fitness to practice law. (emphasis added)

Respondent knowingly misrepresented to Lenny Kagan that Patrick Richmond had agreed that Kagan could sign the plea form in question. There is no evidence (other than Respondent's assertions) supporting Respondent's version of the story that Richmond said he didn't care if Respondent altered the recommendations. All the evidence shows that Respondent was told at least twice by Richmond that he would not sign the plea, he would not participate in changing the recommendation, and he did not agree with Respondent going to see the judge alone. Therefore, Respondent clearly knew that if Richmond would not do so, his trainee, Kagan, would not have the authority or the "okay" to do so. He misrepresented the facts to Kagan.

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. Whirley was there in the courtroom or in the nearby hallway all during the time in question.

Rule 4-3.5(b) Negligent Ex Parte Contact

Respondent's ex parte communication with Judge Jamison is also a serious violation, and some might view it as just as serious as the misrepresentation to the prosecutor. Prohibited ex parte contact with a judge is governed by the ABA Standards for Violations of Duties Owed to the Legal System, specifically Standards 6.31- 6.33.

Standard 6.33 states:

> Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. (emphasis added)

If the improper communication is knowingly made, and it causes potential or actual injury or interference, Standard 6.32 suggests that suspension is the appropriate sanction. In fact, the Washington Supreme Court ordered a 60 day suspension for misrepresentations made to a judge about giving notice to opposing parties in obtaining an ex parte order. However the violations in that case included Rule 3.3(f) (candor toward a tribunal), as well as Rule 4-3.5(b) and the prejudice to the administration of justice rule, Rule 4-8.4(d). *In the Matter of Carmick*, (2002) 146 Wash 2d 582, 48 P.3d 311.[3]

On the other hand, if one were to give the benefit of the doubt to Respondent that his conduct was merely negligent, one must assume that he interpreted Patrick

[3] But see *In Matter of Anonymous* (2000) 729 N.E.2d 566 - (Private reprimand to attorney for violation of Rule 4-3.5(b) for urging the judge in chambers to read the guardian ad litem's report at the time he filed his Verified Petition for Immediate Emergency Custody and then returning later at judge's suggestion for the order).

Richmond's response to him as ambivalence about ex parte contact with a judge. When Respondent requested that Richmond accompany him to Judge Jamison's chambers, Respondent reports the exchange as follows:

> **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 (T. 161).

Of course, Richmond recalls it differently and his testimony shows that he adamantly does not believe ex parte contact with the judge without the prosecutor present is acceptable, unless the parties have an agreement and the lawyer is simply relaying their agreement to the judge. This is also strongly maintained by the other prosecutors who testified. **App. 68 (T. 108-109); 71 (T. 121); 74-75 (T. 133-134); 77 (T. 143); 78 (T. 148-149)**. 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. A plausible explanation could be that Respondent "heard what he wanted to hear," given the fact that he either did not want to speak to prosecutor Whirley because he knew she would disagree with him, or he did not want to be bothered with the extra step of locating her and getting her attention when she was in the midst of preparing witnesses for her scheduled preliminary hearing. For this reason, Informant suggests that at a minimum, Respondent's ex parte contact with the judge was negligently undertaken and that a reprimand is the appropriate sanction as suggested in ABA Standard 6.33.

Even the more general charge of "conduct prejudicial to the administration of justice," Rule 4-8.4(d), would warrant at least a public reprimand. A Nebraska Supreme Court case in which a prosecutor was found culpable of a charge of conduct prejudicial to the administration of justice by intervening in reducing her brother's speeding ticket, warranted a public reprimand. *State of Nebraska ex rel. Nebraska State Bar Association v. Owens*, 615 N.W.2d 489 (Neb. 2000). A Mississippi attorney received a public reprimand for conduct prejudicial to the administration of justice in failing to inform

opposing party of his ex parte communication with a magistrate. *Mississippi Bar v. Logan*, (MS 1998) 726 So.2d 170.

In coming to a final determination of the appropriate sanction, mitigating and aggravating factors should be evaluated. A factor in aggravation to be considered is the apparent lack of acknowledgement of any wrongdoing by Respondent. He continues to assert he did nothing wrong. **App. 81 (T. 161); 84 (T. 170); 85 (T. 175); 87 (T. 182-183)**. Even as recent as 2005, he acknowledges making an ex parte appearance before a judge without consent of opposing counsel. **App. 86-87 (T. 179-182)**. Under the Aggravating Standards 9.2, "refusal to acknowledge wrongful nature of conduct" is a recognized aggravating factor.

The evidence shows, at a minimum, that Respondent's conduct was negligent in his ex parte contact with the judge. Thereafter, he engaged in a knowing attempt to mislead Lenny Kagan about what his supervisor had said, and all this conduct had a prejudicial effect on the administration of justice. A public reprimand is warranted.

ARGUMENT

IV.

THE SUPREME COURT SHOULD REVIEW THE PANEL'S ISSUANCE OF AN ADMONITION TO RESPONDENT BECAUSE OF THE IMPORTANCE TO THE ATTORNEY DISCIPLINE SYSTEM OF IMPOSING THE APPROPRIATE SANCTION IN THAT REVIEW OF PANEL ISSUED ADMONITIONS SHOULD NOT BE PRECLUDED BY AN UNREASONABLE INTERPRETATION OF RULE 5.16, IN THE EVENT DISCIPLINARY COUNSEL DOES NOT CONCUR WITH THE PANEL'S ADMONITION.

Rule 5.19

There may be some question whether the Office of Chief Disciplinary Counsel has authority under Rule 5 to file the disciplinary record for Supreme Court review in the event a respondent accepts an admonition per Rule 5.19(b). Subpart (b) speaks to what happens if the respondent rejects the admonition, but is silent as to disciplinary counsel's options if disciplinary counsel does not concur with the panel's issuance of an admonition.

After a hearing on the merits, the Disciplinary Hearing Panel issued a written admonition to Respondent. Respondent neither accepted or rejected the admonition in writing. Rule 5.19(b) provides that "[f]ailure of the respondent to timely respond in

writing is an acceptance of the admonition." Because Informant did not concur in the panel's issuance of the admonition and believes that public reprimand is the appropriate sanction, the complete record, of which the admonition was a part, was filed with the Court pursuant to Rule 5.19(d)(2).

In 2001, Rule 5.19 was amended to add panel-recommended dismissals to the post-panel decision review options available to the parties. Specifically, subpart (d)(1) was amended to permit the chief disciplinary counsel to file the record for the Court's review if the chief disciplinary counsel did not concur in a panel's decision to dismiss an information. The Court's amendment of the Rule in 2001 did not expressly speak to the issue of a disposition by admonition, and whether the Court intended to foreclose further review of panel issued admonitions, if disciplinary counsel does not concur in the panel's disposition.

Supreme Court Rules may be interpreted by reference to statutory construction principles. *Jones v. Jackson County Circuit Court*, 162 S.W.3d 53, 61 (Mo. App. 2005). By expressly broadening Supreme Court review to include dismissals in which disciplinary œounsel did not concur, it would require an unreasonable construction of Rule 5.19 to conclude that the Court intended to foreclose Supreme Court review of panel-issued accepted admonitions.

Further, this Court deliberately used the word "review" in Rule 5 rather than "appeal" because the Court intended to give a broad construction to Supreme Court review of lawyer discipline cases. *In re Conner*, 207 S.W.2d 492, 495-496 (Mo. banc 1948). In *Conner*, the Court noted that "review," as referenced in Rule 5, is broader than

the more limited word "appeal." The Court also noted that Rule 5, which is ancillary to the administration of justice itself, was "intended to and did enlarge the scope of the Court's review of disciplinary matters." 207 S.W.2d at 495.

Rule 5.16

There may also be some ambiguity about whether the Disciplinary Hearing Panel has the authority to issue an admonition after the amendment of the Rule 5.16 in 2002. Prior to November 13, 2002, Rule 5.16, which governs the "Decision of Disciplinary Hearing Panel – Findings and Recommendations," enumerated the following possibilities for a panel's "recommended discipline": written admonition, private reprimand, public reprimand, suspension or disbarment. The November 2002 amendment to the Rule eliminated "written admonition" and "private reprimand" from the foregoing list.[4]

At the time Rule 5.16 was amended to eliminate these two sanction options (private reprimand and admonition) from the list available to disciplinary hearing panels, Rule 5.19 was not amended in any way. Rule 5.19, which is entitled "Procedure

[4] Recommendation 10 of the ABA Standing Committee on Professional Discipline's Report on Missouri's Lawyer Regulatory System was for elimination of "private reprimand" by the Court. The committee's rationale for the recommendation was that all Court-issued discipline should be public inasmuch as Missouri admonitions, which can be issued by lesser authorities than the Court, are public to the extent that they are available to the public for three years after acceptance.

Following Decision of a Disciplinary Hearing Panel," continues to reference written admonitions and sets forth a procedure for rejection of that admonition by the respondent. Subpart (a) of Rule 5.19, both before and after the 2002 amendment to Rule 5.16, states that after 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." Subpart (b) of Rule 5.19 continued to specify what happens in the case of acceptance by the respondent of the admonition ("the written admonition shall become part of the record"), or rejection by the respondent of the panel-issued admonition ("panel shall render a written decision . . . . The decision shall include the findings and recommendations required by Rule 5.16.").

While there may be inconsistency between Rules 5.16 and 5.19 in whether a hearing panel has the option of issuing an admonition, the Rules do not expressly preclude Informant from asking for review of an admonition. Disciplinary Counsel urges an interpretation of these rules that would provide for Informant's request for review by the Supreme Court on any disposition by a disciplinary hearing panel, be it dismissal, admonition, diversion, or other more serious sanction recommendations.

CONCLUSION

Informant asks that the Court adopt the Disciplinary Hearing Panel's findings with regard to the violation of ex parte contact with Judge Jamison in violation of Rule 4-3.5(b). Informant further asks the Court to find violations of Rules 4-8.4(c) and 4-8.4(d) for dishonest conduct and conduct prejudicial to the administration of justice. Public reprimand is the recommended sanction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2005, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
Maridee F. Edwards

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 6,948 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Maridee F. Edwards

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