IN THE SUPREME COURT

STATE OF MISSOURI

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

RESPONDENT'S BRIEF

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ATTORNEY FOR RESPONDENT

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STATEMENT OF JURISDICTION

Respondent joins and adopts the jurisdictional statement of the Informant.

STATEMENT OF FACTS

Respondent supplements the Informant's Statement of Facts to clarify certain incorrect impressions that might flow from the Informant's selection for recitation and to more fully describe the hearing evidence.

Stipulation

Respondent does not believe that he is bound by any conclusions of law contained in the stipulation into which Informant and Respondent entered. *See*, Inf. App. at 94-116. The stipulation contained the following language:

> Informant and Respondent agree and understand that the recommended discipline in this joint recommendation is not binding on either party if it is not adopted by the Disciplinary Hearing Panel or the Supreme Court. Regardless of whether the Disciplinary Hearing Panel or Supreme Court adopts or rejects the recommended discipline, Informant and Respondent agree to be bound by any ***factual*** stipulations made by Informant and Respondent.

(Inf. App. at A-100)(emphasis added).

The stipulation contained a number of paragraphs that did not address factual matters but were instead conclusions of law. Specifically, Respondent

identifies paragraph 15 under Count I (Inf. App. at A-97).[1] Respondent, by the plain terms of the agreement, is not bound by these two paragraphs.

Carol England's Testimony

Informant's Statement of Facts informs the Court that Mr. Tackett watched a trial at which "assistant prosecutor Carol England" was acting as prosecutor prior to Mr. Tackett's visit with Judge Holt. (Inf. Statement of Facts at 11). The Informant omits to inform the Court that Judge Holt was acting as the City of Fulton Municipal Judge (App. 6; T 13:9) and that Ms. England was acting as the City of Fulton's municipal prosecutor in that case. (App. 6: T 13:7-8). Mr. Tackett did not know Carol England. (App. 33; T: 123:13) He did not know that any Callaway County Assistant Prosecutor was present in the courtroom during the City of Fulton municipal docket. (App. 33; T: 124:1-6).

To the extent that Informant's statement of facts is intended to leave the impression that Mr. Tackett knew that the assistant prosecuting attorney representing Callaway County was in the courtroom as he waited to see Judge Holt and that he waited for an assistant prosecuting attorney representing Callaway County to leave before seeing Judge Holt, Informant's brief inaccurately reflects the record and the facts.

[1] As to Count IV, the Disciplinary Hearing Panel did not object to the agreed to sanction.

Carol England testified that the ticket matters had been set for trial on January 17, 2003. (App. 9; T 25:24-25). The court would have sent notice of the trial setting. (App. 9; T 26: 15- 27: 10). She had issued subpoenas for witnesses. App. 9, T 27: 17 - 28:6).

Judge Holt's Testimony

Bob Watson of the Jefferson City News Tribune conducted a tape recorded, on-the-record interview with Judge Holt on January 7, 2003, less than three weeks after the events under consideration when those events were more fresh in the Judge's memory. The transcript of that interview is included in the record. (Inf. App. at A-141-144).

A careful reading of Judge Holt's testimony, combined with a reading of the transcript of the interview conducted by the Jefferson City News Tribune's reporter shows that Judge Holt's memory of the events has deteriorated substantially with time. In the days immediately following the events, Judge Holt believed that he, not Mr. Tackett, had made a mistake. (App. 141-144). Judge Holt confirmed at the hearing that he did not dispute the accuracy of the transcript of the interview with Bob Watson of the Jefferson City News Tribune. (e.g. App. 19; T 67:1; 73:15-16, 18)

His testimony at the hearing was much more equivocal. He never denied that the misunderstanding in the matter was his. He simply claimed a lack of memory about the events:

Q. Okay, now, did he ever talk to you about the Schaefer case itself that you recall at that meeting?

A. I do not recall it.

(Transcript at 56, A-16).

And later:

Q. Did Mr. Tackett at any time ever identify to you that Roland Tackett was his brother?

A. I don't have any recollection of that. Had he done that, I -- I would hope I wouldn't have done what I did, but I don't have any recollection of that one way or the other.

(Transcript at 60, App. A-17).

On cross examination, Judge Holt again displayed a lack of memory.

Q. Okay. And then he [Watson] says, Right, and you say, There's not much there. I didn't look at it much beyond the ticket and made an entry finding guilty and suspending imposition of sentence. Do you remember that?

A. Not specifically, but I don't have any quarrel with that.

(Transcript at 66-67, App A-19).

During the interview with the reporter, when his memory was more fresh, Judge Holt admitted:

Holt: It was a screw up, at least by me. I'm certainly going

to admit to that. Bill had been special prosecutor on lots of cases. He came to see me on some cases, somehow I got in my head that he was talking about these two cases and that he was the special prosecutor on them.

Watson: Uh huh

Holt: These are routine traffic tickets. They are not sort of thing that normal people normally people will pay attention to and certainly you in the news media, as a general thing, don't pay any attention to them.

Watson: Right.

Holt: And, Bob, it isn't the first time I have made a mistake on the record and it isn't the first time I have corrected that mistake on the record.

***

Holt: And I had to set this one aside because I made a mistake in doing it.

Watson: But I hear you saying that you had a conversation with Bill Tackett about one case, and then made entries into different cases because you thought that was the case you were talking about.

HoIt: I thought that was the case we were talking about.

Watson: And that was not what you were talking about? -

Holt: That was not the case at all. He had no involvement in these as a special prosecutor.

Watson: Okay

Holt: And I made a mistake because I didn't look at the case file, which is like I said, it's a very poor, there is not a lot of file there when you are talking about traffic tickets.

Watson: Right.

Holt: But I suspect that if I had read it carefully I would have seen, wait a minute, there is something here that flags this is not right. I didn't look at that.

***

Holt: That was just flat wrong. I didn't listen; I didn't pay attention; or I, something. Anyway-I made a mistake.

…

(Inf. App. at 141-143).

Judge Holt has received no discipline for his role in this matter. (App. 22; T 78:1-5).

Curtis Hanrahan's Testimony

Curtis Hanrahan is a lawyer practicing in Jefferson City and, from time to time represent clients in Callaway County. (App. 25; T. 91) Mr. Hanrahan testified that he represented Roland Tackett and Brandon Manumaleuna. (App. 25; T. 91-93).). Judge Augustine would generally not agree to suspended impositions of sentence in traffic cases but Judge Holt would. (App. 26: T. 93). Mr. Hanrahan had previously asked for a change of judge for the purpose of obtaining a suspended imposition of sentence for his clients. (App. 26; T. 94). Mr. Hanrahan did this in open court on the record with Callaway County Assistant Prosecutor Carol England present. (App. 26; T. 94). He had received a trial setting of January 17, 2004. (App. 9; T 9:26)

Mr. Hanrahan testified that Mr. Tackett was appearing on Mr. Hanrahan's behalf. (App. 30; T: 112) Mr. Tackett volunteered to help Mr. Hanrahan because he was going to be in Callaway County. (App. 26; T. 96) Mr. Hanrahan wanted Mr. Tackett to seek Judge Holt's permission to move the two tickets off the appearance docket. (App. 26; T. 96). There was a trial setting approaching. (App. 9; T 9:26) Mr. Hanrahan knows of no circumstance in which a traffic ticket can be disposed of in circuit court without the state and defense counsel being present. (App. 27-28; T. 100-101). "You can't do a deal for a ticket without everybody being present." (App. 28; T. 101). Mr. Hanrahan expected to have to go back to court to complete the pleas on the tickets. (App. 28; T. 104). It is Mr. Hanrahan's experience that judges often ask lawyers what the plea arrangements are going to

be. (App. 29; T: 105) The judges do this as a courtesy. (Id.) These conversations are often ex parte. (App. 29; T: 106)

Recommended Discipline

A hearing was conducted on October 25, 2005. At the close of the hearing and after hearing all of the evidence, the Office of Chief Disciplinary Counsel did not change his recommendation of public reprimand. Mr. Schaeperkoetter stated:

> You will note that we have cited in the stipulation certain ABA sanctions that we believe would be appropriate ones. Section 5.13 and Section 5.23. I would encourage the panel to look over the ABA Standards for Imposing Lawyer Sanctions Booklet (1991 ed.) and decide what you think is appropriate. ***I think you'll find that the sanctions that we have cited fit with the evidence and testimony that has been put forth today.***

(Trans. At 163, App. A-43)(emphasis added). The cited ABA sanctions call for a reprimand, not a suspension.

POINTS RELIED ON

I. THERE IS NO BASIS FOR THIS COURT TO IMPOSE DISCIPLINE IN COUNT I BECAUSE THE STIPULATED FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLFULLY VIOLATED RULES 4-1.7 4-3.3(a) OR 4.33(d) OF THE RULES OF PROFESSIONAL CONDUCT. RESPONDENT DID HAVE AN EX PARTE CONVERSATION WITH JUDGE HOLT IN WHICH RESPONDENT DISCUSSED DOCKETING ISSUES REGARDING PENDING MATTERS AND, TO THE EXTENT THAT SUCH A CONVERSATION IS A PER SE VIOLATION OF RULE 4-3.5, RESPONDENT ADMITS SUCH A VIOLATION.

In Re Carinchini, 956 S.W.2d 910 (Mo. banc 1997)

In Re Ver Dught, 825 S.W.2d 847 (Mo. banc 1992)

In Re Wallingford, 799 S.W.2d 76 (Mo. banc 1990)

II. RESPONDENT DOES NOT TAKE EXCEPTION TO THE POINTS AND AUTHORITIES RAISED BY INFORMANT WITH RESPECT TO COUNT IV, HOWEVER, THE SANCTION OF REPRIMAND IS THE ONLY APPROPRIATE SANCTION.

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

III. RESPONDENT DOES NOT TAKE EXCEPTION TO THE POINTS AND AUTHORITIES RAISED BY INFORMANT WITH RESPECT TO COUNT IV, HOWEVER, THE SANCTION OF REPRIMAND IS THE ONLY APPROPRIATE SANCTION.

In re Littleton, 719 S.W.2d 772, 777 (Mo. banc 1986)

In Re Cupples, 952 S.W.2d 226 (Mo banc 1997)

In Re McBride, 938 S.W.2d 905 (Mo. banc 1997)

In Re Crouppen, 731 S.W.2d 247 (Mo. banc 1987)

ARGUMENT

I. THERE IS NO BASIS FOR THIS COURT TO IMPOSE DISCIPLINE IN COUNT I BECAUSE THE STIPULATED FACTS AND EVIDENCE DO NOT SUPPORT A CONCLUSION THAT RESPONDENT KNOWINGLY OR WILLFULLY VIOLATED RULES 4-1.7 4-3.3(a) OR 4.33(d) OF THE RULES OF PROFESSIONAL CONDUCT. RESPONDENT DID HAVE AN EX PARTE CONVERSATION WITH JUDGE HOLT IN WHICH RESPONDENT DISCUSSED DOCKETING ISSUES REGARDING PENDING MATTERS AND, TO THE EXTENT THAT SUCH A CONVERSATION IS A PER SE VIOLATION OF RULE 4-3.5, RESPONDENT ADMITS SUCH A VIOLATION.

A. Standard of Review

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

B. Respondent is not Bound by any Stipulation Admitting a Violation of Rules 4-1.7, 4-3.3(a), 4-3.3(d) or 4-3.5 as the Existence of a Violation of these Rules is a Conclusion of Law not a Fact.

This Court must determine whether the Respondent committed professional misconduct. The CDC alleges that by failing to go to greater lengths fully to clarify his role in speaking with Judge Holt about the two traffic tickets, Respondent violated Rules 4-1.7 (conflict of interest); Rule 4-3.3(a) (making false statements to a tribunal); Rule 4-3.3(d) (presenting all material facts in an ex parte setting), and Rule 4-3.5 (relating to certain ex parte contact).

Respondent admitted certain facts in the stipulation with the Informant. Importantly, when the Disciplinary Panel did not accept the recommendation of the Chief Disciplinary Counsel, all that remained of the stipulation was the admitted facts.

The stipulation provided that "[r]egardless of whether the Disciplinary Hearing Panel or Supreme Court adopts or rejects the recommended discipline, Informant and Respondent agree to be bound by **any factual stipulations** made by Informant and Respondent." (Inf. App. At A-100)(emphasis added). Thus, any stipulated conclusions of law are no longer binding.

The Chief Disciplinary Counsel relies on this language from the stipulation as a legal predicate for its decision to abandon its recommendation for a public

reprimand as the appropriate sanction. The factual pretext for this change, is, however, too thin even to block light. The CDC now claims that the evidence at the hearing changed its mind. This is a late conversion. It did not occur at the hearing. At the close of the evidence, Mr. Schaeperkoetter said:

> And we rely heavily on the ABA standards for imposing lawyer sanctions when we try to evaluate what an appropriate sanction should be. You will note that we have cited in the stipulation [in the section entitled "recommended discipline"] certain ABA sanctions that we believe would be appropriate ones. Section 5.13 and Section 23.[2] I would encourage the

[2] The sanctions recommended by the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) specifically cited by the Chief Disciplinary Counsel are as follows:

> 5.13 ***Reprimand*** is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.
>
> 5.23 ***Reprimand*** is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

panel to look over the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) and decide what you think is appropriate. ***I think you'll find that the sanctions that we have cited fit with the evidence and testimony that has been put forth today.***

(Trans. at 163, App. A-43)(emphasis added). That the CDC's brief changes its recommendation is logically inconsistent and curious.

Respondent is no longer bound by the conclusions of law in the stipulation. Importantly, the paragraphs of the stipulation with respect to professional misconduct are not factual stipulations; they state legal conclusions and neither this Court nor the parties can be bound under the plain language of the contract. Nor may they bind or otherwise limit this Court's non-delegable judicial function of determining the legal issues relating to charged violations of the canons of ethics.

The rules applicable to the construction of contracts generally govern the courts in their interpretation of stipulations, and thus stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give it the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished.

(Emphasis added).

Huegel v. Huegel, 329 Mo. 571, 46 S.W.2d 157, 158 (Mo. banc 1932). See also ***Ezenwa v. Director of Revenue,*** 791 S.W.2d 854, 859 (Mo.App.1990). The general rule is that stipulations of litigants cannot be invoked to bind or circumscribe a court in its determination of questions of law. ***State v. Biddle,*** 599 S.W.2d 182, 186 n. 4 (Mo. banc 1980). Thus, a stipulation should be interpreted in view of the result which the parties were attempting to accomplish. ***Pierson v. Allen***, 409 S.W.2d 127, 130[3] (Mo.1966).

Here the parties were attempting to resolve a matter by agreement. When that did not result, the goal of the stipulation was not met and the terms of the stipulation control as to its future efficacy. Only the purely factual stipulations now remain.

Respondent has forthrightly acknowledged his role in the creation of the issues now before this Court. At the hearing of this matter before the Disciplinary Hearing Panel Respondent testified:

> Q. Did you do anything wrong?
>
> A. Yep
>
> Q. Tell the Panel what you did.
>
> A. Having thought about this six weeks from Sunday, when I began talking about special prosecution of Schaefer and I transitioned over to those tickets, I obviously did not make this clear. I clearly did not make it as clear as I should have

> that I was making that transition. … But if you choose to leave that purpose and go to another purpose, then the court needs to know in clear, undaunted terms that you're leaving one purpose and going to the next.

(App 37; T: 138-139)

The stipulation as to facts, and this admission, show that Mr. Tackett was negligent in not making sure that Judge Holt understood that he was not meeting with Judge Holt in a prosecutorial capacity on the two speeding tickets. His failure to make his role clear may be grounds for discipline only if the stipulated facts and Mr. Tackett's admission establish that he violated the canons of ethics.

C. There is No Evidence Supporting a Rule 4-1.7 Violation

The CDC contends that Mr. Tackett violated Rule 4-1.7 regarding loyalty to the client. "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." Inf. Br. at 22-23.

Rule 4-1.7 states:

> Conflict of Interest: General Rule
>
> (**a**) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(**b**) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected;

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 4-1.7

The Comment to Rule 4-1.7 makes clear that Rule 4-1.7 is a rule directed at loyalty to the client, not to any obligations to the justice system:

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has

> been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c).

Rule 4-1.7 Comment.

There is 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. That Judge Holt may have mistakenly assumed that fact - which he admitted may have been the case in his testimony -- was not a product of Mr. Tackett's affirmative representations to Judge Holt. As a result, no client of Mr. Tackett was compromised because of Mr. Tackett's failure to clarify his role.

> Q. Now, at any point in the conversation did Mr. Tackett say to you, I am the special prosecutor on -- on these two traffic cases?
>
> A. [Judge Holt] No, I don't think he would have used those words.

(App. 20; T. 72: 2-6)

The error in the judge's entry was quickly spotted due to the built-in procedural safeguards in the court system safeguards of which both Mr. Tackett and Judge Holt were well aware and expected to operate. (App. 36; T. 133-134). The judge initially took responsibility for the misunderstanding. (See App. App.

141-144). The two speeding ticket clients of Mr. Hanrahan were not harmed; both received dispositions consistent with their offenses. The state was not prejudiced. It got its convictions and fines.

Simply put there is not a preponderance of evidence sufficient to show that there is a violation of Rule 4-1.7 in this case.

D. Respondent Did Not Violate Rule 4-3.3(a)

The CDC charges that Tackett violated Rule 4-3.3(a) by "failing to identify to Judge Holt, Respondent's position." By its plain, unambiguous language, Rule 4-3.3(a) requires more than a mere failure to identify, it requires a material false statement knowingly made. That did not happen here, and there is no evidence anywhere in the record to support this charge.

Rule 4-3.3 States:

> Candor Toward the Tribunal
>
> (**a**) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> ***

Rule 4-3.3(a) requires an affirmative act -- a false statement -- and that the affirmative act be ***knowingly*** made to a tribunal.

The evidence fails to establish the legal conclusion argued by Informant. There were only two people who were present when Mr. Tackett and Judge Holt

met and discussed the Schaefer and speeding ticket matters. One of those admits that, in hindsight, he did not make the matter clear to the judge. The other, at the hearing of the matter, claimed a lack of memory. However, his statements made at or around the time when the incident took place establish that the error and misunderstanding were his:

> Holt: It was a screw up, at least by me. I'm certainly going to admit to that. Bill had been special prosecutor on lots of cases. He came to see me on some cases, somehow I got in my head that he was talking about these two cases and that he was the special prosecutor on them.
>
> Watson: Uh huh
>
> Holt: These are routine traffic tickets. They are not the sort of thing that normal people normally people will pay attention to and certainly you in the news media, as a general thing, don't pay any attention to them.
>
> Watson: Right.
>
> Holt: And, Bob, it isn't the first time I have made a mistake on the record and it isn't the first time I have corrected that mistake on the record.
>
> ***

Holt: And I had to set this one aside because I made a mistake in doing it.

Watson: But I hear you saying that you had a conversation with Bill Tackett about one case, and then made entries into different cases because you thought that was the case you were talking about.

HoIt: I thought that was the case we were talking about.

Watson: And that was not what you were talking about?

Holt: That was not the case at all. He had no involvement in these as a special prosecutor.

Watson: Okay

Holt: And I made a mistake because I didn't look at the case file, which is like I said, it's a very poor, there is not a lot of file there when you are talking about traffic tickets.

(App. at A-141-144). Judge Holt confirmed Mr. Tackett's lack of affirmative representations at the hearing.

Q. Now, at any point in the conversation did Mr. Tackett say to you, I am the special prosecutor on -- on these two traffic cases?

A. [Judge Holt] No, I don't think he would have used those words.

(App. 20; T. 72: 2-6)

There is no showing of any false statement made to the tribunal. The judge made an erroneous assumption in his own mind of which Respondent was not aware and which Respondent did not correct. Respondent, Mr. Tackett, erred in not making clear that his role had changed from special prosecutor to mail carrier for attorney Hanrahan. But at no time did Mr. Tackett make an affirmatively false statement to the Court, and the evidence presented (and stipulated) does not establish that he made any affirmative, false statement to the Judge.

Missouri cases interpreting Rule 4-3.3(a) support the conclusion that the Rule requires an affirmative, false statement or act. ***In Re Carinchini***, 956 S.W.2d 910 (Mo. banc 1997) involved an attorney who continued to use a document in litigation that she knew was a forgery. The court applied non-mutual collateral estoppel in determining the factual issues which had previously been determined by a federal court. The evidence of the falsity of the document was not contested. Moreover, in another matter, the attorney falsely stated to the Court that she did not know of a party's residence in another state, which was likewise knowingly false.

Similarly, ***In Re Ver Dught***, 825 S.W.2d 847 (Mo. banc 1992), the Respondent was charged with violating Rule 3.3(a) in that he made materially false statements to the court. This Court, noting that the false statements were related to marital status, and that the marital status was not material to the issue

before the court, held that Mr. Ver Dught was not guilty of professional misconduct under Rule 4-3.3(a)[3]

In Re Wallingford, 799 S.W.2d 76 (Mo. banc 1990) involved an attorney who submitted a false affidavit that was wrongfully notarized by her in a domestic matter. This Court found that there was evidence of misconduct based on the false document.

In each of the cases cited there was clear, credible evidence of a purposeful attempt to deceive or mislead the court by offering documents or evidence that was both material and false. Contrast those cases, with a definitive paper trail of knowing deceit, with this case where the Respondent is not shown to have made a single affirmative misrepresentation to the Court.

A careful review of the record shows that no one testified that Mr. Tackett ever made an affirmative false representation. Once the error was discovered Mr. Tackett took the proper route of notifying the judge. Judge Holt unwound the error. Judge Holt also assumed responsibility for the misunderstanding. Under these facts there can be no credible evidence of a false, material statement

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[3] The Court did find Ver Dught guilty of violating Rule 4-3.3(a)(4) in that Ver Dught offered testimony he knew to be false and did not correct that testimony. No requirement of materiality is required under the first part of Rule 4-3.3(a)(4).

knowingly made by the respondent to the tribunal and no violation of Rule 4-3.3(a).

E. There Was No Violation of Rule 4-3.3(d)

Informant charges that Respondent "fail[ed] to inform Judge Holt in an ex parte proceeding of all material facts which would enable to tribunal to make an informed decision.

Rule 4-3.3(d) requires:

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The comment to the rule states that

> in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Rule 4-3.3(d) Comment.

By the clear terms of the rule and comment, the rule is designed to apply to those situations where an attorney seeks a dispositive action of a judge on an ex parte basis, and not to those situations where the attorney is simply seeking a procedural step that would not dispose of or reach the merits of the matter under discussion. Mr. Tackett testified that his purpose in asking Judge Holt to move the matter from the trial to the appearance dockets was for purposes of an open plea. Judge Holt did not dispute this.

The record is clear that the judge misinterpreted Mr. Tackett's position and motive, and made record entries reflective of this. Mr. Tackett testified that when the judge read the information back to him, he assumed the judge was merely reading his notes back -- notes that would have aided the judge when the matter came to the court for the plea -- Mr. Tackett was not there to obtain a disposition of the matter.

Mr. Tackett admitted at the hearing that he should have made his purpose crystal clear to the judge, and was wrong in failing to do so. However, the judge's admission that he made a mistake and that he misunderstood make clear that both parties to the conversation had a duty to understand each other. Mr. Tackett's failures were negligent and were not an overt, affirmative act aimed at undermining justice.

Yet, an examination of the rule and comment, which apply to those situations where an attorney seeks dispositive action of some variety from a judge,

does not square up with the facts here, where Mr. Tackett's goal was simply to get the matter moved from the trial docket to the appearance docket.

This Court has not decided a case implicating Rule 4-3.3(d). However, cases from other jurisdictions support this reading of the rule. See ***Goodsell v. Mississippi Bar,*** 667 So.2d 7 (Miss. 1996)(attorney violated rule in an ex parte proceeding where he represented to court that motion for temporary restraining order was signed by his client, when in fact, attorney had signed document himself.); ***In the Matter of a Member of the State Bar of Arizona, Thomas Edward Higgins,*** 884 P.2d 1094 (Ariz. 1994) (attorney violated rule by filing ex parte motion without full knowledge and consent of the adverse party as required by rule); ***Daniels v. Alander***, 268 Conn. 320, 844 A.2d 182 (Conn. 2004)(associate attorney had duty under Rule 3.3(d) in ex-parte proceeding to obtain child custody to correct erroneous statements made by partner and was therefore subject to discipline); ***Fitzhugh v. Committee on Professional Conduct,*** 308 Ark. 313, 823 S.W.2d 896 (Ark. 1992)(failure to disclose all material facts in ex parte application for garnishment of funds violates Rule 3.3(d)); ***Malmin v. Oths,*** 126 Idaho 1024, 895 P.2d 1217 (1995)(court found Rule 3.3(d) applied to situation where opposing party did not present evidence because application of the rule is not meant to hinge on a technical definition of the term *ex parte,* but is instead intended to ensure that the tribunal is informed of facts necessary to render a just decision and "accord the absent party just consideration" in any proceeding

where "there is no balance of representation by opposing advocates" due to one of the parties being unrepresented).

In each of the situations set out above the attorney was in an essentially ex parte situation with a judge, and, in that setting, failed to inform the judge of facts that were material to the disposition or order sought. The goal of each of those proceedings was to obtain a judicial ruling, not move a matter to another docket for final subsequent disposition. ***Goodsell,*** 667 So.2d 7 (TRO); ***Higgins***, 884 P.2d 1094 (disposition of disputed escrow funds); ***Daniels***, 844A.2d 182 (Child Custody); ***Fitzhugh***, 823 S.W.2d 896 (Garnishment funds); ***Malmim***, 895 P.2d 1217 (default judgment sought after parties had agreed to settlement).

Here Respondent testified he was simply doing a favor for Attorney Hanrahan and was not seeking a disposition. Indeed it would have been ludicrous for Mr. Tackett to have attempted to seek a final disposition, given that one of the tickets was a ticket of his brother (who has the same last name.) He could not possibly hope to represent the state or “get away with” attempting to represent the state in a matter in which his brother was a defendant. Judge Holt testified under oath to a lack of memory as to whether Mr. Tackett informed him that the brother was the defendant. The ticket bore the name “Tackett,” an uncommon name, and Mr. Bill Tackett had every right to presume that the Judge would read the style of the case. Mr. Hanrahan confirmed Mr. Tackett’s testimony.

Under the facts as stipulated and demonstrated at the hearing on this matter, there was no actual violation of Rule 4-3.3(d). No disposition was sought. A misunderstanding occurred. The misunderstanding was corrected through a timely docket entry and the prosecutions continued unimpeded.

F. There Was a Technical Violation of Rule 4-3.5

Respondent charges that there was a violation of Rule 4.3.5 which provides in applicable part:

> Impartiality and Decorum of the Tribunal
>
> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person except as permitted by law; or
>
> (c) engage in conduct intended to disrupt a tribunal.

Specifically, Informant contends that by communicating ex parte with Judge Holt without the consent of the Callaway County Prosecutor's Office, there was a violation of Rule 4-3.5. If the mere existence of a non-dispositive ex parte communication is a violation of Rule 4-3.5(b), Respondent admits that the Rule was violated.

Importantly, Mr. Tackett did not believe he was seeking to gain favor with the judge; he believed he was simply communicating the facts necessary to move

the matters off the trial docket and onto the appearance docket for an open plea. The request for a change of judge in open court, with the Callaway County prosecutor present, for the purpose of obtaining a suspended imposition of sentence had already been made. A trial setting existed. Subpoenas had been issued for trial witnesses. There being no contested issue, Mr. Tackett did not believe it was necessary to call in an assistant prosecuting attorney for Callaway County.

To repeat: Mr. Tackett was not there to arrange a disposition of the case; he was simply accomplishing a docketing change – one that went terribly awry.

Considering the evidence and the most reasonable inferences from the evidence, the most logical explanation of what occurred is this:

Mr. Tackett knew:

1. He was not the special prosecutor in the speeding ticket cases.
2. CaseNet keeps track of all docket entries and sends notices to attorneys of record.
3. The Callaway County Prosecutor's office would have notice of all proceedings in the ticket cases, including the existing trial setting, because of CaseNet and the clerk's office procedures.

Mr. Tackett reasonably assumed that:

1. Judge Holt knew that he had not appointed Mr. Tackett as Special Prosecutor in the speeding ticket cases.

2. Judge Holt would know that Mr. Tackett had no authority in Callaway County and without Judge Holt ordering his appointment as special prosecutor, Mr. Tackett could not be there representing the state or Callaway County.
3. Since Judge Holt had appointed Mr. Tackett to only a single case as Special Prosecutor, Judge Holt would know which case that was.
4. Judge Holt would see the name Roland Tackett on the file and would either know that Roland and Bill Tackett are brothers or be curious about the commonality of their last names.
5. Judge Holt would not dispose of a case in chambers without presence of both parties.
6. Because Judge Holt could not dispose of the case ex parte, Judge Holt was merely making notes of the requests Curtis Hanrahan would make at the appearance docket.

What the evidence shows:

1. Curtis Hanrahan had sought and received a change of judge and had expressed his reasons – to obtain a Supended Imposition of Sentence following an open plea – in open court in the presence of Carol England.
2. Carol England and Curtis Hanrahan had received notice of trial settings.
3. Subpoenas had been issued to the ticketing troopers for the January 17, 2003 trial.

4. All of this took place before the meeting between Judge Holt and Mr. Tackett.
5. Curtis Hanrahan had asked Mr. Tackett to have the cases removed from the trial docket and put on the appearance docket.
6. Mr. Tackett went to Callaway County to see if he could resolve the Robert Schaefer matter and when he could not, he informed Albin Clarkston that he was going to see Judge Holt to tell him that he needed to be relieved of his appointment as Special Prosecutor.
7. There are no orders in the ticket files appointing any special prosecutor.
8. Judge Holt and Mr. Tackett discussed the two tickets.
9. Mr. Tackett saw Judge Holt writing in the files.

What the evidence does not show:

1. That the Callaway County Prosecuting Attorney's Office disqualified itself in the ticket cases.
2. That Mr. Tackett ever affirmatively represented himself as the special prosecuting attorney in the ticket cases.
3. That Mr. Tackett was ever appointed special prosecuting attorney in the ticket cases – there is no order in either file.
4. That Judge Holt approved any payment to Mr. Tackett for his service as Special Prosecutor in the ticket cases.

What Judge Holt apparently assumed incorrectly:

1. That Mr. Tackett was the Special Prosecutor in the traffic ticket cases.

What must be believed in order to find that Mr. Tackett intentionally attempted to "fix" these tickets and that Judge Holt participated in an ex parte conference to achieve that end:

1. Judge Holt believes it is proper to reach final resolutions of tickets in his chambers without both parties' presence.
2. Judge Holt regularly reaches final determinations of tickets in ex parte proceedings.
3. Bill Tackett would not object to the use of the phrases "APA" and "PA Tackett" when he knew that neither was true.
4. Judge Holt would not be curious about the difference in the fines between the defendants.
5. Judge Holt would have had to have appointed Bill Tackett as special prosecuting attorney and done so without making any record in the file that the Callaway County Prosecuting Attorney was disqualified, without any reference in the file of a request by the Callaway County Prosecuting Attorney that that office was disqualified; and without any order appointing anyone Special Prosecuting Attorney being in the file.
6. Judge Holt would have had to have appointed Bill Tackett Special Prosecuting Attorney in State v. Tackett, his brother's case.
7. That both Judge Holt and Bill Tackett would believe that a final disposition of the tickets would escape the attention of the Callaway County

Prosecuting Attorney despite the existence of Case Net, the clerk's office procedures, and the assistant prosecutor's own trial calendar.

These conclusions are contrary to reason and the evidence.

The most reasonable inferences and conclusions:

1. Judge Holt did not read out loud the parts of what he was writing relating to "APA" or "PA Tackett" because (1) Mr. Tackett knew he was not a special prosecutor in those cases. The use of his name would have been clearly incorrect and would have raised flags if Mr. Tackett and Judge Holt were trying to fix the tickets. (2) Mr. Tackett would have to be a special prosecutor, not an APA or PA in order to have any authority to act in a Callaway County case.
2. That Judge Holt did not think Mr. Tackett was the ***Special*** Prosecutor because he did not write the word "special" or any similar abbreviation in the order because Mr. Tackett has no authority in Callaway County and without that title, he could not be there representing the state.
3. Mr. Tackett was merely carrying out Curtis Hanrahan's request because Mr. Tackett knew he was not the special prosecutor in the case. He knew that Mr. Hanrahan had sought a change of judge to obtain an SIS and that the Callaway County Prosecutor's office knew that was Hanrahan's intention because he had said it in open Court. Further, subpoenas had been issued for the January 17, 2003 trial. Notice had gone out to both Carol England and Hanrahan of the trial setting. This made it impossible to

"fix" the ticket because the trial date had been set and the Callaway County Prosecutor would appear for trial and discover what had happened when the trial did not occur.

4. That Judge Holt made a mistake because he admitted as much at the time nearest the incident.

CONCLUSION

No factual basis exists to find as a matter of law that Respondent is subject to discipline for violations of Rules 4-1.7, 4-3.3(a), or 4-3.3(d). Respondent admits to a technical violation of Rule 4-3.5(b).

II. RESPONDENT DOES NOT TAKE EXCEPTION TO THE POINTS AND AUTHORITIES RAISED BY INFORMANT WITH RESPECT TO COUNT IV, HOWEVER, THE SANCTION OF REPRIMAND IS THE ONLY APPROPRIATE SANCTION.

Respondent does not take exception to the argument related to Count IV. Respondent has admitted his error in failing to address his letter to the court en banc rather than personally to Judge Brown. The colloquy between the Office of Chief Disciplinary Counsel and two members of the hearing panel shows that that is the gravamen of the complaint:

> MR. LEONATTI: I want to make sure on Count IV that you both agree that this violation that's cited in paragraph 9 is a violation because the letter was addressed to Judge Brown individually rather than to the Circuit Court of Cole County en banc.
>
> MR. SCHAEPERKOETTER: … The statements that were made to which Mr. Tacket referenced were made by the court en banc. To the extent they were true or false, they were -- they were made by the court and not by Judge Brown individually.
>
> MR. MACOUBRIE: And the fact that the letter from Mr. Tackett directed comments to Judge Brown personally rather than to the court en banc, is that correct?
>
> MR. SCHAEPERKOETTER: That's correct.

MR. LEONATTI: So are you saying if it had been addressed to the court en banc, there would be no charge?

MR. SCHAEPERKOETTER: I don't think for purposes of our stipulation we are stipulating one way or the other as to those statements.

For these acts, and as noted in point III, infra, the appropriate sanction is public reprimand. ***In Re Westfall***, 808 S.W.2d 829 (Mo. banc 1991)(Prosecutor who suggested that judge was less than honest in a judicial act punished by reprimand).

III. THE APPROPRIATE LEVEL OF DISCIPLINE IN THIS MATTER IS PUBLIC REPRIMAND.

A. Standard of Review

In a disciplinary proceeding, the Disciplinary Hearing Panel's "findings, conclusions, and recommendations are advisory in nature. This Court reviews the evidence *de novo*, determines independently the credibility, weight, and value of the testimony of the witnesses, and draws its own conclusions of law." ***In re Oberhellmann***, 873 S.W.2d 851, 852 (Mo. banc 1994). In attorney disciplinary proceedings, the truth of the allegations must be established by a preponderance of the evidence. ***In re Howard***, 912 S.W.2d 61, 63 (Mo. banc 1995). "The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession." ***In re Caranchini,*** 956 S.W.2d 910, 918-919 (Mo. banc 1997).

B. Reprimand Is the Appropriate Sanction in this Matter

At the outset Respondent notes it is difficult to determine exactly what the Office of Chief Disciplinary Counsel is recommending before this Court. In its Point Relied On it states that Respondent should receive a public reprimand at a minimum. Later, OCDC changes its recommendation from reprimand to suspension. It says “In changing its recommendation from public reprimand to suspension, the OCDC gives deference to Judge Holt’s testimony before the panel.” Inf. Br. at 34.

The OCDC does not seem to be able to articulate and support any particular basis for its change of position beyond the assertion that Judge Holt's testimony weighs heavily in its new recommendation of suspension. As noted, after all the evidence was heard at the hearing, and in particular, after Judge Holt had testified, Mr. Schaeperkoetter said:

> You will note that we have cited in the stipulation certain ABA sanctions that we believe would be appropriate ones. Section 5.13 and Section 5.23. I would encourage the panel to look over the ABA Standards for Imposing Lawyer Sanctions Booklet (1991 ed.) and decide what you think is appropriate. I think you'll find that the sanctions that we have cited fit with the evidence and testimony that has been put forth today.

(Trans. At 163, App. A-43). As noted, the particular ABA sections related specifically to reprimands, not suspensions.

The facts do not support the level of discipline recommended by the Disciplinary Hearing Panel or the OCDC, and the recommendation of the panel and the OCDC does not comport with prior Missouri cases or substantial justice in this matter.

A public reprimand is a substantial sanction, which must be administered only in accordance with due process of law. ***In re Voorhees***, 739 S.W.2d 178, 180 (Mo. banc 1987), citing ***Zauderer v. Office of Disciplinary Counsel of Supreme***

Court of Ohio, 471 U.S. 626, 636-37, 105 S.Ct. 2265, 2274-75, 85 L.Ed.2d 652 (1985). The reprimand is a scar on the lawyer's record. ***In re Westfall***, 808 S.W.2d 829 (Mo. banc 1991)(Blackmar, J., dissenting). The impact of the sanction on Mr. Tackett's career as a public official and as a prosecutor should not be lightly weighed.

As noted, the purpose of attorney discipline is to protect the public, not to impose punitive measures on the attorney. ***In re Caranchini,*** 956 S.W.2d 910, 918-919 (Mo. banc 1997). Those purposes are achieved both directly, by removing a person from the practice of law through suspension or disbarment, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct. ***In re Littleton,*** 719 S.W.2d 772, 777 (Mo. banc 1986) (citations omitted).

"[T]his Court is authorized to administer four types of discipline: reprimand; indefinite suspension; suspension for a fixed period; and disbarment." ***In re Caranchini,*** 956 S.W.2d 910, 919 (Mo. banc 1997).

Reprimand is ordinarily appropriate when the breach of the rules of professional conduct "does not involve dishonest, fraudulent, or deceitful conduct on the part of the attorney." ***In re Littleton***, 719 S.W.2d 772, 777 (Mo. banc 1986). *See also* ***In re Disney,*** 922 S.W.2d 12, 16 (Mo. banc 1996); ***In re Stricker***, 808 S.W.2d 356, 361 (Mo. banc 1991). Suspension is an appropriate intermediate sanction where reprimand is insufficient to protect the public and

maintain the integrity of the profession, and where the Court does not believe that the acts of a respondent are of a quality such that he should not be practicing law. ***In re Littleton,*** 719 S.W.2d at 777-78.

The ABA Standards for Imposing Lawyer Sanctions (1991 ed.) are consistent with this Court's precedents. For violations of duties owed to the public, the ABA standards direct that:

> 5.12 ***Suspension*** is generally appropriate when a lawyer ***knowingly engages in criminal conduct*** which does not contain the elements listed in 5.11 [disbarment] and that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.13 ***Reprimand*** is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

(Emphasis added).

For matters related to failure to maintain the public trust, the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) direct that:

> 5.22 ***Suspension*** is generally appropriate when a lawyer ***in an official or governmental position*** knowingly fails to follow proper procedures or rules, and causes injury or potential injury o a party or to the integrity of the legal process.

> 5.23 ***Reprimand*** is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

(Emphasis added). (Application of section 5.22 and 5.23 is doubtful here. Mr. Tackett was not acting as a "lawyer in an official or governmental position" with regard to these two traffic tickets.)

Recently this Court decided ***In Re Carey*** and ***In Re Danis,*** 89 S.W.3d 477 (Mo. banc 2002). In that case, attorneys Carey and Danis indiscriminately trampled upon the conflict of interest rules, used confidential information in the representation of a former client to the disadvantage of that client, lied in discovery matters, disavowed statements and conversations that were made, and were found guilty of professional misconduct for making deliberately and knowingly false statements.

This Court characterized the conduct of Carey and Danis as "an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal." ***Id.*** at 503. By suggesting that Respondent here be suspended from the practice of law for his violations of the rules, OCDC and the Disciplinary Hearing Panel are equating Carey's knowing and intentional rule violations that caused harm to clients as being proportionally as severe as

Respondent's failure to clarify his role to Judge Holt. That is not a rational or reasonable comparison.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.) Rule 6.11 provides that: "In determining the proper sanction, this Court must also consider aggravating and mitigating circumstances." ***In re Cupples,*** 979 S.W.2d 932, 938 (Mo. banc 1998). Respondent has never been charged with an ethical breach before this matter. He is the elected prosecuting attorney of Cole County. He has practiced for more than 13 years without a single blemish.

Yet, even if this Court does find cause to discipline on both counts, the level of sanction should be consistent with sanctions imposed previously by this court.

In Re Cupples, 952 S.W.2d 226 (Mo banc 1997) is an excellent case comparison. In ***Cupples*** the attorney, a former attorney with Deacy and Deacy in Kansas City, violated his duties to both his former law firm and that firm's client by secreting away with client's files as he prepared to withdraw from the firm. He removed files from the firm without the client's consent, and he failed to inform the client of the change in the nature of his representation. This Court held he violated the disciplinary rule that prohibits engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and ordered a public reprimand for his misconduct. The Court, looking at the isolated act for which Cupples had been

charged, and the nature of the offense, concluded the appropriate sanction was reprimand.

In ***Cupples,*** clients were harmed and the lawyer breached his duties to his former partners. The misconduct and deceit were plain and palpable, both factors that are absent in this case. Although the OCDC makes reference to Judge Holt's testimony as "much less confident of Respondent's innocence," Inf. Br. at 34, the fact is that Judge Holt's testimony was much less confident -- period. He remembered very little and could not say that Mr. Tackett's version of events was not correct. Judge Holt's testimony does not attempt to characterize Tackett's behavior as either improper or sanctionable.

Moreover, any characterization of Judge Holt's testimony before the panel must be squared with his own investigation by the Committee for the Retirement and Removal of Judges. (See Trans. At 77-78 App. A-22). Judge Holt's testimony before the panel indicated that he simply did not consider this to be a big deal and that it did not stand out:

> Q. And so this one doesn't stand out to you particularly but for what's happened afterwards?
>
> A. Absolutely not.
>
> Q. So
>
> A. Minor-minor cases, as I view them, especially when you deal with millions of dollars in dissolution cases or death cases

and criminal cases. Didn't seem like a large matter.

Q. And that's perhaps an explanation for why your memory's not as complete on this as it might otherwise be?

A. I would think that's part of it. The number of cases that I see is a part of it also.

(Trans. At 79, App. A-22).

The fact is that attorneys who have committed much more serious ethical (and even criminal) breaches of the rules of professional conduct have not been punished as severely as is recommended by the Disciplinary Hearing Panel here. In ***In Re McBride***, 938 S.W.2d 905 (Mo. banc 1997), the attorney took a gun and accosted three men outside a tavern. A fight ensued and one of the men was shot and critically wounded. McBride was convicted of felony assault and an SIS was imposed.

This court imposed discipline for violation of Rule 5.21(a) finding as an aggravating factor that McBride was "engaging in conduct which under the circumstances, might incite or invite reckless conduct by the three men, posing a danger to the public in the area or to himself." This court imposed a reprimand rather than a suspension even though McBride was adjudicated guilty of a serious felony that caused grievous personal harm to another. This Court said:

We find that the conduct for which Mr. McBride was convicted was an isolated act that did not involve dishonesty, fraud, or deceit.

> After considering the aggravating and mitigating circumstances present in this case, we do not find that the circumstances behind Mr. McBride's reckless conduct warrant suspension. Mr. McBride poses no threat to his clients or the public at large, and it would not serve the public or the profession to suspend his ability to provide competent legal service.

Id. at 909.

Like ***McBride***, the conduct here is isolated and does not involve dishonesty, fraud or deceit. There are no aggravating circumstances, and there are several mitigating circumstances present. Like ***McBride***, Mr. Tackett does not pose a danger to himself, the public, or the legal profession, and suspension would be an unduly harsh tax to impose on the publicity already generated by this case against an elected official.

Suspension would be needlessly and disproportionately punitive in view of ***Cupples***, ***Carey*** and ***McBride***. Missouri case law clearly supports a reprimand here.

A reprimand is appropriate for an isolated act of ethical misconduct. ***In Re Crouppen,*** 731 S.W.2d 247 (Mo. banc 1987). In ***Crouppen***, the attorneys approached a hospitalized patient after being informed he already had counsel. The patient told them he had an attorney, and these lawyers denigrated the ability

of the attorney and suggested that they discharge him and hire them. This Court found a rule violation and imposed a reprimand. ***Id***. at 250.

When attorney Carol Coe engaged in intentional conduct that had the effect of disrupting a criminal trial, after having received previous admonitions from the bar, this Court imposed only a reprimand in spite of the previous admonition and in spite of the increasing sanctions used by the trial court that included incarceration. ***In Re Coe***, 903 S.W.2d 916 (Mo. banc 1995). Importantly, the court initially imposed a suspension in that case, but reduced the suspension to a reprimand on rehearing after the Respondent apologized. ***Coe,*** 903 S.W.2d at 920, 921. (Covington, J., dissenting).

Neglect is most often punished by reprimand. ***In Re Staab***, 719 S.W.2d 780 (Mo. banc 1986). There, an attorney neglected cases to the detriment of clients and refused to cooperate with bar authorities investigating the issue. This court imposed a reprimand. ***Id.*** at 784-85. And, where an attorney breached fiduciary duties to a client by engaging in self-dealing transactions – breaches that the court found to be negligent rather than purposeful attempts to disadvantage the client – this Court imposed a reprimand. ***In Re Miller***, 568 S.W.2d 246 (Mo. banc 1978).

Missouri cases generally favor reprimand in situations such as those before the Court here, where simple neglect and not willful disregard of the judicial process is alleged. See, e.g., ***In Re Shelhorse,*** 147 S.W.3d 79 (Mo. banc

2004)(Reprimand for failure to maintain CLE requirement and failure to respond to disciplinary authorities); ***In Re Hardge-Harris***, 845 S.W.2d 557 (Mo. banc 1993)(failure to cooperate and produce documents to committee grounds for reprimand); ***In Re Westfall***, 808 S.W.2d 829 (Mo. banc 1991)(Prosecutor who suggested that judge was less than honest in writing opinion on double-jeopardy punished by reprimand); ***In Re Sullivan***, 494 S.W.2d 329 (Mo. banc 1973)(Reprimand appropriate for attorney who kept $1000 retainer without providing legal services).

CONCLUSION

For the reasons stated, Respondent respectfully suggests that the proper sanction in this case is no greater than a public reprimand.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Rule 84.06(b) in that it contains 9,305 words. Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via United States Mail, first-class postage prepaid on this _____ day of February, 2005, to:

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