IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
WILLIAM M. TACKETT,	)	**Supreme Court #SC86522**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

SHARON K. WEEDIN #30526
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

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

Background and Disciplinary History

Respondent William M. Tackett was licensed to practice law in 1988. **App. 94**. He is the elected prosecuting attorney of Cole County, Missouri. **App. 31 (T. 115).** Mr. Tackett has no prior disciplinary history.

Procedural History

A four count information was filed against Respondent with a signature date of January 28, 2004, **App. 45-57**, and served upon Respondent by certified mail on February 13, 2004. **App. 74**. Respondent filed his answer to the information on March 15, 2004. **App. 75-82**. On April 9, 2004, David Macoubrie, Louis Leonatti, and Sue Heckart were appointed to the disciplinary hearing panel. **App. 83-84**. Mr. Macoubrie was designated as presiding officer. A disciplinary hearing was initially scheduled for June 28 and 29, 2004. **App. 85**. The matter was continued at the request of Respondent's counsel, **App. 87-88**, and rescheduled for hearing on August 23 and 24, 2004. **App. 89**.

Prior to the scheduled hearing date, Informant and Respondent entered into a joint stipulation of facts and recommendation for sanction. **App. 94-101.** The August 23 hearing was postponed inasmuch as a stipulated resolution of the case had been submitted to the panel. By letter dated August 26, 2004, the disciplinary hearing panel advised Informant and Respondent that the panel would not accept the recommendation for

discipline as set forth in the stipulation, stating that a public reprimand was insufficient to address the seriousness of the misconduct admitted in paragraphs 15, 15a, 15b, 15c, and 15d of the stipulation. **App. 91**.

By agreement among Informant, Respondent, and the members of the disciplinary hearing panel, the case was reset for hearing as to Count I only on October 25, 2004. **App. 4 (T. 6-7); 92**.

The disciplinary hearing panel heard evidence on Count I of the information on October 25, 2004. Testimony was taken from Assistant Callaway County Prosecutor Carol England, **App. 4-11 (T. 8-33)**, Callaway County Prosecuting Attorney Robert Sterner, **App. 11-16 (T. 34-53),** 13th Judicial Circuit Judge Joseph Holt, **App. 16-24 (T. 53-86)**, Callaway County resident Alben Clarkston, **App. 24-25 (T. 87-90)**, Cole County attorney Curtis Hanrahan, **App. 25-31 (T. 90-115)**, and the Respondent **App. 25-41 (T. 115-155).** Also admitted into evidence were the Joint Stipulation (Ex. A), **App. 94-116**; and docket sheets from *State v. Tackett* (Ex. B), **App. 117-120**; *State v. Manumaleuna* (Ex. C), **App. 121-125**; and the Judge's Docket Sheet in *State v. Tackett* (Ex. R-1), **App. 126-133**; the Judge's Docket Sheet in *State v. Manumaleuna* (Ex. R-2), **App. 134-140**; and the transcript of an interview with Judge Holt taken on January 7, 2003 (Ex. R-5), **App. 141-144**.

The disciplinary hearing panel issued its decision on November 5, 2004, recommending that Respondent be suspended from the practice of law for a period of thirty days. **App. 145-146**.

Stipulation

The stipulation entered into between Informant and Respondent on August 20, 2004, is shown in the record as Informant exhibit A, **App. 94-116**, and also is attached as exhibit A to the disciplinary hearing panel decision and recommendation. **App. 147-169**.

In the stipulation Informant and Respondent agreed that the recommended discipline in the stipulation was not binding on either party if not adopted by the disciplinary hearing panel or the Supreme Court, but that regardless of whether the disciplinary hearing panel or the Supreme Court adopted or rejected the recommended discipline that Informant and Respondent would be bound by all factual stipulations. **App. 100**. As part of the joint stipulation Informant dismissed Counts II and III. With regard to Count I, the parties stipulated to the following facts.

Respondent met with 13th Judicial Circuit Judge Joseph Holt in Judge Holt's chambers on December 18, 2002, regarding speeding tickets that had been issued in Callaway County against Roland Tackett, Respondent's brother, and Brandon Manumaleuna. On December 18, 2002, Respondent was the prosecutor-elect of Cole County, Missouri, was an assistant prosecutor for Cole County, Missouri, and was in Callaway County on behalf of defendants Roland Tackett and Brandon Manumaleuna. Respondent failed to identify to Judge Holt that he was not appearing in the capacity of a prosecutor but rather on behalf of the defendants. No one from the Callaway County prosecutor's office was at the meeting between Respondent and Judge Holt, nor was anyone from the Callaway County prosecutor's office advised of that meeting. At the meeting on December 18, 2002, Judge Holt made docket entries in the respective cases

showing guilty pleas with suspended impositions of sentence. On December 31, 2002, the Callaway County prosecutor's office filed a motion to set aside the December 18, 2002, dispositions. Those dispositions were set aside on January 6, 2003.

Respondent stipulated that his conduct in Count I violated Rules 4-1.7, 4-3.3(a), 4-3.3(d), and 4-3.5.

In Count IV the parties stipulated that Judge Thomas Brown, as presiding judge and on behalf of the Cole County Circuit Court en banc, along with Circuit Clerk Brenda Umstattd, issued a letter to Respondent on September 2, 2003, advising Respondent of certain conditions the court was imposing on him. The parties further stipulated that on or about September 3, 2003, the Respondent made comments about Judge Brown implying that Judge Brown alone was responsible for the letter and implying that Judge Brown's investigation was inadequate. Respondent issued a letter on September 7, 2003, stating that there was no indication that the investigation had been initiated by the court en banc. The court, en banc, had approved the investigation, and the ultimate disposition was the joint decision of the court en banc. Judge Brown made no unilateral decisions regarding the investigation.

Respondent stipulated that his statements concerned the integrity of a judge. His statements implied that Judge Brown, not the court en banc, was the sole impetus for the investigation and letters sent to Respondent, and that the investigative process was not conducted appropriately. Respondent further stipulated the statements he made were false or made with reckless disregard as to their truth or falsity at the time Respondent made them, and thus a violation of Rule 4-8.2(a).

Informant and Respondent stipulated to recommendation of a public reprimand.

DHP Hearing

A hearing was held on October 25, 2004, to present evidence on Count I and to consider the disposition.

Traffic tickets were issued in Callaway County, Missouri to Brandon Manumaleuna on April 9, 2002, **App. 103**, and on July 31, 2002, to Roland Tackett. **App. 102**. Roland Tackett is the brother of Respondent. By the fall of 2002 Brandon Manumaleuna and Roland Tackett were represented by attorney Curtis Hanrahan. **App. 25 (T. 91-92)**. On November 14, 2002, Mr. Hanrahan appeared in Callaway County in front of Judge Cary Augustine. Carol England, assistant Callaway County prosecutor, appeared on behalf of the State. Mr. Hanrahan requested a change of judge and advised Judge Augustine that he was requesting the case be transferred to Judge Holt so Mr. Hanrahan could request suspended impositions of sentence from Judge Holt on behalf of Brandon Manumaleuna and Roland Tackett. **App. 5 (T. 10-11), 26 (T. 93-94)**. The cases were transferred to Judge Holt and set for trial on January 17, 2003. **App. 5 (T. 12), 95**. Sometime prior to December 18, 2002, Mr. Hanrahan saw Respondent at the Cole County Courthouse. **App. 26 (T. 96), 34 (T. 126)**. Mr. Hanrahan advised Respondent that he needed to change the two traffic cases from the trial docket to the appearance docket for purposes of an open plea request for suspended impositions of sentence. Respondent advised Mr. Hanrahan that he was going to Fulton in the next few

days and offered to take the cases off the trial docket and move them to the appearance docket. **App. 27 (T. 97), 34 (T. 126)**.

Prior to December of 2002, Respondent had been appointed special prosecutor of a criminal complaint pending in Callaway County against an individual named Schaefer. Criminal charges had not yet been filed in the case. On December 18, 2002, Respondent interviewed the complaining witness in that matter, a man named Alben Clarkston. **App. 25 (T. 89)**. On that same day, Respondent had scheduled a meeting with Judge Holt to talk to him about the Schaefer case. **App. 16 (T. 54), 32 (T. 119)**. Prior to meeting with Judge Holt, Respondent telephoned the Callaway County clerk's office and asked that the Brandon Manumaleuna and Roland Tackett traffic files be sent to Judge Holt's chambers. **App. 38 (T. 141)**.

When Respondent arrived at the Callaway County Courthouse the afternoon of December 18, 2002, assistant prosecutor Carol England was trying a barking dog case in front of Judge Holt. The trial lasted one and one-half to two hours. **App. 6 (T. 13-14).** Respondent sat in the courtroom and watched the barking dog case.

At the conclusion of the barking dog case, Respondent met with Judge Holt in the judge's chambers. They were the only two people present for the meeting. **App. 16 (T. 55-56)**. Respondent testified he first talked to Judge Holt about the Schaefer case and explained why he needed to have the matter concluded by January 1, 2003. **App. 33 (T. 124)**. Judge Holt testified that he did not recall Respondent ever saying anything to him on December 18 about the Schaefer special prosecution case. **App. 16 (T. 56)**. Two

days later, on December 20, Judge Holt began a two week vacation and did not return to his office until the first Monday in January. **App. 17-18 (T. 60-61)**.

Respondent admitted in his testimony that he should have arranged for an assistant prosecutor to be present when he talked to Judge Holt about the two traffic cases, **App. 37 (T. 139),** but he did not go to the prosecutor's office or advise anyone in that office he would be talking to Judge Holt about the two traffic files. **App. 37-38 (T. 140-141)**. Carol England was the Callaway County assistant prosecutor handling both the Roland Tackett and Brandon Manumaleuna cases. She did talk to Respondent in the courtroom on December 18 during a break in the barking dog trial, but Respondent never said anything to her about either of the traffic cases. **App. 6 (T. 14-15)**. Carol England testified that she would have been available to meet with Respondent and Judge Holt after the trial. **App. 6 (T. 15)**.

Respondent testified that, at the meeting on December 18 with Judge Holt, he advised the judge that Roland Tackett was Respondent's brother. **App. 34 (T. 128)**. Judge Holt testified he did not recall Respondent ever identifying Roland Tackett as Respondent's brother. Judge Holt further testified that had Respondent so identified the relationship between himself and one of the defendants, Judge Holt would not have made the docket entries he did on December 18. **App. 17 (T. 60)**.

On the Roland Tackett docket sheet, Judge Holt made the following handwritten entry:

> state by APA. By agreement. Defendant and counsel not. SIS – defendant on one year unsupervised probation pay costs in 30 days. Defendant to do 20 hours community service in 30 days or in lieu thereof pay $100.00 to charity of his choice within 30 days and file receipt with court of same.

App. 105, 126. On the Brandon Manumaleuna docket sheet Judge Holt made the following handwritten entry:

> P.A. Tackett – by agreement defendant and counsel not. Defendant enters P.G. – SIS with one year unsupervised probation. Payment of costs within 15 days. As defendant is in St. Louis, defendant may pay $200.00 to charity of his choice and file receipt in 30 days or do 40 hours community service within 30 days. Costs to defendant.

App. 104, 134.

Judge Holt does not recall Respondent ever saying anything to him about moving the case to an appearance docket. Judge Holt does recall Respondent advising him what the disposition should be in the two cases. **App. 17 (T. 57)**. Respondent testified that he told Judge Holt the matter needed to be taken off the trial docket for a plea, that Judge Holt asked him what disposition Mr. Hanrahan was going to request, and that Respondent advised Judge Holt what he thought Mr. Hanrahan was going to ask for. **App. 35 (T. 129)**.

Respondent testified he saw Judge Holt writing in his file and read back to Respondent what he had written. **App. 35 (T. 130)**. Respondent testified he thought what Judge Holt had written and read to him was a note about the disposition that Mr. Hanrahan would be asking for at a future date. **App. 35 (T. 130)**.

Judge Holt testified that as a normal practice he reads out loud the docket entries he makes. **App. 23 (T. 82)**. Respondent testified that Judge Holt did read the suspended imposition of sentence terms in each case, but did not read "State by APA," "State by P.A. Tackett," or "By agreement, defendant and counsel not." **App. 35 (T. 131-132)**.

Carol England found out about the December 18, 2002, docket entries on December 24, 2002, when checking her trial docket for January. She called Mr. Hanrahan to ask if they were going to try the Roland Tackett and Brandon Manumaleuna cases. Mr. Hanrahan advised her that Respondent had called him the middle of the previous week and told him the cases were taken care of. **App. 6 (T. 15-16)**. On December 26, 2002, Carol England and Callaway County prosecutor Robert Sterner reviewed the docket sheets, saw the docket entries from December 18, and filed motions to set aside the docket entries. **App. 106-109**. Judge Holt set aside the pleas of guilty in the respective cases on January 6, 2003. **App. 118, 122, 127, 135**.

In an interview with Bob Watson, a reporter for the Jefferson City News Tribune – Newspaper on January 7, 2003, Judge Holt stated it was a screw up by him and that he had made a mistake. **App. 141-144**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE, AT A MINIMUM, NEGLIGENTLY FAILED TO FOLLOW PROPER PROCEDURES AND RULES, THEREBY INJURING THE INTEGRITY OF THE LEGAL PROCESS, IN THAT HE HAD AN EX PARTE DISCUSSION WITH JUDGE HOLT ABOUT PENDING CRIMINAL MATTERS IN WHICH HE FAILED TO CLARIFY HIS ROLE AND THE PURPOSE FOR THE DISCUSSION.

Rule 4-3.3(d)

Rule 4-1.7

Rule 4-3.3(a)

Rule 4-3.5(b)

In re Bell, 294 Or.202, 655 P.2d 569 (1982) (per curiam)

The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d), 8 Geo. J. of Legal Ethics 157 (1994)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE, AT A MINIMUM, KNOWINGLY AND PUBLICLY QUESTIONED A CIRCUIT JUDGE'S INTEGRITY IN THAT RESPONDENT FALSELY STATED THAT AN INVESTIGATION INTO ALLEGATIONS AGAINST RESPONDENT, WHICH WAS UNDERTAKEN AT THE BEHEST OF THE COLE COUNTY CIRCUIT COURT, WAS BOTH INADEQUATE AND PURSUED SOLELY AT THE INSTIGATION OF ONE JUDGE.

Rule 4-8.2(a)

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

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

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD, AT A MINIMUM, PUBLICLY REPRIMAND RESPONDENT BECAUSE, VIEWING THE EVIDENCE MOST FAVORABLY TO RESPONDENT, HE NEGLIGENTLY DISCUSSED THE MERITS OF THE PENDING TRAFFIC FILES WITH THE JUDGE, THEREBY INTERFERING WITH THE OUTCOME OF THE PENDING CASES, IN THAT, BECAUSE RESPONDENT DID NOT CLARIFY HIS ROLE AND WHAT HE WAS REQUESTING FROM THE JUDGE, THE JUDGE MISUNDERSTOOD RESPONDENT'S MISSION AND MADE AN IMPROPER DISPOSITION OF THE FILES.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Bell, 294 Or. 202, 655 P.2d 569 (banc 1982)

In re Mullins, 649 N.E.2d 1024 (Ind. S.Ct. 1995) (per curiam)

In re Ragatz, 146 Wis.2d 80, 429 N.W.2d 488, 491 (1988) (per curiam)

In re Berk, 98 Wis.2d 443, 297 N.W.2d 28 (1980) (per curiam)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE, AT A MINIMUM, NEGLIGENTLY FAILED TO FOLLOW PROPER PROCEDURES AND RULES, THEREBY INJURING THE INTEGRITY OF THE LEGAL PROCESS, IN THAT HE HAD AN EX PARTE DISCUSSION WITH JUDGE HOLT ABOUT PENDING CRIMINAL MATTERS IN WHICH HE FAILED TO CLARIFY HIS ROLE AND THE PURPOSE FOR THE DISCUSSION.

The instant that a bilateral, or ex parte, discussion between Mr. Tackett and Judge Holt commenced in Judge Holt's office on December 18, 2002, unique and vital ethical obligations arose and attached to the discussion. Supreme Court Rule 4-3.3(d) imposes duties on the lawyer in an ex parte setting well beyond those implicated in an adversarial proceeding in which both sides are represented. The Rule imposes these additional, unique duties for good reason – the usual safeguards and checks and balances of our adversarial system are not in place in the ex parte setting. For that reason, the lawyer engaged in an ex parte talk with a judge on a pending matter has the ethical obligation to, in effect, present both sides of the case in his role as an officer of the court. In the language of the Rule, the lawyer "shall" make the judge aware of "all material facts" about which the lawyer is aware that will "enable the tribunal" to make an informed

decision. In an ex parte situation, the advocate's duty to his client is superceded by the lawyer's obligation, in his role as an officer of the court, to our system of justice. See Dennis, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 Geo. J. of Legal Ethics 157 (1994).

Assuming for the sake of argument that Mr. Tackett had a genuine and legitimate reason, as he testified he did, to meet with Judge Holt on December 18 regarding the Schaefer matter, very different considerations were implicated when Mr. Tackett contacted the clerk's office, before his meeting with the judge commenced, and asked that the two speeding ticket files be sent over to Judge Holt. The Schaefer matter was, at the relevant time, an as yet uncharged criminal complaint pending in Callaway County over which Mr. Tackett had been assigned special prosecutor. By having the Tackett and Manumaleuna speeding ticket files sent to the judge, however, Respondent initiated an ex parte communication with the judge on matters in which he played a very different role than the role he played in the Schaefer matter.

At a minimum, the material facts about which Mr. Tackett had an ethical obligation to make Judge Holt aware before taking up the Tackett and Manumaleuna files

with him include: the fact that he was brother to one of the defendants,[1] the fact that he was making a request, in Mr. Hanrahan's stead, on behalf of the defendants, and the narrow purpose to which, according to Respondent, he was to speak, i.e., to request that Judge Holt move the two files from a trial docket to an appearance docket. Had Mr. Tackett articulated these very elemental facts to the judge, there would have been no room for the murkiness that, according to Respondent's theory of what happened, seduced the judge into making dispositive docket entries, rather than the simple docket transfers, that Mr. Tackett was there to request.

The Oregon case of *In re Bell*, 294 Or.202, 655 P.2d 569 (1982) (per curiam), is illustrative of the dangers that await the lawyer who ventures into the mine field of ex parte discussion with a judge. In *Bell*, the respondent lawyer and his law partners provided funding to a judgment creditor so as to enable the creditor to exercise redemption rights over some real property sold at sheriff's sale. The buyer at the sheriff's sale then filed suit to set aside the redemption sale, and while the buyer prevailed at the trial court level, the judgment was reversed on appeal.

[1] Whether Respondent told the judge that his brother was one of the defendants is in dispute and is not part of the stipulated facts. Respondent testified that he did tell Judge Holt he was defendant Tackett's brother; Judge Holt has no recollection whether Respondent did so identify the relationship, but hopes he would not have entered dispositions in the cases as he did if Tackett had so identified the actors.

An issue arose as to whether the decision reversing the challenge to the redemption sale was dispositive as to who owned the realty, or whether further proceedings in the trial court were available to the sheriff's sale buyer. The respondent lawyer decided to submit a proposed decree, which would terminate the suit challenging redemption, to the trial judge. Respondent took the decree to the courthouse, intending to leave it with the judge's secretary. Respondent knew that the sheriff's sale buyer's attorney opposed submission of a decree, and Respondent had not provided opposing counsel a copy of the decree.

At the courthouse, the respondent lawyer ran into the trial judge in the hallway. The judge asked the respondent why he was at the courthouse, and respondent replied he was there to leave something for the judge's signature. The judge indicated he wanted to see what the respondent had, so respondent gave him the proposed decree. Respondent later testified that he indicated to the judge that opposing counsel was of the opinion that an amended complaint could be filed and that he could then proceed with his challenge to the exercise of redemption rights by the respondent's business associate. The judge testified that he could recall nothing about the conversation. It was apparently not disputed that respondent did not reveal his personal financial interest in the outcome of the case to the judge, which would have heightened the judge's sensitivity to possible opposition to the decree. The judge signed the decree in the courthouse hallway, oblivious to much material information.

In a scenario not unlike Judge Holt's role in the case at bar, the judge who testified at Bell's disciplinary hearing stated that he had no recollection of the conversation with

Respondent at the courthouse. The judge testified, however, that it was not his practice to sign a dispositive order or decree without providing opposing counsel a hearing, if he was made aware that there was a dispute about the propriety of the decree.

The *Bell* case demonstrates what can happen, even if the ex parte communication is inadvertant, when one side to a dispute is not present to insure that the decision maker is apprised of all the information necessary for a just result. The Oregon Supreme Court said it well:

> A judge must be able to rely upon the candor, integrity and honesty of lawyers in handling ex parte matters. Experience teaches us that a large volume of judicial business is handled expeditiously and well upon an ex parte basis. A place for such business is regularly reserved upon court calendars. In order to process matters upon that basis, the judge must be able to rely upon the candor, honesty and integrity of the lawyer who presents a matter ex parte. Should the courts have to abandon the system of considering many matters ex parte upon the representation of the appearing counsel, the administration of justice would be seriously affected.

655 P.2d at 573.

The other Rules violated as a consequence of Mr. Tackett's ex parte meeting with Judge Holt are closely connected to the misconduct that resulted in violation of Rule 4-3.3(d). The Rule 4-1.7 violation occurred as a consequence of the conflict of interest inherent in Mr. Tackett's purporting to represent the State's interests in the discussion regarding the Schaefer matter, then, without missing a beat, representing the criminal

defendants in the two speeding files. The Rule 4-3.3(a) violation follows from Respondent's failure to clearly articulate his representative role on behalf of the defendants to Judge Holt. And Rule 4-3.5(b) was violated when substantive discussion regarding disposition of the traffic cases was had without notice to the other side – the Callaway County Prosecutor's office.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE, AT A MINIMUM, KNOWINGLY AND PUBLICLY QUESTIONED A CIRCUIT JUDGE'S INTEGRITY IN THAT RESPONDENT FALSELY STATED THAT AN INVESTIGATION INTO ALLEGATIONS AGAINST RESPONDENT, WHICH WAS UNDERTAKEN AT THE BEHEST OF THE COLE COUNTY CIRCUIT COURT, WAS BOTH INADEQUATE AND PURSUED SOLELY AT THE INSTIGATION OF ONE JUDGE.

The critical facts establishing violation of Rule 4-8.2(a) were stipulated to between Disciplinary Counsel and Mr. Tackett. The crux of the Rule violation lay in Respondent's public assertions that a single circuit court judge was responsible for an inadequate investigation into a complaint lodged against Respondent by a court employee. As a consequence of the investigation, the circuit court, en banc, imposed conditions on Respondent's interactions with court personnel. Respondent stipulated to the fact that his public statements were false, or were made with reckless disregard as to their truth or falsity, and that the statements were about the judge's integrity.

In re Westfall, 808 S.W.2d 829 (Mo. banc 1991) and *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995) address the issue of judicial criticism by members of the bar. In *Howard*, this Court reiterated the threshold that must be crossed for a lawyer's criticism

of a judge to be sanctioned as professional misconduct. "[A]ttorneys may not make allegations they know to be false, or with reckless disregard for their truth or falsity." 912 S.W.2d at 63. Thus, Respondent has stipulated to the facts that make his statements sanctionable.

ARGUMENT

III.

THE SUPREME COURT SHOULD, AT A MINIMUM, PUBLICLY REPRIMAND RESPONDENT BECAUSE, VIEWING THE EVIDENCE MOST FAVORABLY TO RESPONDENT, HE NEGLIGENTLY DISCUSSED THE MERITS OF THE PENDING TRAFFIC FILES WITH THE JUDGE, THEREBY INTERFERING WITH THE OUTCOME OF THE PENDING CASES, IN THAT, BECAUSE RESPONDENT DID NOT CLARIFY HIS ROLE AND WHAT HE WAS REQUESTING FROM THE JUDGE, THE JUDGE MISUNDERSTOOD RESPONDENT'S MISSION AND MADE AN IMPROPER DISPOSITION OF THE FILES.

The Office of Chief Disciplinary Counsel entered into a joint stipulation with Respondent recommending a public reprimand as the appropriate sanction in this case. The sanction analysis that led to that recommendation is as follows.

In cases involving more than one instance of misconduct, the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) anticipate that the ultimate sanction be consistent with the sanction appropriate to the most serious charge of misconduct. Of the two counts in the information finally submitted to the panel in this case, the count I charge encompassing the Callaway County ex parte communication was determined to be the more serious of the two. That conclusion was reached, in part, on the basis of the

outcome in *In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991), where this Court issued a public reprimand to Mr. Westfall for criticizing a judge's opinion in a televised interview.

The theoretical framework of the Standards requires identification of four factors: to which of four groups was a duty violated (the most important being duties to clients), the lawyer's mental state, the extent of injury or potential injury resulting from the misconduct, and recognition of the aggravating and/or mitigating factors present in the record. See ABA Standards, at p. 5. By engaging in an ex parte discussion with Judge Holt about the defendants' desired outcome in the two traffic cases, Respondent primarily violated a duty he owed to the legal system, a duty that the Standards identify as a less serious duty than the duties owed to clients.

The second factor is the lawyer's mental state. Evidence regarding an individual's mental state is almost never provable by direct evidence; proof of mental state generally rests on circumstantial evidence. See *State v. French*, 79 S.W.3d 896, 900 (Mo. banc 2002). There is credible evidence in this record supporting Respondent's explanation for what happened on December 18, 2002. Mr. Tackett had a legitimate reason for meeting alone with the judge, i.e., to discuss the unfiled Schaefer complaint, a matter over which Mr. Tackett had been appointed special prosecutor. Mr. Tackett testified that, while the two traffic files were sent to the judge at Mr. Tackett's request, he made that request only so the files would be there when he asked the judge to move them from a trial docket to an appearance docket. Mr. Hanrahan's hearing testimony corroborated Respondent's testimony that this procedural request, undertaken to save Hanrahan a trip to Callaway County, was Respondent's sole purpose in initiating with Judge Holt a communication

regarding the speeding ticket files. And, perhaps most tellingly, OCDC was aware that Judge Holt had given a contemporaneous statement to a local newspaper reporter largely absolving Respondent from blame and assuming to himself responsibility for the "mistake." The judge's public assumption of the blame for the "error" weighed heavily in favor of consigning Respondent's mental state to one of negligence, or inadvertence, and not deliberate malfeasance.

The third factor in sanctions analysis is recognition of the injury or potential injury caused as a consequence of the misconduct. As soon as the Callaway County Prosecuting Attorney's office realized that dispositive orders in the Tackett and Manumaleuna files had been entered without its knowledge, the necessary motion was filed asking that the dispositions be set aside. Judge Holt did so on January 6, 2003, less than three weeks after they were entered on the docket sheets. While potential injury to the perceived integrity of the system is undeniably an issue to be considered, it should be acknowledged that little or no actual injury resulted to the parties involved in the traffic cases themselves.

The final factor to be considered pursuant to the Standard's framework is consideration of the aggravating and mitigating factors. As is noted in the Stipulation entered into between the parties, the aggravating factor of the multiplicity of the counts of misconduct was believed offset by the mitigating factor that Mr. Tackett has no prior disciplinary history.

With these four factors identified, the applicable "black letter" standard is Rule 6.33.[2] It reads as follows:

> 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.

The Office of Chief Disciplinary Counsel was able to reach a stipulation with Respondent recommending a public reprimand. At the time the stipulation was agreed to, the anticipated evidentiary record fell within the range of a public reprimand when analyzed against the framework of the ABA Standards. It was and is OCDC's position that stipulated resolutions of disciplinary cases are desirable outcomes. A stipulated resolution necessitates the respondent lawyer's acknowledgement of wrongdoing, and provides incentive to the lawyer to identify and remedy the causes of his misconduct. The lawyer has a personal stake in the successful resolution of a stipulated case.

---

[2] The Stipulation mistakenly identifies Standard Rules 5.13 and 5.23 as the applicable standards. ABA Standard Rule 5 encompasses the misconduct that results from a lawyer's commission of criminal acts, so is not applicable to this case. Standard Rule 6, more particularly Standard 6.3, encompasses improper communication with individuals in the legal system and is, we believe, the Standard Rule that should apply.

That said, OCDC is certainly cognizant that the record in this matter can support imposition of a sanction greater than public reprimand. There is evidence from which a higher mental state can be inferred; i.e., it can be inferred from the fact that one of the defendants was Respondent's brother, and from Respondent's failure to clarify his role and purpose to Judge Holt, that Respondent deliberately obtained a favorable resolution of his brother's traffic infraction case by knowingly muddying the waters during his ex parte meeting with the judge. To reach that conclusion, however, one has to assume that Respondent did not realize that the lawyers in the Callaway County Prosecutor's office would learn of the ex parte dispositions and take appropriate action to overturn them.

A better rationale for imposition of a higher sanction, which would include the 30-day suspension recommended by the Panel, is recognition of the harm to the public's perception of the legal profession that flowed from Respondent's conduct. Respondent was an assistant prosecuting attorney, and the Cole County Prosecuting Attorney-elect, at the time of the misconduct. It is entirely appropriate to hold Respondent to a higher ethical standard by virtue of his public position as the newly elected prosecuting attorney. The harm done to the public's perception of the integrity of our profession is exacerbated when the wrongdoer is the very public person entrusted with upholding and enforcing the law.

Every disciplinary case rests on a unique set of facts. Cases from other state supreme courts may, however, be helpful in identifying the range for the appropriate sanction in this case. The Oregon Supreme Court, in *In re Bell*, 294 Or. 202, 655 P.2d 569 (banc 1982), imposed a 30-day suspension on a lawyer for providing a judge a

proposed decree without notifying the opposing attorney, and without clarifying to the trial judge the lawyer's personal interest in the real property that was the subject of the decree. The lawyer was suspended despite the evidence that he did not go to the courthouse with the intention of engaging the judge in an ex parte communication or even with the intent of personally providing the decree to the judge. The *Bell* case is discussed in some detail under Point I of this brief.

In *In re Mullins*, 649 N.E.2d 1024 (Ind. S.Ct. 1995) (per curiam), the Indiana Supreme Court publicly reprimanded Ms. Mullins, in accordance with a conditional agreement for discipline submitted by the Indiana disciplinary office and Ms. Mullins, where, among other misconduct, the lawyer obtained an emergency guardianship over a woman by way of an ex parte request to a judge. The woman over whom Ms. Mullins obtained guardianship was in a persistent vegetative state. Ms. Mullins failed to inform the court from whom she obtained the emergency guardianship that the woman's parents had on file in a different county a petition to remove their daughter's artificially-delivered nutrition and hydration. In addition to violating Indiana's Rule 3.3(d), Ms. Mullins stipulated to violating Rule 1.6 by releasing her client's medical records and Rule 4.4 in that her release of the records had no substantial purpose other than to embarrass, delay, or burden a third person. The Indiana Supreme Court publicly reprimanded Ms. Mullins in accordance with the conditional agreement for discipline submitted to that court by the parties.

The Wisconsin Supreme Court imposed a sixty-day license suspension on a lawyer who, after a tip from a presiding judge that the judge was considering making a

finding adverse to the lawyer's client, wrote the judge a letter containing legal research and argument against the potentially adverse finding. The respondent lawyer did not provide a copy of the letter to opposing counsel, and did not intend for opposing counsel to find out about the existence of the letter. The Wisconsin court condemned respondent's acceptance of "ex parte information from the judge on a contested issue and additional ex parte argument to the judge on that issue." *In re Ragatz*, 146 Wis.2d 80, 429 N.W.2d 488, 491 (1988) (per curiam).

The Wisconsin Supreme Court publicly reprimanded the lawyer in *In re Berk*, 98 Wis.2d 443, 297 N.W.2d 28 (1980) (per curiam), for requesting an ex parte conference with the judge presiding over Berk's client's ongoing criminal trial. Berk told the judge that he needed the ex parte meeting to discuss a "personal matter" with the judge. It turned out that what Berk wanted to tell the judge in private was that if his client were convicted in the ongoing trial, the company over which Berk sat as president would suffer adverse consequences. The Wisconsin court publicly reprimanded Mr. Berk.

A longer term suspension is implicated in a case where a higher degree of culpability, i.e., mental state, can be ascertained from the evidence. In *The Florida Bar v. Mason*, 334 So.2d 1 (Fla. S.Ct. 1976) (per curiam), the court publicly reprimanded and suspended for one year the license of a lawyer who engaged in ex parte communications with sitting members of that state's supreme court in an effort to affect the result in a pending case. The lawyer heightened the egregiousness of his ex parte contacts by thereafter attempting to conceal that they occurred from opposing counsel.

And, while it is not a case involving the issue of ex parte contact, the case of *In re Weishoff*, 75 N.J. 326, 382 A.2d 632 (1978) exemplifies that a more severe sanction is appropriate in the event the evidence shows that a prosecutor knowingly improperly disposes of a traffic ticket. In *Weishoff*, the New Jersey Supreme Court concluded that a municipal prosecutor knowingly made an improper disposition of a senator's secretary's speeding ticket. Although there was no evidence that the prosecutor profited personally from "fixing" the ticket, the court nonetheless imposed a one year license suspension. In imposing the suspension, the court referred to a New Jersey case wherein a municipal judge had been charged with fixing traffic tickets.

> A judge who does "favors" with his office is morally an embezzler. He is also a fool, for a judge who plays a "good" fellow for even a few must inevitably be stained with the reputation of a man who can be reached.

382 A.2d 632 at 635, quoting from *In re Mattera*, 34 N.J. 259, 275-276, 168 A.2d 38, 47 (1961).

As the foregoing cases illustrate, public reprimand and relatively short-term suspensions are within the range of sanctions imposed by courts on lawyers guilty of improper ex parte communication with a judge. By the terms of the Stipulation entered into between OCDC and Respondent, the Office of Chief Disciplinary Counsel is not bound to its recommendation of a public reprimand if the recommendation is not adopted by the panel or this Court. The Office of Chief Disciplinary Counsel believes that a public reprimand is within the range of appropriate sanctions for this case, or the recommendation would not have been made. After considering the testimony given

before the panel, however, OCDC joins with the panel in recommending that the Court suspend Respondent's license. In changing its recommendation from public reprimand to suspension, OCDC gives deference to Judge Holt's testimony before the panel. As discussed earlier, as the only person other than Mr. Tackett present for the December 18 conference, Judge Holt's initial virtual exoneration of Respondent from blame for the December 18 dispositions weighed heavily in disciplinary counsel's assessment of this matter. The judge's hearing testimony, however, was much less confident of Respondent's innocence than were his earlier statements. For example, Judge Holt did not recall the subject of the Schaefer criminal complaint, which was the pretext for the December 18 meeting, even arising during the meeting. And, the judge did not recall Mr. Tackett making him aware that one of the ticket cases involved Respondent's brother, information the judge testified would have raised a flag had he heard it. Nor did Judge Holt recall Respondent mentioning the request to switch the cases from the trial to an appearance docket. Judge Holt's hearing testimony makes Respondent's explanation for what occurred during the ex parte conference that caused the judge to enter dispositive entries on the docket sheets less believable. The Office of Chief Disciplinary Counsel recommends the Court suspend Mr. Tackett's license.

CONCLUSION

Respondent Tackett committed professional misconduct on several different levels by initiating an ex parte meeting with a judge – Rule 4-1.7 (conflict of interest in that he purported to appear on behalf of defendants charged with criminal offenses while he was an assistant prosecuting attorney), 4-3.3(a) (in that he failed to clarify material facts to a judge), 4-3.3(d) (in that he failed to inform a judge of all material facts in a situation where he was discussing, ex parte, the merits of pending cases), and 4-3.5 (in that he engaged in improper ex parte communications with a judge). Respondent also committed professional misconduct by making false, or with reckless disregard as to their truth or falsity, statements about a judge's integrity, in violation of Rule 4-8.2(a). The Office of Chief Disciplinary Counsel recommends that the Court suspend Respondent's license.

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____

Maridee F. Edwards #53481
Carl Schaeperkoetter #30467
Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2005, two copies of Informant's Brief have been sent via First Class mail to:

Edward D. Robertson, Jr.
715 Swifts Highway
Jefferson City, MO 65109

Attorney for Respondent

_____
Sharon K. Weedin

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 84.06b);

3. Contains 7,007 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.

_____
Sharon K. Weedin

APPENDIX