IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

OFFICE OF
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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.

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.

LIKEWISE, IT WOULD BE AN UNREASONABLE INTERPRETATION OF RULE 5.12 TO FIND THE ADVISORY COMMITTEE WAS WITHOUT AUTHORITY TO REVIEW THIS MATTER.

Rule 5.12

Matter of Stern, 425 Mass. 708, 682 N.E.2d 867 (Mass. 1997)

In re Disciplinary Proceedings Against Huddleston 137 Wash.2d 560, 974 P.2d 325 (Wash. 1999)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

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 RULES.

Respondent responds to Informant's Point I with a point asserting that he did not violate the Rules because opposing counsel had notice and opportunity to object but failed or refused to attend the hearing and waived participation in the hearing. His argument assumes that the prosecutors and their cases were interchangeable and any one of them had the authority and the ability to pick up any file at any time and be responsible for it.

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

Respondent makes this point in his brief at page 18. Informant does not disagree that some assistance, some "cover" is provided by prosecutors working within a division. It is the Respondent's interpretation of "covering" a case for another attorney that needs clarification.

All attorneys "cover" cases for others in appropriate circumstances, but they only act within the parameters the responsible attorney has given them. "Covering" for another attorney does not mean that attorney then has authority to act on the ultimate disposition of a case. The only document exemplifying an instance of "cover" in the Ring case by Richmond was his agreement to a continuance on September 24, 2002. **S.A. 24, 33**. (S.A. refers to Respondent's Supplemental Appendix).

What actually happened here was that Respondent thwarted the process that was designed by our judicial system to deal with disagreements by the parties. The case was on the court's docket for that day. When it was time for it to be called, Whirley, the assigned attorney for the state would have asserted the state's position, Respondent would have asserted his client's position, and the judge would have ruled. Respondent chose a different and improper approach. Contrary to Respondent's Point heading implying that the prosecutor "failed or refused to attend *the hearing* and waived participation in *the hearing,*" there was no hearing.

Respondent's Exhibits Relating to Other Unrelated Matters

Should be Given No Weight

Respondent suggests that Informant "ignored" certain evidence which he offered. He references exhibits that were presented to witnesses for review at pages 22-24 of his brief. The evidence was not commented upon because it was of little or no probative value to the issues before the Court.

Numerous court forms and letters from other unrelated and irrelevant cases were produced at the hearing in an attempt to show that in other cases, court forms were signed by prosecutors other than the assigned prosecutor, or that recommendations were changed by other than the assigned prosecutor. The evidence proffered did not merit discussion and tended to obfuscate the facts of the instant case, as illustrated by the exchange below between prosecutor Sheila Whirley and Respondent's counsel.

At the June 2005 Disciplinary Hearing Panel hearing, Respondent's counsel referred to **Exhibit F**, a letter recommendation prepared by Whirley in a case unrelated to this proceeding from 2001 against a Mr. Charles Mitchell. **S.A. 78**. He pointed out that on her letter of October 18, 2001, the number of community service hours was changed from 40 to 30. He further pointed out that the *Judgment and Sentence* court form (**Exhibit F**) appears to be signed by Patrick Richmond, although Ms. Whirley sent out the original recommendation. **S.A.79; App. 68-69 (T.109-110)**.

Examination by Mr. Mandel

Q: And the plea actually differs from your recommendation. Take a look, if you would at your recommendation letter, there's actually a change here on your letter?

A: Yes.

Q: And the change is initialed by Patrick Richmond, not by yourself?

A: Doesn't look like my initial. Is that 30 instead of 40, maybe?

[Note by Informant: there are no initials discernable by Informant on the October 18, 2001, letter]

Q: Yeah.

A: Yeah, and it's possibly Richmond's writing.

Q: So Richmond changed your recommendation?

A: That's the way it looked on the letter. However, I don't know the circumstances of that.

Q: Of course.

A: If we talked about it –

Q: But your testimony was that – that – that one prosecutor usually doesn't change another prosecutor's recommendation.

A: Without a discussion prior – prior discussion.

Q: Do you remember a discussion?

A: I don't know which case that was. It could have been changed in my file even. Do you have the file?

Q: No.

A: What could happen is in my file, if I talk to an attorney, he says how about 30 hours instead of 40, I'll scratch it out, Patrick will grab it and know it's okay with me.

App. 68-69 (T. 110-111).

And so it went -- Respondent's counsel querying the prosecutors about isolated documents, without benefit of the files, or any recall of the events in long-closed files, in

a series of non-related cases. **S.A. 12 (Depo. T. 34-36); S.A. 15 (Depo. T. 47-49); App. 56 (T. 60); App. 74 (T. 131-134); Respondent's brief page 24**. The evidence is definitive proof of nothing and arguably, should not have even been allowed as admissible evidence because of its tenuous relevance. This is precisely the type of evidence that generally is not admitted into proceedings because it would require collateral proceedings simply to ascertain the circumstances behind what these hearsay documents represent.

Respondent's Alleged Reliance on APA Richmond

As Attorney of Record

Respondent refers to a "pleading," signed by Richmond at page 17 of his brief which in fact is a court docket memo form whereby Richmond's signature shows the state agreed to a continuance of a trial date on the court record in the Ring case. Respondent relies upon this "pleading" as support for his assertion that Richmond was then "the attorney of record." **Respondent's brief page 22, S.A. 33**. Clearly, this is merely the type of professional courtesy that all attorneys provide for one another -- standing in on a scheduling matter. It does not then constitute a change of assignment on the case. Respondent was made aware of Whirley's assignment, at least as early as August 2002 when Sheila Whirley signed and filed her pleading, "State's Request to Produce" in the Ring case. **S.A. 34**. Respondent suggests that Kagan's "entry of appearance" as he characterizes it, was the next indication in the file of who was assigned to the case. In fact, the "pleading" that he relies on for this claim, is the very same document that is at issue in this proceeding. It is the "blind plea form" filed on the day

Respondent approached the judge and on which Kagan was instructed by Respondent to write "state opposed." **App. 25, Respondent's brief page 17**.

None of the references to "appearances" that Respondent points to detract from the fundamental facts of this case. Respondent knew that Sheila Whirley and Ethan Corlija were handling the case. Respondent knew that Richmond and Kagan both told him they would not get involved in the matter because it was not their case. They both told him that he needed to talk to Sheila Whirley because it was her case. A technical argument by Respondent that there was an "appearance" by Richmond since his name is on the court record as having agreed to a continuance on behalf of the prosecutor's office, is disingenuous.

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.

LIKEWISE, IT WOULD BE AN UNREASONABLE INTERPRETATION OF RULE 5.12 TO FIND THE ADVISORY COMMITTEE WAS WITHOUT AUTHORITY TO REVIEW THIS MATTER.

Respondent's argument on the level of discipline is that no discipline should be imposed because there were no violations or in the alternative that Informant was without authority to bring the case.

Respondent suggests in his recitation of the procedural facts that this matter should not have been reviewed by the Advisory Committee because of the lack of an explicit statement by the complainant that he was requesting review under Rule 5.12. It is not uncommon that requests for review, or expressions of dissatisfaction with the conclusions

of a regional disciplinary committee's investigation, are phrased in ambiguous terms. It is always within the prerogative for the Advisory Committee to decline review of a matter. It is the obligation of the Office of Chief Disciplinary Counsel to transmit files for review when instructed to do so by the Advisory Committee.

Rule 5.12 provides that if the Advisory Committee finds the complaint to be without merit it shall notify the Complainant. Obviously, the Advisory Committee found there was merit to the complaint and ordered further investigation. The discipline process provides for these important checks and balances to assure that matters are properly and fully reviewed.

If any consideration is to be given to the impact of the disciplinary process on Respondent's case, that factor might be any delay in the ultimate disposition of this matter by the fact that it was originally opened in 2002 and not finalized in the disciplinary system until 2005.

Delay in disciplinary proceedings is a recognized factor in mitigation under ABA Standards 9.32(i). If the delay has impacted the Respondent's ability to defend on the matter, some mitigating effect may be appropriate. If the delay by discipline authorities was unreasonable or unconscionable, some mitigating effect may be appropriate. That is not the case here.

The Supreme Judicial Court of Massachusetts considered this issue and found no evidence to suggest that bar counsel was "lethargic in his pursuit" of a matter where the investigation was opened within one year of the last act of wrongdoing and the petition for discipline was commenced within six years after the last act. *Matter of Stern*, 425

Mass. 708, 682 N.E.2d 867, 872 (Mass. 1997) – matters were not dismissed because of unconscionable delay.

The Supreme Court of Washington found that a two year delay after a judgment was entered against a respondent and the initiation of disciplinary action was not a mitigating factor affecting the disciplinary sanction. *In re Disciplinary Proceedings Against Huddleston* 137 Wash.2d 560, 974 P.2d 325, 329 (Wash. 1999). Further, the Court noted the delay may have inured to the respondent's advantage.

Respondent's assertion that this matter was improperly reviewed by the Advisory Committee has no bearing on disposition of this case.

CONCLUSION

The Court should uphold the Disciplinary Hearing Panel's finding of a violation of Rule 4-3.5(b) (ex parte contact) and the Court should find violations of Rules 4-8.4(c) (dishonesty) and 4-8.4(d) (prejudicial to the administration of justice). Respondent's assertion that he committed no violations because his contact with the judge was proper is incorrect. Respondent's assertion that the Advisory Committee had no authority to order the matter re-opened is wrong. A public reprimand should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2005, two copies of Informant's Reply 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 2,338 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