IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S REPLY BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

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.

Mr. Tackett argues in his brief that the record underlying Count I fails to support all but a "technical" violation of Rule 4-3.5. Respondent concedes what he dismissively calls the "technical violation" of Rule 4-3.5, but contends that the record fails to establish his violation of Rules 4-1.7, 4-3.3(a), and 4-3.3(d), the other Count I charges.

Informant bears the burden of proving charged Rule violations by a preponderance of the evidence. Rule 5.15(c). "Preponderance of the evidence is that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not." *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App. 1986) (citing Black's Law Dictionary 5th ed. 1979). The Count I stipulated facts, taken together with the evidence adduced at the hearing, demonstrably refute Respondent's argument.

Rule 4-1.7. Respondent argues that because there was "no evidence in the record that Mr. Tackett affirmatively informed Judge Holt that he was speaking with the judge as a representative of the State or of Callaway County," (Respondent's brief at 25), that there was no evidence of his violation of the conflict of interest Rule. Respondent's argument misses the boat. Informant never theorized, or charged in the information, that Mr. Tackett affirmatively misrepresented to Judge Holt that he was representing the county or state in the course of having the Tackett and Manumaleuna files sent to the judge and taking those matters up with him; it would have been a much easier case if that evidence did exist. What Informant did allege and prove is that on December 18, 2002, Respondent met with Judge Holt in two very different, and adverse, capacities: (1) as a lawyer for the State (Schaefer matter), and (2) on behalf of two defendants against whom criminal charges were pending. Therein lies the conflict of interest prohibited by Rule 4-1.7.

At the time of the conduct in question, Respondent was employed as an assistant prosecuting attorney in Cole County, Missouri, and was the prosecuting attorney-elect for Cole County. **App. 94** (stipulated facts). On December 18, 2002, Respondent represented the defendants in a meeting with the judge to whom the two misdemeanor speeding cases had been reassigned. Respondent has stipulated that he was acting "on behalf of" the two charged individuals in arranging for their files to be sent to Judge Holt, and in speaking to the judge about those files. These are undisputed facts.

Respondent's brief contains a subheading entitled "There is No Evidence Supporting a Rule 4-1.7 Violation." The above-referenced stipulated facts, standing

alone, establish a Rule 4-1.7 violation. A prosecuting attorney is a "quasi-judicial officer, retained by the public for the prosecution of persons accused of crime." *State ex rel. Griffin v. Smith*, 258 S.W.2d 590, 593 (Mo. banc 1953). A prosecuting attorney "shall represent generally the county in all matters of law." § 56.070.1 RSMo 2000. As the legal representative of a county, Respondent was prohibited by Rule 4-1.7 from appearing "on behalf of" parties charged by a county with committing crimes, which is precisely what Mr. Tackett has admitted doing.

There are exceptions (consent after consultation; reasonable belief that representation will not adversely affect existing client) to the Rule 4-1.7 prohibitions, but Respondent does not argue that his case falls within an exception. Rather, Respondent inverts the role he was playing on December 18, at least for purposes of his Rule 4-1.7 argument. Informant agrees with Respondent that he was not representing Callaway County when he asked for the Manumaleuna and Roland Tackett files to be sent to the judge's office and thereafter discussed the files with the judge. Mr. Tackett was representing Mr. Manumaleuna and Roland Tackett at the same time he was representing Callaway County in the Schaefer matter. That concurrent representation of adverse parties violated Rule 4-1.7.

Rule 4-3.3(a). Who a lawyer is representing in any particular matter is a material fact. It may not be a fact material to substantive resolution of an underlying legal issue, but it is always a fact material to the proper administration of justice in resolving the underlying issues. The lawyer's signature block on any kind of document filed with a court includes the line "Attorney for _____." It is essential to the integrity of

the adversarial system that a judge know on whose behalf a lawyer is speaking.

If the material fact of who the lawyer is representing is not patently obvious, as it should be when all adverse parties' legal representatives are present, then silence can itself, in some circumstances, be misrepresentation of a material fact. The comment to Rule 4-3.3 expressly states that "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Mr. Tackett's ex parte meeting with Judge Holt on December 18 presented just that kind of circumstance.

Mr. Tackett "knew" he represented the state in the Schaefer matter. He knew, and has stipulated to the fact, that he was speaking on behalf of Mr. Manumaleuna and Roland Tackett when he had their files sent to the judge's office and initiated discussion with Judge Holt on those pending matters. The greater weight of credible evidence establishes that Respondent's silence, his failure to clarify, just who he was representing in each of the matters he took up with the judge on December 18 amounted to an affirmative misrepresentation of a material fact in violation of Rule 4-3.3(a).

Rule 4-3.3(d). Respondent advocates grafting additional language onto Rule 4-3.3(d). He suggests that the Rule should apply only when a lawyer seeks a dispositive outcome by way of an ex parte communication. Respondent's suggestion would emasculate the very reason that the Rule requires unique and heightened candor from the advocate engaging in any ex parte contact. The events of Mr. Tackett's ex parte meeting with Judge Holt provide a case in point.

Giving Mr. Tackett the benefit of the doubt, i.e., assuming as true his testimony that his only purpose in initiating a discussion with the judge about the Manumaleuna and

Tackett cases was to ask Judge Holt to move the cases off his trial docket, the fact that Judge Holt "misconstrued" Mr. Tackett's purpose validates all the more Rule 4-3.3(d)'s requirement that the lawyer, in an ex parte setting, make darn sure the judge knows and understands all material information about what is going on. To limit the Rule's applicability to ex parte communications wherein the lawyer has the overt goal of obtaining a dispositive outcome ignores the very dangers the Rule was designed to avoid. When advocates for all sides are not present, facts are more likely to be overlooked and mistakes made. In this case, a request to remove cases from the trial docket to the appearance docket became dispositive orders. In *In re Bell*, 294 Or 202, 655 P.2d 569 (1982) (per curiam) (discussed at pages 20-22 of Informant's brief), the lawyer's intent to drop off a proposed order for a judge's consideration turned into a signed, final disposition of a disputed matter.

Mr. Tackett's interpretation of Rule 4-3.3(d) would undermine the safeguards that Rule provides for preserving the integrity of the legal system against the missteps likely to result from ex parte meetings. The more convincing and greater weight of the evidence supports the conclusion that Respondent failed in his heightened duty to make Judge Holt aware of "all material facts" when the two met alone on December 18, 2002, regardless of what his intention was in arranging the meeting.

Rule 4-3.5(b). Respondent concedes violation of this Rule, but asserts that his was a mere "technical" violation for which little or no sanction is necessary. Mr. Tackett does not dispute that the conversation he had with Judge Holt veered from a request for docket removal to discussion of the desired substantive outcome in the files. It was completely

inappropriate for Respondent to participate in a discussion of the merits of the cases without notice to the Callaway County prosecuting attorney's office, particularly under the murky conditions in which the discussion was taking place. The regret Mr. Tackett expressed in his hearing testimony for allowing the discussion to go forward belies his claim now that the violation was "technical."

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.

Informant reiterates the argument made in its initial brief.

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's role in the sanction determination process is to develop a record containing the information relevant to sanction analysis, then to recommend to the Court the sanction OCDC believes is appropriate. OCDC refers to the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), this Court's decisional law, other states' disciplinary cases, and experience in arriving at a recommendation. It is, in most cases, a difficult process because sanction analysis takes so many factors into account. Ultimately, of course, the difficult decision is the Court's to make.

OCDC strives to develop an evidentiary record in each case that contains the information pertinent to sanctions analysis, and to provide the Court a sanctions analysis model consistent with the ABA Standards model and the Court's prior decisions. Sanction analysis is a fluid process. The assessment of a case at the investigation stage may be different than assessment of the case post-hearing, depending, of course, on how the record ultimately develops. The Office of Chief Disciplinary Counsel believes that it is more important that the sanction recommendation made to the Court be the one best supported by the record and consistent with legal authority than it is to state a recommendation, and stick by it regardless of evolving case developments.

In the instant case, Respondent and OCDC were able to come to an agreement incorporating stipulated facts and a joint recommendation for sanction – public reprimand. As was stated in OCDC's opening brief, in disciplinary counsel's judgment public reprimand and short term suspension are both within the range of sanctions appropriate to Respondent's misconduct. Owing, however, primarily to the change in tenor in Judge Holt's hearing testimony,[1] disciplinary counsel believes the scale has tipped toward suspension.

[1] Mr. Tackett's brief takes Judge Holt to task for the differences in his assessment of the December 18 meeting between the telephone interview given the newspaper reporter in January of 2003 and his hearing testimony. Judge Holt's willingness, in that impromptu interview, to assume publicly to himself the lion's share of the blame for the December 18 ticket dispositions speaks volumes about his humility and character. Judge Holt's

The disciplinary office is painfully aware that this is a very public and, in some respects, politicized case.[2] The possible consequences to Respondent and the citizens of Cole County of any discipline imposed by the Court in this case, however, has not been a factor in OCDC's processing of this case. The lawyer discipline system exists to protect the public and preserve the integrity of the legal system. As is any licensed member of Missouri's bar, Mr. Tackett is answerable to the Court for his professional misconduct. OCDC recommends, for all the reasons set forth in its initial brief, that the Court suspend Respondent's license to practice law for a period of time not to exceed six months.

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assumption that he was the one to blame is also illustrative of just the sort of trust judges reside in their lawyer/officers to be completely candid with them and provide them with all the information needed for just resolution of disputed matters.

The fact of the matter, however, is that when Judge Holt gave the interview, this matter had not yet been investigated. The advantage of being apprised of the many circumstances attending the December 18 meeting, it is suggested, should offset any loss of memory Judge Holt may have experienced between January of 2003 and the disciplinary hearing in October of 2004.

[2] The Attorney General's interest in the effect that suspension would have on Respondent's viability as county prosecutor is understandable. Quo Warranto, however, is an "extraordinary" remedy for good reason – it provides an expeditious remedy for circumstances necessitating urgent judicial intervention. The Attorney General's prospective, hypothetical concerns should not be engrafted onto this discipline case.

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,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 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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_____
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 2,909 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