IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	Supreme Court No. SC94683
ALLISON L. BERGMAN	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent agrees with the Informant's statement of jurisdiction.

STATEMENT OF FACTS

BACKGROUND

This Court licensed Allison L. Bergman to practice law in Missouri in 1997. Tr. 209. She continues to practice law in Missouri. Tr. 208-209. She is also licensed to practice law in Kansas. Tr. 207. She remains in good standing in both states and has never been the subject of any disciplinary action. Until this event, she was with Lathrop and Gage, LP., first as an associate and then a partner, ultimately serving on the executive management committee of the firm, and in other managerial leadership positions.

On February 15, 2012, the Kansas City Terminal Railway Company ("KCTR") terminated Bergman as its general counsel and removed her as corporate secretary, Tr. 70, ostensibly because she failed to disclose her relationship with Charles Mader, who had become KCTR President to the Board, and because she allegedly worked on various personal projects for Mr. Mader. Tr.200-01. These events also led to her resignation from Lathrop. Since this event, Ms. Bergman has been a principal at the Hardwick Law Firm, LLC, where she continues her work related primarily to transactions.

In 1999, Bergman first performed legal services for KCTR. In late 2002, Bergman assisted KCTR in successfully completing a number of complicated real estate matters. Tr. 468. In 2003, Bergman was selected by Bill Somervell, KCTR's president, to serve as assistant general counsel and assistant secretary of KCTR. Tr. 210.

In June, 2007, Bergman was appointed outside general counsel of KCTR and became its corporate secretary. Tr. 40; Tr. 210. As general counsel, Bergman was responsible for overseeing all legal services needed by KCTR. Tr. 41. Under the KCTR Bylaws, the secretary is a designated officer position. The KCTR Bylaws do not name the general counsel as an officer of the corporation and assign no duties to the general counsel. LF1181-1183.

The KCTR Board looked to its *secretary* for assistance in running its Board meetings in a manner consistent with the law and the KCTR Bylaws. The President and Chairman of KCTR's Board of Directors, Douglas Banks, testified:

> Q. How do you view the position of general counsel for the Kansas City Terminal?
>
> A. My view of the position of general counsel for the board is a *trusted advisor, source of guidance during board meetings and executive committee meetings*. That position really *provides a means of the board conducting its meetings properly and in accordance with the bylaws and any other governing laws that might affect what we do*. That position is a source of *independent counsel and advice*

to the board as we go through the process of board meetings and annual shareholder meetings.

Tr. 149. Bergman was never asked to provide legal advice to the Board of Directors. Tr. 216.

KCTR is one of the largest railroad terminals in the United States. Tr. 33-34. KCTR owns railroad track in the Kansas City area, on both sides of the state line. Tr. 33-35. KCTR is also responsible for maintaining tracks owned by other railroads. Tr. 33-35. KCTR collects about $35 million in annual revenue, most of which is redistributed back to the shareholders. Tr. 39; Tr. 241. KCTR has approximately twenty employees.

The shareholders, or owner railroads, of KCTR consist of five major railroads, Union Pacific, BNSF, Kansas City Southern, Norfolk Southern, and Canadian Pacific. Tr. 33. The shareholders are actually business competitors, but their predecessors came together cooperatively for purposes of establishing a railway terminal in Kansas City. Tr. 232. The relationship between the shareholders is not always a collegial one. In fact, it is adverse. Tr. 493. BNSF attempted to "unwind" KCTR in 1999. Tr. 301. The matter ended up in litigation. *Id*. President Somervell was brought in from the Union Pacific to finish the job of unwinding KCTR. Even then, BNSF was "still up to its shenanigans." Tr. 302.

Each owner railroad is given an independent right to audit the KCTR. LF1185.

Each shareholder of KCTR is allotted a certain number of seats on the KCTR Board of Directors. The KCTR president also has a seat on the KCTR Board of Directors, with equal voting power. Tr. 44; Tr. 187.

The corporate Bylaws of KCTR provide that the "property, business and affairs of the Corporation shall be controlled and managed by the Board of Directors." LF1181. But the day-to-day operation if KCTR is in the hands of the KCTR President:

> The President shall have general care, supervision and control of the corporation's business and operation in all departments subject to the direction of the Board of Directors and he shall when present preside at all meetings of the Board of Directors and of the stockholders.…
>
> He shall exercise a general supervision over the finances of the Corporation and submit to the Board for its determination any propositions for the expenditure of money not embraced in the ordinary operating expenses. …
>
> He may make such contracts and execute such certificates, documents and other instruments as may be incident thereto, as the ordinary conduct of the Corporation's business may require.

LF1182 (Ex. 49). Board Chair Douglas Banks testified that the Board of Directors does not involve itself in the day-to-day operations of the KCTR.

> Q. And the Board does not involve itself in the day-to-day

operations of the Kansas City Terminal Railway?

A. No.

* * *

Q. The decisions that are the day-to-day decisions that are made with respect to the operation of the Kansas City Terminal are made by the officers, the president, and vice-president, chief financial officers, and other employees, are they not?

A. For day-to-day operations, that's correct.

Tr. 181-82.

All Lathrop & Gage's legal bills to KCTR were sent to the company's president. Tr. 243-244. Payment of all billing invoices from Lathrop & Gage had to be approved by the company president. Tr. 45. They were also independently approved by the KCTR Chief Financial Officer, Brad Peek. Tr. 46.

CHARLES MADER, AS CONTRACTOR AND EMPLOYEE

In 2002, TranSystems employed Charles Mader as an engineer. KCTR contracted with TranSystems to provide engineering services. Mader provided those services and became KCTR's chief outside engineer. Tr.42. In 2002, Mader worked with Bergman on an important railway/real estate transaction.

In 2007, Mader and TranSystems parted ways. KCTR President William Somervell wanted to continue to use Mader's services as an outside engineer contractor. In July, of 2007, at the direction of Somervell, Mader formed Interlocker, LLC, to provide those services under a continuous service agreement

with KCTR. Tr. 264. KCTR thus knew of Mader's involvement with Interlocker. Interlocker is a business entity wholly owned by Mader. Tr. 262. Mader was not required to dissolve Interlocker when he became a KCTR employee. Tr. 188 (Banks).

A few months after KCTR contracted with Interlocker, Somervell and the Board selected Mader to become the next president of KCTR, in view of Somervell's impending retirement, if Mader passed a "test-drive." Tr. 289. On September 11, 2007, at a special meeting of the KCTR Board of Directors, the Board unanimously voted to offer Mader a three-year contract to serve in the role of vice president and general manager. Tr. 288. The Board set forth the material terms of the proposed employment contract. LF1007.

Following the Board meeting, Bergman was instructed by Somervell and the Board to prepare an employment agreement between Mader and KCTR to implement the written resolution unanimously adopted at the September 13, 2007 KCTR Board meeting. LF1007, 1254; Tr. 288. Such an employment contract was unique for KCTR; no other executive or employee for KCTR ever had a written employment contract. Tr. 289. In October, 2007, Mader became a full-time employee of KCTR. Tr. 264-265.

The general practice under the Somervell presidency at KCTR was for Somervell to direct that a contract be drafted by counsel, returned to Somervell, and for Somervell to complete the negotiations without benefit of counsel. This occurred with Mader's contract. Tr. 117 (Peek).

Bergman delegated the task of the initial draft of the Mader employment contract to a Lathrop & Gage employment attorney, Tedrick Housh. Tr. 290. Mr. Housh prepared a draft of Mader's employment agreement and emailed it to Bergman, with several questions regarding additional potential terms for further consideration. App. 711. Bergman reviewed it for consistency with the Board's directives. Tr. 292. Bergman never discussed the employment contract with Mader. Tr. 294

The CDC did not pursue any conflict-of-interest claim against Bergman related to the employment agreement. The CDC offered no findings of fact in this regard, and the Hearing Panel concluded that the CDC had abandoned any claim of an ethical violation in this regard. LF1348.

Mader became KCTR President on July 1, 2009.

THE RELATIONSHIP BETWEEN BERGMAN AND MADER

Bergman admits that she had a personal and sometimes intimate relationship with Charles Mader.

Bergman testified that the relationship with Mader started in 2002, after she was assigned to handle legal work for KCTR in connection with the construction of a complex transaction involving both legal and engineering expertise. Tr. 468-469. Bergman met Mader while working on the project. Tr. 469. At the time, Mader was employed by TranSystems, not KCTR. Tr. 469. Thus, Mader was not a constituent of KCTR. Tr. 190 (Banks). Mader did not become a constituent of KCTR until October, 2007. Tr. 264-265. At the time Mader became a constituent

of KCTR, he and Bergman had been in a close, personal and sometimes intimate relationship for over five years.

Bergman disclosed the relationship to President Somervell in 2005, in a direct conversation. Tr.247. Rule 4-1.7 did not require written conflict waivers until July 1, 2007. Rule 4-1.8(j) did not take effect or exist until July 1, 2007.

CFO Brad Peek knew of a special relationship between Mader and Bergman. Tr. 99. When Mader became gravely ill in 2006, Bergman acted as his caregiver. Tr. 471. This was known to Somervell and Peek, as Mader was a chief engineer for KCTR and he was incapacitated for a period of time. Tr. 471.

With respect to the KCTR Board of Directors, there was direct evidence that Bryce Bump, the Board Chairman in 2009, Somervell, the company president who was at all times a KCTR Board director, and the CFO, Peek (also a KCTR officer), had knowledge of the personal relationship between Mader and Bergman in 2009. App. 328-332 (Tr. 245-249); LF1153. In 2009, Bergman had a conversation with Mr. Bump "about my relationship with Mr. Mader," following an audit of the KCTR undertaken by the UP. Tr. 249.

In discussing why her relationship with Charles Mader was not disclosed to the KCTR Board of Directors, Bergman testified as follows:

> Q. Why is it that you never discussed your relationship with Charles Mader with any Kansas City Terminal director other than Mr. Bump and Mr. Somervell after Mader was hired in September of 2007?

A. When he was hired in September of 2007, Mr. Somervell had known for years that Chuck [Mader] and I were in a relationship, sometimes physical relationship. So I didn't see the imperative of bringing the issue up. He was fully learned of the fact that we were in a close relationship, and, in fact, encouraged our relationship.

Q. No. I'm not talking about Somervell. I'm talking about why you didn't discuss that with the board of directors.

A. Because I felt as though the board of directors -- Mr. Somervell was my client, and I told my client. And my client knew. So I didn't feel like I had an obligation to tell the board of directors, who were not my client, that I was in a relationship with somebody.

Q. So it's your testimony that Mr. Somervell was your client?

A. Mr. Somervell was the constituent representative of my client. So when I had an obligation, I felt, to talk to my client about my relationship, which I had done years earlier, he was the highest ranking officer of the Kansas City Terminal.

Q. Was the board of directors the highest authority within the company also a constituent of the attorney/client relationship?

A. I do not feel like the board of directors was my client.

Q. Well, I understand that. But were they a constituent of your client, the same way that Somervell was a constituent of your client?

A. I do not believe so.

> Q. Did you feel like the board of directors had a right to know of the status of your relationship with Charles Mader when they decided to hire him?
>
> A. No. I felt like Mr. Somervell knew and that was sufficient, since he was my client.
>
> Q. It was none of the board of directors' business at that point?
>
> A. Mr. [Odrowski], I didn't feel like they were my client. So I didn't feel I had an obligation to tell them any more than I had an obligation to tell a non-client. My client was the Terminal. The highest ranking officer of that company was Bill Somervell, and he had known about our relationship for years.

Tr. 252-254.

Bergman testified that "there was nothing about my relationship with [Charles Mader] that did affect or could have affected my ability to serve that client [KCTR]." Tr. 454. Neither Banks nor Peek provided any direct evidence that they were displeased with the quality of Bergman's work.

In late June of 2007 (shortly after being appointed general counsel), Bergman attended a CLE presentation during which there was a discussion of Missouri Supreme Court Rule 4-1.8(j)[1] involving sexual relations between an attorney and client. Tr. 244; Tr. 473-474. In response, Bergman reviewed the rule

[1] Rule 4-1.8(j) became effective July 1, 2007.

at that time. Tr. 244. Bergman read the rule and determined she was not in violation because her relationship with Mader pre-existed both the Rule and Mader's ascendancy to a KCTR constituent role. Tr. 245.

The CDC is quick to inform the Court that Bergman produced neither Mader nor Somervell to provide testimony on Bergman's behalf at the disciplinary hearing. The CDC does not add, however, that Mader and Somervell were then (and continue to be) under scrutiny by the U.S. Attorney for potential criminal violations for matters not the subject of this disciplinary proceeding, and that both Mader and Somervell would have waived any 5th amendment rights, by testifying at Bergman's hearing. There is no allegation that Bergman was either aware of or participated in the matters under criminal investigation.

THE TALLGRASS LLC ISSUES

About the time Allison Bergman became general counsel of KCTR, in June of 2007, the President of KCTR, William Somervell, took she and Charles Mader, who was not yet an employee of KCTR, but an independent contractor engineer operating from an entity called Interlocker, to lunch at Ameristar Casino, which had a featured passenger railcar. Tr. 426. Somervell announced at that time, to both Mader and Bergman, that he wanted to buy a railcar for KCTR. Tr. 426. KCTR's Chief Financial Officer, Brad Peek, testified that Somervell also told Peek that Somervell wanted to purchase a railcar for KCTR. Tr. 77. Somervell had also explored KCTR's purchasing a railcar with senior executives of the KCTR majority owner, the Union Pacific. Tr.77.

Somervell asked Bergman to prepare the purchase agreement because *KCTR* was exploring purchasing the railroad car. Tr. 129. Jamison Shipman, of Lathrop, prepared a tax analysis memorandum indicating it was more tax favorable for *KCTR* to own rather than lease a railcar. LF 1266.

The course of conduct between KCTR and its general counsel was that Somervell would direct the legal work he needed done for KCTR. Tr. 117 (Peek)(Tr. 297 (Bergman). Bergman did not consider the Board of Directors her client, nor did she believe she needed to seek authorization from the Board when KCTR's President directed her to perform legal work. Tr.44 (Peek). Bergman often drafted contracts for Somervell and he carried out negotiations. Tr. 406. KCTR often modified documents without her knowledge. Tr. 297. Somervell often directed Bergman to work on acquisition documents for the Terminal, prior to actual acquisition or finalization of terms. Tr. 353.

KCTR's Chief Financial Officer, Brad Peek, testified that KCTR President Somervell directed and supervised the general counsel's work. Tr. 44. Lathrop Gage bills were sent to the attention of the President. Tr. 243. Both the President and the CFO reviewed and approved the legal bills before payment. Tr. 45, 46. Under the KCTR's Bylaws, the KCTR President has authority to "make such contracts … as the ordinary conduct or the corporation's business may require." Tr. 121; Ex. 49 (KCTR Bylaws). The Board did not authorize the purchase of the railcar. Tr. 166. KCTR did not purchase the railcar nor did it spend any money to lease the railcar. Tr. 111. Douglas Banks, the current Board Chair, testified that

the Board does not involve itself in the day-to-day operations of the Terminal. Tr. 181. Officers of KCTR made decisions on day-to-day operations. Tr. 182. Both Somervell and Peek were officers of KCTR. LF1182. If the KCTR President had surplus funds within his budget, the Bylaws permit him to spend such funds, without additional authority from the Board of Directors. LF1181. Tr. 354.

On August 26, 2007, Mader sent Bergman an email setting out the price and terms of the purchase of the railcar from Century Rail Enterprises, Inc. LF1256. The email indicated that KCTR would be the purchaser of the railcar. LF1256. Every version of the contract described the item to be purchased as some variant of "Conrail." LF1031, 1237, 1244, 1257. In Bergman's billings to KCTR, and in the contracts that were drafted, that transaction was referred to as involving "Conrail." LF1104-08. This is because the railcar was originally owned by the former Conrail service provider. The CDC seems to make the fact that Bergman's bills called this the "Conrail" matter as proof of some sort of conspiracy or attempt to conceal the railcar purchase in her billings. Bergman testified that she referred to "Conrail car" in her time entries merely because she "had been working on the transaction for about six months and had called it Conrail car, and that's just what came out of my fingers on the keyboard" when she tracked her time. Tr. 347.

On September 22, 2007, the Seller of the railcar sent correspondence indicating that KCTR would be the purchaser. LF1262. Bergman proceeded to draft at least four versions of the KCTR's purchase agreement for the Conrail

railcar. LF1031, 1237, 1244, 1257. These were sent to Somervell. In each, the purchaser was KCTR, until December 21, 2007. LF1031.

Bergman believed that KCTR faced potential liability if the railcar was left on tracks and an accident happened. Tr. 526. Therefore, she recommended that KCTR form a separate limited liability company to own the railcar to insulate itself from such liability. Tr. 526. Somervell approved the formation of the LLC, which Bergman believed he had authority to do without Board approval. Tr. 533. Somervell told Bergman he could use funds from his operating budget to acquire the Conrail railcar. Tr. 355.

At the direction of Somervell, on December 12, 2007, Bergman formed Tallgrass Railcars LLC, to purchase the Conrail car. LF1000. The Secretary of State's form does not require a listing of ownership of the LLC. LF1000. Lathrop and Gage internal conflicts documents listed the Tallgrass entity as an affiliate of KCTR. LF1110; Tr. 434. The Tallgrass billing address was KCTR. LF1113; Tr. 390. Immediately prior to the creation of the LLC, the purchase agreement was amended to show the Tallgrass entity as the purchaser. LF1031. The transaction closed on December 21, 2007. LF1031. Bergman did not attend the railcar purchase closing. Tr. 433. She facilitated the closing only to the extent she prepared closing documents and provided them to her client. LF 1099-1100 Bergman never saw the checks to the Seller for the purchase of the Conrail car. Tr. 433.

Tallgrass did not have an operating agreement when the transaction closed – and did not until June, 2008. Lisa Hansen, a Lathrop tax and corporate attorney, took responsibility for drafting the operating agreement. Tr. 436. The Tallgrass operating agreement, completed in June, 2008, LF1107, showed that Somervell, Mader and a KCTR vendor, Watco Companies, were the owners of the LLC, and thus the Conrail railcar. LF1046. Hansen sent a copy of the operating agreement to Bergman by email on February 26, 2008. LF1130. The Lathrop metadata showed that Bergman never opened the email nor did she open, view or edit the operating agreement before October, 2011, the time at which Bergman learned of the actual ownership of the railcar. LF1146; Tr. 437. Bergman did not bill any time to KCTR related to any review or drafting by Bergman of the Tallgrass operating agreement.

In 2007, KCTR's Chief Financial Officer, Brad Peek, knew that Somervell and Mader bought the Conrail railcar. Tr. 77. Peek never reported it to the Board. Tr. 121. Peek had no reason to believe that Bergman knew that Tallgrass was not an affiliate of KCTR. Tr. 133. Peek approved all Lathrop bills that were sent by Bergman regarding the Tallgrass/Conrail transaction. Douglas Banks, the current Board Chair, testified that Peek never reported any concerns about Mader to the Board. Tr. 186. Nor did Peek ever raise any alarm about bills from Lathrop. Tr. 193. Banks testified that KCTR never paid Tallgrass "a dime." Tr. 202.

When asked if she was deceived by Somervell and Mader regarding their December 2007 purchase of a railcar, Bergman testified as follows:

> Q. Do you now think that Somervell and Mader sort of tricked you into thinking that Tallgrass was a Terminal entity?
>
> A. I feel like something changed along the way and nobody told me. And I don't know if that is trickery. I don't know if it was deception or -- I don't know what their intent was and what happened. But there was -- when I formed that entity, when I drafted all of those documents, I was drafting them for the railroad. They were buying a railcar. And what ultimately was determined to be the [reality] of the ownership was a surprise to me, and it was-- I don't know if it was trickery or not.

Tr. 359.

Bergman confirmed the only document that identifies Tallgrass as an affiliate of KCTR is the client intake form prepared and submitted by her administrative assistant under Bergman's typed signature. Tr. 353. Bergman testified:

> Q. As organizer of a Missouri LLC, aren't you supposed to have knowledge about who owns it and who's going to manage the company?
>
> A. Well, you have to have knowledge of who's going to own it because that's going to be the entity that you're forming the entity for. So at the time this was formed, it was --the Kansas City Terminal was going to be owning it. Mr. Somervell had directed me

> for several months to do work in advance of purchasing the railcar for the terminal, and the ownership was going to be for the terminal. Actually, for the Secretary of State, all you have to have is the entity name for purposes of forming the entity. Nothing else really needs to be done for them.
>
> Q. As general counsel for the Kansas City Terminal, wasn't it your obligation to confirm the authority for the president of the company to form a subsidiary?
>
> A. It was my direction from Mr. Somervell that he was going to be purchasing the railcar with monies out of his operating budget. And I knew that he had inherent authority to use the money in his operating budget as he saw fit.

Tr. 353-354.

BILLING ISSUES

KCTR never asked for Bergman to refund any of the amounts billed. Tr. 193. Had KCTR questioned her bills and she had found them incorrect, Bergman would have corrected them. Tr. 400.

CFO Brad Peek testified he believed KCTR was billed $10,000 that should not have been billed or paid relating to Tallgrass legal work. Tr. 85. He admitted, however, that "some of the entries [in the billings] in 2007 at the beginning of this were requested by the president while the company was in the exploratory mode of acquiring the railcar." Tr. 129. Peek didn't "believe we included that in the

$10,000 because it was likely requested [by KCTR] and work performed by [Lathrop]." Tr. 129. Further, to arrive at the $10,000 figure, Peek's allocated all time billed by Bergman to Tallgrass, despite the fact that her time entries reflected work on multiple KCTR matters. See, e.g., LF 1099; 1100.. Thus, the $10,000 figure itself was merely an estimate, did not fully consider what was properly billed during the "exploratory mode," offer any timeline for when the "exploratory mode" ended, and rested on Peek's own admission that it was not possible to determine a precise number. Tr. 101, Tr. 85. But the bills are available after December, 2007. LF1101-02 (Exhibit 21).

Thus, Peek admitted that some of the bills relating to the railcar acquisition were properly billed to KCTR. Peek also admitted that he learned as early as November or December, 2007, that Somervell and Mader were going to acquire the railcar, not KCTR. Tr. 101. Peek did not disclose this knowledge to either the KCTR Board or to Bergman. Tr.122.

Once Bergman learned of the true ownership of Tallgrass in late October, 2011, no one at Lathrop, including Ms. Bergman, billed KCTR for Tallgrass work. Indeed, no Tallgrass bill was sent to KCTR after June, 2008, when the Operating Agreement was finalized by Lisa Hansen, LF1107, and Bergman completed the lease documents. LF1106. The billing amounts for Hansen's preparation of the operating agreement amounted to $868 (Lisa Hansen alone: 3.1 hours at $280). LF1101, 1102, 1104, 1107. Somervell directed Ms. Bergman to prepare an equipment lease, to document KCTR's use of the railcar for track inspection and

entertainment, and for third parties' rental of the railcar, amounted to $4,402.[2] LF1101-1107 (Exhibit 21). Ms. Bergman believed these hours were billed for KCTR's purposes, as she believed KCTR owned Tallgrass. Tr. 400. Collectively, all billings related to the railcar amounted to $5,270 (not the $10,000 the CDC claims). Moreover, the invoice for most of these services reflected a 10% discount, see LF1103 (Exhibit 21). During that same period, Bergman wrote-off more than $35,000 in 2009, when a matter was brought to her attention that should not have been billed to KCTR. Tr. 399. Lathrop billed KCTR $370,965.23 in 2008, LF1018 (Exhibit 11). Moreover, the CDC expressly abandoned any claim at the hearing regarding overbilling. Tr. 49.

Bergman denied any form of deceit or dishonesty in submitting legal bills for Tallgrass legal work to be paid by KCTR. Tr. 408. Bergman denied any wrongful conduct regarding the billing to KCTR for Tallgrass work. Tr. 408-409.

MADER'S OUTSIDE INTERESTS

Mader formed Black Boot Properties LLC on July 27, 2007. LF1165 (Exhibit 45). Black Boot owned two six-plexes as rental property. Tr. 267. Black Boot was an investment in real estate by Mr. Mader in which KCTR had no interest. Tr. 267. Bergman performed legal work for Black Boot, and

[2] This assumes a $200 per hour billing rate for C. Lawrence, who billed 7.7 hours for work on the lease agreement between February and April, 2008. LF1101-06 (Exhibit 21).

acknowledges an attorney-client relationship between herself and Black Boot. Tr. 266. Bergman performed some incidental services for Black Boot at Mader's request, such as helping to draft letters to tenants. Tr. 269-270

Mader signed a contract to become an employee of KCTR on October 1, 2007. Specifically, Mader became a vice-president for engineering and the general manager of KCTR. LF1038 (Exhibit 17). The contract provided that Mader must "diligently and conscientiously devote his full and exclusive time and attention and his best efforts to the discharge of his duties." *Id.*

Board Chair Douglas Banks testified that Mr. Peek was in the best position to know what Mader was doing on a daily basis, not Ms. Bergman. Tr. 185.

> Q. Mr. Peek was there in the same building. So if Mr. Mader wasn't attending to his business, and was gone for inordinate periods of time, it would be Mr. Peek who would know about it?
>
> A. I would think so.
>
> Q. And if Mr. Peek was somehow or another alarmed that Mr. Mader wasn't in there attending to his business, then Mr. Peek had an obligation, did he, to report to the board?
>
> A. I would say so.
>
> Q. And did that ever happen?
>
> A. Not that I recall.

Tr. 185-86. Mr. Peek testified that he never saw anything in the conduct of Somervell or Mader that he felt needed to be reported to the Board. Tr. 122-23.

INTERLOCKER AND THE CITY OF NEWTON

Interlocker LLC, was formed by Mader on the same day as Black Boot, before Mr. Mader became an employee of KCTR. LF1172. Interlocker was formed with full knowledge of KCTR, because Interlocker was used by Mader to sell his engineering services generally, including as a vendor to KCTR, which he did for a short period of time until he became an employee of KCTR. Tr. 264. KCTR knew that Mader's services to KCTR were provided through Interlocker. Tr. 264. And there was no requirement that Mader dissolve Interlocker when he became an employee of KCTR. Tr. 188 (Banks).

No employee of KCTR had an employment contract, except Mader, and then only for his "test drive" as vice-president. Tr. 331. KCTR did not enter into contracts with its employees, including that of the KCTR President. Tr. 331. Thus, when Mader was promoted into the position of President of KCTR, he no longer had an employment contract. Tr. 331.

Interlocker began consulting services for the City of Newton in late 2010 or January, 2011. LF1228. By then, Mader was President and had no contractual limitation on his outside efforts. It was not until April, 2011, that the KCTR Board adopted an ethics policy. LF1131 (Exhibit 25). The ethics policy forbade "[i]nvolvement in an outside business enterprise *that may require attention during business hours and prevent full-time devotion to duty*…." (emphasis added). LF1135. Again, this policy does not prevent outside business interests provided they do not detract from work for the KCTR. *Id.* Peek testified that he never saw

anything in the conduct of Mader that he felt needed to be reported to the Board. Tr.122-23. And even more important, as noted, the Newton consultation began *before* the KCTR ethics policy existed, and KCTR had actual knowledge of Interlocker.

Bergman testified that the terms of the employment agreement "may" have prevented such activities between 2007 and 2009. Tr. 330-331. (The CDC's recitation of facts in this regard -- that Bergman admitted that Mader could not have outside business interests -- is not accurate).

Bergman was aware that Mader performed independent consulting work for the City of Newton, Kansas, while a full-time employee of KCTR. Tr. 320-321; Tr. 323-324. Bergman never saw Mader's agreement with Newton, and Bergman did not draft the agreement. Tr. 328. See LF1230. Bergman testified that she did not believe that Mader's activities on behalf of Interlocker and Black Boot interfered with his full-time employment for KCTR. Tr. 330. Peek agreed. Tr. 121.

STANDARD OF REVIEW

> "Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). The panel's findings of fact, conclusions of law, and the recommendations are advisory and, this Court may reject any or all of the panel's recommendations. *In re Coleman*, 295 S.W.3d 857, 863 (Mo. banc 2009).

In re Ehler, 319 S.W.3d 442, 448 (Mo. banc 2010). See Rule 5.15(c)(establishing the preponderance of the evidence standard and placing burden of proof on Informant) and Rule 5.16(g)(establishing that the decision of a hearing panel "shall not have any binding or limiting effect on this Court").

ARGUMENT

I. RESPONDS TO INFORMANT'S POINT I

A. INTRODUCTION

1. Substantive Law and Evidence Impact the Application of the Rules of Professional Conduct

Unlike many disciplinary matters that come to this Court for resolution, the substantive law that governs corporations and the case-specific evidence concerning how the Kansas City Terminal Railway Company ("KCTR") has chosen to conduct its affairs through written bylaws necessarily inform this case. The CDC chooses to argue this case without reference to these, attempting to divorce the legal and corporate governance context from the CDC's bare assertions of ethics violations.

But that legal/governance context renders the arguments of the CDC misdirected.

In the end, the CDC appears unduly influenced by two mistaken legal conclusions. First, that sex somehow overshadows everything else, and second, that this Court's Rule 4-1.8(j) makes an indisputably pre-existing sexual relationship between an attorney for the corporation and a person who several years later becomes a constituent of a corporation a *per se* violation of that Rule in every context.

There is no dispute but that Ms. Bergman and Mr. Charles Mader, who was then employed by TranSystems and served as a contract outside engineer for

KCTR, began a sometimes-intimate relationship in 2002. Mader later (in 2007) became an employee of KCTR, and ultimately became its President in July, 2009. The CDC states: "Respondent's relationship with Mader was prohibited because he was a constituent of KCT and he supervised, directed, and regularly consulted with Respondent concerning the organization's legal matters." CDC Br. at 74. This conclusion is made without regard for the plain language of the Rule or the undisputed evidence:

> (1) that Bergman disclosed the relationship with Mr. Charles Mader to the President of KCTR, William Somervell, in 2005,
>
> (2) that the Chief Financial Officer of KCTR (Brad Peek) actually knew that a special relationship existed between Mader and Bergman, and
>
> (3) that a 2009 audit of the KCTR by one of its owner railroads, initiated because a whistleblower complained of the Mader/Bergman relationship, reported nothing about the relationship at all, leading to the quite proper inference that nothing supported a conclusion that Ms. Bergman was not fulfilling her ethical and professional obligations to KCTR or that the relationship interfered with either doing her/his job.

This case also involves the CDC's claims that Bergman violated Rule 4-1.13. This claim dovetails with the CDC's assertion that Bergman found herself in a conflict of interest because of the relationship in violation of Rule 4-1.7.

The conflict manifests itself, according to the CDC, because Mader had signed a employment contract with KCTR when he first became an employee of

KCTR. That contract required Mader to "diligently and conscientiously devote his full and exclusive time and attention and his best efforts to the discharge of his duties. LF1038 (Exhibit 17). Mader had outside real estate investment interests that pre-dated his employment with KCTR (Black Boot Properties, LLC). Bergman knew of those interests. Mader did not divest himself of those interests when KCTR hired him. The CDC contends that Bergman did not report Mader's real estate investments, his later engineering consulting work with the City of Newton, and his (unknown to Bergman until October, 2011) investment in Tallgrass Railcars, LLC, to the Board of Directors of KCTR (despite a duty the CDC imagines she had) simply because she did not want to jeopardize her relationship with Mader.

The CDC speculates: "If Respondent had affirmatively reported Mader's outside business activities to the Board in a timely fashion, the events thereafter might have played out much differently." CDC Br. 90. Further: "Full disclosure to the Board of Mader's for-profit activities on behalf of Interlocker, Black Boot and Tallgrass would almost certainly have caused the Board to scale back bonuses and pay increases to Mader." CDC Br.91.

KCTR's CFO, Brad Peek, had actual, admitted knowledge of Mader's interest in Tallgrass in December, 2007 (while Bergman did not until 2011) and reported nothing to anyone. He did not – and neither did Bergman – because Mader had violated no contractual provision or obligation to KCTR. As will be shown, a contract that requires devotion of "full and exclusive time and attention"

does not create an indentured servitude nor prohibit outside economic activities that do not detract from an employee's work performance or the employer's opportunities.

Rule 4-1.13 does not require Ms. Bergman to become a tattletale for two reasons: First, there was no violation of any duty or contract owed KCTR by Mader. The CDC's argument in this regard simply ignores controlling law. Second, even assuming arguendo that Mader did violate his contract with KCTR, there was no evidence that the condition precedent to Bergman becoming a tattletale under Rule 4-1.13 – the risk of *substantial injury* to KCTR – existed or occurred.

The CDC also seems to believe that conflicts of interest exist where they do not. A conflict of interest may arise "if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Rule 4-1.7 (Comment 8).

Indeed, the proper way to analyze these issues is to remove the intimate relationship from the equation altogether. If all of the events here had involved CFO Brad Peek, rather than Charles Mader, would there be any violation of Rule 4? Respondent respectfully suggests that this case would never come before the Court.

The unstated premise of the CDC's argument that supports both errors of law appears to be this: That the woman in the relationship is the weaker of the

two; that the man is the controlling, cunning and coldly-calculating predator, and that the woman's naturally weaker, more emotional and clearly subservient status renders her putty in the hands of the man, once sex is involved. The CDC writes that there was thus a conflict "between KCT's interests and Respondent's own personal interest in maintaining the relationship with Mader…." CDC Br. 67-8.

A twenty-first century understanding of the relative independence of the genders requires a different premise. Indeed, the notion that a professional woman -- whose very identity is defined as "Railway Lawyer Allison Bergman," LF1003 (Exhibit 8), and who was "in a novel position of being the woman in the boardroom who's running the show" *id.* -- would purport to engage in unethical activity, because she felt the most important thing in her professional life was to chase and keep a man, is highly offensive.

For purposes of a conflict-of-interest analysis, "[t]he critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Rule 4-1.7 (Comment 8). But there must be a divergence of interests between Mader and KCTR for a conflict of interest to exist – each must be pursuing a different outcome on a matter in which both have an interest. A true conflict of interest is a tug of war with each side pulling on the rope of interest in a different direction, hoping for a result that defeats the other. Where one side isn't interested in the rope at all, the rope can be turned into a

jump rope, where one jumps alone without any concern for or from the other. This is a jump rope case.

And in this regard there is no evidence that Ms. Bergman placed her duty of undivided loyalty to KCTR in any subservient role – for Mr. Mader or anyone else. If there was a tug of war – and there was no evidence there ever was – Bergman always pulled with all her might for KCTR to prevail.

The third claim of ethical violations centers on bills from Lathrop & Gage to KCTR relating to the Tallgrass Railcars, LLC. On the record, the CDC announced that there was no claim of overbilling in this case. Tr.49. Yet here, the CDC claims a violation of Rule 4-1.5(a)[3] because, the CDC contends, Lathrop sent bills to KCTR for work for which Tallgrass should have paid. But this does not make the fee charged unreasonable. The Rule addresses as a matter of the hourly rate, rather than the question whether the invoice should have been sent at all. As the evidence shows, Ms. Bergman believed the bills were accurate. The bill listed Tallgrass/Conrail as the reason for the work. From Ms. Bergman's perspective, the invoice assumed that Tallgrass remained an affiliate of KCTR, not a company owned by Somervell, Mader and Watco Companies. As CFO, Peek approved each and every one of the bills. And as Exhibit 21 shows, the bills were not short on specificity as to the purpose of the time spent by counsel.

[3] Rule 4-1.5 prohibits a lawyer from charging an unreasonable fee.

This billing issue claim also generates the CDC's argument that Ms. Bergman's acts were deceitful, dishonest, fraudulent or involved a misrepresentation in violation of Rule 4-8.4(c). Each of these Rule 4-8.4(c) acts involves a scienter element. The CDC failed to meet its burden that Ms. Bergman actually knew that the bills, *when sent*, were incorrect, much less purposefully intended to deceive KCTR. CFO Peek's actions in approving the bills are sufficient to defeat the claim that Ms. Bergman violated Rule 4-8.4(c).

We turn now to the substantive law and the material evidence that the CDC ignores.

a. The Corporation is the Client of Corporate Counsel, not the Board of Directors or its Officers.

The Court need not look beyond its own Rules to learn that the corporation, not its constituents, is the client of a lawyer for a corporation. Rule 4-1.13 provides:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The Comment to the Rule explains:

> (1) An organization is a legal entity, but it cannot act except through its officers, directors, employees, shareholders or other constituents. Officers, directors, employees and

> shareholders are constituents of the corporate organizational client.…
>
> (2) … This does not mean, however, that constituents of an organization are the clients of the lawyer….
>
> (3) When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations … are not as such in the lawyer's province…. Clear justification should exist for seeking review over the head of the constituent normally responsible for it.

Rule 4-1.13. Comment ¶ 3. *See, also* 6 Ariz. Prac., Corporate Practice § 2:5 ("Ethical Rule 4-1.13 adopts the 'entity' theory in connection with representation of entities. In other words, the entity is a person and susceptible to being represented; although the entity can act only through its constituents, the constituents are not the clients of the entity's lawyer. Thus, a lawyer employed or retained by an entity represents the entity").

These comments are consistent with settled Missouri law. "A corporation is a legal entity, separate and apart from the person or persons who are stockholders and directors of the corporation and counsel who represents a corporation is not ordinarily precluded from acting as counsel in suing a director."

Terre Du Lac Prop. Owners' Ass'n, Inc. v. Shrum, 661 S.W.2d 45, 48 (Mo. Ct. App. 1983).

It is axiomatic that it is not a conflict of interest for a corporate counsel to represent a corporate officer individually in matters in which the corporation has no interest or in which the officer's and the corporation's interests are aligned. This is precisely because there can be no divergence of interests if the corporation has no interest in a matter or has the same interest. See Rule 4-1.13(g). The analysis turns on divergent interests, not the fact of different, but unrelated interests. Thus Rule 4-1.13 provides:

> (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 4-1.7

Id.

b. Where Corporate Bylaws Empower the Corporation's President to Control the Corporation's Business and to Enter into Contracts without Advance Board Approval, Corporate Counsel may Properly Rely on the Directives of the President to be those of the Corporation.

In the lone case cited in its brief on the subject of corporate governance, the CDC argues that the board of directors is in charge of the day-to-day operation of a corporation. *Decker v. National Accounts Payable Auditors*, 993 S.W.2d 518 (Mo. App. 1999). As a general proposition that may be true, but like most broad

generalizations, the rule is subject to recognized exceptions. Specifically, a corporation controls its own governance with its by-laws. *See,* 18A AM. JUR. 2D Corporations § 265 ("Generally, the bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation"). *See generally*, § 351.270, RSMo. (2012) ("[W]ith respect to any action to be taken by the . . . corporation the articles of incorporation or provisions of the bylaws adopted thereof . . . shall control"); and § 351.210.1 RSMo. (2012) ("The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.") And those by-laws may place the day-to-day management of the corporation in the hands of the officers of the corporation rather than the board of directors. That is the point that *Decker* also makes. A corporation "functions within the authority of the laws under which it was created and the terms of its articles of incorporation and by-laws." *Id.* at 525.

The KCTR Board of Directors met only four times each year. KCTR Bylaws, Sec. 4.5 (LF1178). For this reason, the bylaws expressly place the day-to-day control of KCTR in the hands of the President of the KCTR:

> The President shall have general care, supervision and control of the corporation's business and operation in all departments subject to the direction of the Board of Directors and he shall when present preside at all meetings of the Board of Directors and of the stockholders.…

> He shall exercise a general supervision over the finances of the Corporation and submit to the Board for its determination any propositions for the expenditure of money not embraced in the ordinary operating expenses.…
>
> He may make such contracts and execute such certificates, documents and other instruments as may be incident thereto, as the ordinary conduct of the Corporation's business may require.

LF1182 (Ex.49). In fact, Board Chair Douglas Banks' testimony, which the CDC ignores, was that the Board of Directors does *not* involve itself in the day-to-day operations of the KCTR:

> Q. And the Board does not involve itself in the day-to-day operations of the Kansas City Terminal Railway?
>
> A. No.
>
> * * *
>
> Q. The decisions that are the day-to-day decisions that are made with respect to the operation of the Kansas City Terminal are made by the officers, the president, and vice-president, chief financial officers, and other employees, are they not?
>
> A. For day-to-day operations, that's correct.

Tr. 181-82.

Because the corporation is the client, and because the bylaws expressly authorize the President of KCTR to control the corporation's business, Ms.

Bergman had every right as a matter of law, and based upon long-standing experience, course of conduct and the corporate governance structure erected by KCTR, to presume that President Somervell had authority to speak for KCTR and that his directives were the wishes of her client – again KCTR, not the Board of Directors as a separate entity.

c. By Disclosing Her Relationship with Mr. Mader to KCTR President Somervell, Bergman Disclosed the Relationship to KCTR.

The uncontradicted testimony was that Ms. Bergman informed President Somervell of her relationship with Mr. Mader "years" before Mader became an employee of KCTR. Tr.471, 247, 253. When Mader became gravely ill, Bergman became his "caretaker." Tr.471. That was known in KCTR because Mader was, at that time, the chief outside engineer for KCTR. Tr.469. And that she took such a role was a telltale that something more than friendship was afoot. Thus, Chief Financial Officer Brad Peek admitted that he knew of the relationship between Bergman and Mader, though he did not know of the exact nature of the relationship. Tr. 99.

Bergman had a conversation with KCTR Director Bryce B. Bump of the Union Pacific in 2009, following an audit conducted by the Union Pacific.[4] Mr.

[4] Under the Bylaws, any shareholder may conduct an audit of the KCTR's operations. LF1185. Exhibit 49. The audit to which the body of the text refers is found at LF981-987 (Exhibit 1).

Bump informed Ms. Bergman that the "genesis of the audit had alleged that I was having a relationship with Mr. Mader." Tr. 249. Thus, Director Bump knew of the relationship. And again, before Mr. Mader became President of the KCTR, Ms. Bergman asked President Somervell if the relationship between Bergman and Mader would be "an issue." Tr. 488. The uncontradicted testimony in response to a question by a member of the hearing panel was that Somervell responded: "Absolutely not." Tr. 488. Just as Somervell knew, so knew all of the KCTR directors, as a matter of law.

> "[A] corporation … can obtain knowledge only through its agents and, under the well-established rules of agency, the knowledge of agents obtained in the course of their employment is imputed to the corporation. *Packard Mfg. Co. v. Indiana Lumbermens Mut. Ins. Co*., 356 Mo. 687, 203 S.W.2d 415, 421 (1947); AM. JUR. 2D Corporations § 1442."

Wandersee v. BP Products North America, Inc., 263 S.W.3d 623, 629 (Mo. banc 2008).

> Accordingly, the knowledge of officers, employees, and agents obtained in the course of their employment will generally be imputed to the corporation. Notice to an officer or agent is notice to the corporation in the circumstance where the officer or agent in the line of his or her duty ought, and may reasonably be expected, to act upon or communicate the knowledge to the corporation. A

> corporate principal is chargeable with notice of facts known to its agent, except when the agent has not acted for or on behalf of a corporation or has acted adversely to the corporation in his or her own interest. As a general rule, knowledge acquired by a corporation's officers or agents is properly attributable to the corporation itself, and this is true whether the officer or agent has actually disclosed the information to the corporation….

18B AM. JUR. 2D Corporations § 1442, quote with approval in *Wandersee*, 263 S.W.3d at 629.

> [T]he existence in the breast of a single director, while sitting in the board, of a matter of knowledge which he ought to communicate, and which he can properly communicate to his codirectors, is knowledge to the corporation as a matter of law. 10 Cyc. 1057. And it is also true that the principal is ordinarily chargeable with the knowledge acquired by his agent in executing the agency.

Lawrence v. Cameron Savings and Loan Association, 395 S.W.2d 452 (Mo. 1965), quoting *Home Building & Loan Ass'n of Joplin v. Barrett*, 141 S.W. 723, 728 (1911).

Where the company president – the highest ranking official, its chief financial officer, and at least one board member had knowledge of the relationship, KCTR had knowledge as well.

B. RESPONDENT DID NOT VIOLATE RULE 4-1.8(J)

Rule 4-1.8(j) took effect on July 1, 2007, at least five years *after* the Bergman/Mader relationship began, and at least two years after Bergman revealed the relationship to KCTR President Somervell. Rule 4-1.8(j) provides:

> (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship [already] existed between them when the client-lawyer relationship commenced.

Rule 4-1.8 (emphasis added). A corporation can act only through its duly authorized constituents. See Rule 4-1.13. Thus, when analyzing the exception set forth in Rule 4-1.8(j), it is commencement of the sexual relationship with the *constituent* of the corporate client, not the commencement of the relationship with the corporation with which the constituent may become affiliated, that is controlling. The only constituent relevant to this proceeding, Mader, did not become a constituent of KCTR until 2007, five years *after* Bergman and Mader first became intimate.

The CDC wants to focus on when Bergman formed an attorney-client relationship with KCTR as the critical moment for purposes of Rule 4-1.8(j), because to do otherwise renders its argument impotent. Here's why: The CDC's reading of the Rule means that the fact that someone might one day become a corporate constituent, even though that has not occurred and even though there is no indication that it will occur, makes a person an "untouchable" for a corporate attorney's affections. And if an attorney cannot sufficiently see around

tomorrow's corner (here 5+ years), the CDC's reading of the Rule requires all physical intimacy between a non-constituent and a lawyer to cease immediately upon the assumption of the corporate constituent status. And the fact of disclosure, as occurred here, matters not at all. The exception that appears on the face of Rule 4-1.8(j) is there precisely because readings of the Rule such as the CDC advances here are simply wrong.

Two important undisputed facts bear repeating here. **The first**: Consensual sexual relations between Ms. Bergman and Mr. Mader began in 2002. At that time, Ms. Bergman held no role with KCTR beyond that of an outside lawyer. She became Assistant General Counsel, an officer, in 2003. In 2002, Mr. Mader was not an employee of KCTR; rather, he was then employed as an outside engineer with TranSystems, a company that contracted with KCTR. To state the obvious, Ms. Bergman did provide legal counsel to KCTR in 2002, but Mader was neither an employee, officer nor constituent of KCTR when the sometimes intimate relationship began.

The second: KCTR did not adopt an ethics policy until April 11, 2011. Ex. 25. Any claim that KCTR had an anti-nepotism policy in place prior to that date is simply wrong under the undisputed evidence. Moreover, even if the nepotism policy had been in place, Bergman was not an employee of KCTR. The policy only applies to "Prohibit a KCT employee who is a family member of another KCT employee from working directly for or supervising the other family member….." LF1141.

The hearing panel relied on two comments to Rule 4-1.8(j) to conclude that Ms. Bergman had violated the Rule. What is a comment?

> "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

Preamble: Rule 4 Missouri Rules of Professional Conduct ¶ 21. See also *In re Hess,* 406 S.W.3d 37, 44 (Mo. 2013)(comments accompanying the Rules "may serve to assist in the interpretation of the rule if it [is] ambiguous, [but] they should not be used to usurp the plain language"). "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." Rule 4 Preamble at ¶ 14.

Rule 4-1.8(j)'s Comment 19 attempts to explain how the Rule applies in a corporate setting since a lawyer cannot have a consensual sexual relationship with a corporation.

> When the client is an organization, Rule 4-1.8(j) prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Id.

Because the Rule controls, the Rule's timing controls. Thus, where the consensual sexual relationship predated the lawyer-constituent relationship, the prohibition of Rule 4-1.8(j) does not apply. Comment 19, when read in context, suggests no other result.

Comment 18 makes this clear in a person-to-person context.

> Sexual relationships that predate the client [constituent]-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 4-1.7(a)(2).

Rule 4-1.8(j), Comment 18.

The hearing panel concluded that "the rule absolutely proscribes sexual relations between Respondent and Mader" after Mader became a constituent of KCTR. LF1347 ¶ 4 (emphasis added). This conclusion is flatly wrong. Rule 4-1.8(j) does no such thing. Rather, it expressly permits pre-existing, consensual relations between persons who later become part of an attorney/client relationship, even where that client is a corporation. The fact that the attorney-client relationship between Bergman and KCTR pre-dated the intimate relationship between Bergman and Mader is not, as the CDC seems to argue, the critical event.

It is when Mader became a constituent that matters, and if the intimacy pre-dated the "constituency," the Rule's exception controls.

There is also a due process/notice issue here. A lawyer reading the new Rule would not guess that the Comment would amend the Rule's substance in a corporate setting. To deprive Ms. Bergman of her livelihood because the Rule said one thing and the Comment may say something else, when this Court's Rules say that the text of the Rule controls, would be a property deprivation without due process. *See, Garozzo v. Missouri Dep't of Ins., Fin. Institutions & Prof'l Registration, Div. of Fin.*, 389 S.W.3d 660, 667 (Mo. banc 2013)("Professional licenses are 'property' for the purposes of the Fourteenth Amendment to the United States Constitution…").

Ms. Bergman did not violate Rule 4-1.8(j) when her pre-existing consensual sexual relationship with Charles Mader continued after Mader became an employee of KCTR.

C. RESPONDENT DID NOT VIOLATE RULE 4-1.7(A)(2)

Rule 4.1-7(a)(2) provides in part pertinent to the CDC's charge:

> **(a)** Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> * * *

> (2) there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer.

Id. (Emphasis added). Thus "[t]he mere possibility of subsequent harm does not itself require disclosure and consent." Rule 4-1.7 (Comment 8)(emphasis added).

The CDC posits four areas in which it finds a "potential" conflict of interest. These will be discussed individually in turn following. Respectfully, in every instance the Court might wish to ask whether the interests of KCTR and Charles Mader actually were in conflict. In essence the question becomes, did Allison Bergman place KCTR's interest in a subordinate position to that of Charles Mader in any way?

1. The Interlocker Continuous Services Agreement

Prior to 2007, TranSystems employed Mader. Through TranSystems, Mader served as the chief outside engineer for KCTR. In 2007, Mader "was separated" from TranSystems. Tr. 197 (Douglas Banks). President Somervell "wanted to continue to use Mr. Mader as an engineer, and so Mr. Mader formed this entity [Interlocker] to provide services, his engineering services to KCT as a vendor…." Tr. 198 (Douglas Banks).

Ms. Bergman prepared the contract between KCTR and Interlocker in July, 2007. The CDC did not introduce the contract in evidence. There was no evidence that the contract differed in any way from the contract KCTR used for all other outside contractors. Ms. Bergman testified that she represented KCTR in the

transaction. Tr. 264. She did not represent or even discuss the agreement with Mader. Tr. 266. The agreement terminated when Mader became an employee of KCTR. Tr. 265.

The CDC argues that "the continuous service agreement may appear to have been innocuous…." CDC Br. at 67. And it was. The fact that the CDC can concoct all manner of things that might have happened differently were this innocuous contract not signed, is too *Palsgrafian* even for the most cynical among us to conclude that an ethics violation occurred.

The CDC failed to meet its burden of a conflict of interest on this issue. Indeed, there was no conflict of interest.

2. Mader's Employment Contract

In September, 2007, President Somervell, with Board approval, decided that Mader might become KCTR's next president. Tr. 289. Somervell and the Board wanted to "test drive" Mader before they made him president. Tr. 289. Although the KCTR Bylaws contemplated the position of general manager, the Bylaws did not recognize the position of vice president. To reflect Mader's professional seniority internally, and at the same time promoting Peek, the KCTR Directors amended the Bylaws to create "vice president" titles for both Mader and CFO Peek. After the Board created these new positions, Somervell directed Bergman to prepare a short-term employment agreement for Mader's newly created position within KCTR – vice-president for engineering and general manager. Tr. 289. Peek, as an existing and permanent employee, required no

separate employment agreement to effect his promotion, and as permanent employees, no other officer of KCTR had an employment contract. *Id.* Bergman asked her partner, Tedrick Housh, who specialized in employment law, to draft the contract. *Id.* He did so. It was reviewed by Bergman to assure that the salient terms of the directives of the Board had been included. Tr. 292.

But Somervell had the final say as to the terms of the contract, not Bergman. CFO Peek testified that Somervell's usual practice was to have the lawyers draft a contract and for Somervell then to complete the negotiations. Tr. 117. Indeed, as to the Mader contract, Peek testified that Lathrop (not Bergman) drafted the contract and that Somervell "completed the negotiations with Mr. Mader." Tr. 117. The bylaws gave Somervell the authority to "make such contracts … as the ordinary conduct of the Corporation's business may require." Tr. 121 (Peek); LF1182 (Ex. 49). The Board also unanimously approved the terms of the contract. Tr. 116 (Peek). There is no evidence that the contract drafted by Lathrop (but not Bergman) departed in any way from the directives of Somervell and the Board.

The Hearing Panel correctly found that the CDC had "abandoned" any claim that the Mader employment contract violated any of the Rules of Professional Conduct. LF1348. The Hearing Panel concluded that there was no evidence of a conflict of interest because there was no evidence "regarding advice to and representation of Mader." *Id.* In sum, there was no evidence that Bergman represented or attempted to represent any interests contrary to those of KCTR. Given this conclusion by the hearing panel, the CDC's efforts to inject this issue

into its brief is improper. If, as the CDC now argues to this Court, "[t]he employment agreement clearly created a conflict of interest for Respondent," CDC Br. 68, the CDC was required to present evidence in that regard, preserve it in its suggested findings of fact to the Hearing Panel, and not abandon that issue before the Hearing Panel.

3. The Black Boot, Interlocker, City of Newton Issues

One of the CDC's contentions is that Bergman "was responsible for overseeing Mader's compliance with the terms of his employment contract, which required him to devote his full and exclusive attention to the business of KCT." CDC Br. 83. The CDC goes further, claiming that Mader's ownership of a rental property through Black Boot Properties, LLC, and an engineering consulting agreement between Interlocker and the City of Newton for some isolated services was "misfeasance" and represented "serious instances of misconduct." CDC Br. 84. To make this claim, the CDC must willingly close its eyes to the timeline that necessarily informs this charge, as well as ignore the case law surrounding the contractual/ethics provisions on which it relies.

a. Black Boot

Mader formed Black Boot Properties LLC on July 27, 2007. LF1165 (Exhibit 45). Bergman did not form the LLC but Lathrop was the registered agent for it. Black Boot owned two six-plexes as rental property. Black Boot was thus an investment in real estate by Mr. Mader in which KCTR had no interest.

Mader signed a contract to become an employee of KCTR on October 1, 2007, more than two months later. Specifically, Mader became a vice-president for engineering and the general manager of KCTR. LF1038 (Exhibit 17). The contract provided that Mader must "diligently and conscientiously devote his full and exclusive time and attention and his best efforts to the discharge of his duties." *Id.*

The CDC claims that Back Boot was a breach in Mader's employment agreement because it was outside employment. As such, the CDC asserts that Ms. Bergman should have informed the Board of the contractual breach. But was owning investment property outside employment and thus a contractual breach? The law says that it was not.

The CDC does not burden itself with research (nor apparently any recognition of the Thirteenth Amendment) in making this allegation. Missouri law suggest a different outcome to the analysis that the CDC advances.

> [T]he requirement to devote one's entire time is subject to a reasonable construction and would not include time normally devoted to rest and recreation, [citation omitted] or time which by the employment contract the employee was entitled to devote to other activities. During such 'free' time an employee may engage in any activity outside the scope of the business of his principal even though it is to his own advantage and benefit. [citation omitted]. In addition to the above general rule pertaining to the use by an

> employee of his time, service and efforts, an employee may not place himself in a position in which his personal interests are or may be in conflict with that of his employer [citation omitted] or deal with the subject matter of the employment to his own advantage and to the disadvantage of his employer….

Durwood v. Dubinsky, 361 S.W.2d 779, 789-90 (Mo. 1962). Thus, the law is clear that a contractual requirement to devote time exclusively to an employer's interests does not prohibit investments in real estate, railcars, or the stock market unless such an investment detracts from service to the employer.

Did Black Boot require Mader to diminish his service to KCTR? The evidence says "no."

Board Chair Douglas Banks testified that Mr. Peek was in the best position to know what Mader was doing on a daily basis, not Ms. Bergman. Tr. 185.

> Q. Mr. Peek was there in the same building. So if Mr. Mader wasn't attending to his business, and was gone for inordinate periods of time, it would be Mr. Peek who would know about it?
>
> A. I would think so.
>
> Q. And if Mr. Peek was somehow or another alarmed that Mr. Mader wasn't in there attending to his business, then Mr. Peek had an obligation, did he, to report to the board?
>
> A. I would say so.
>
> Q. And did that ever happen?

A. Not that I recall.

Tr. 185-86. Mr. Peek testified that he never saw anything in the conduct of Somervell or Mader that he felt needed to be reported to Board. Tr. 122-23.

b. Interlocker/Newton

Interlocker, LLC, was formed by Mader on the same day as Black Boot, that is, more than two months before Mr. Mader became an employee of KCTR. Interlocker was formed with full knowledge of KCTR because Interlocker allowed Mader to sell his engineering services generally, including as a vendor to KCTR, which he did for a short period of time until he became an employee of KCTR. But KCTR knew that Mader was Interlocker. And there was no requirement that Mader dissolve Interlocker when he became an employee of KCTR. Tr. 188 (Banks). KCTR thus knew of Interlocker and Mader's interest in it.

No employee of KCTR had an employment contract except Mader and then only for his "test drive" as vice-president. By its terms, the contract itself only applied to the vice-president for engineering/general manager position. Therefore, when Mr. Mader was promoted out of that position into permanent employment as President, following the successful completion of his "test drive," the contractual provisions related to the vice-president and general manager expired with the contract. Again, KCTR did not enter into contracts with its employees, including that of the KCTR president. Tr. 331. Thus, when Mader was promoted into the position of President of KCTR, he no longer had an employment contract. Ms.

Bergman testified that the Mader employment agreement terminated when Mader became president. Tr. 331.

Interlocker began consulting services for the City of Newton in January, 2011. LF1228, Exhibit 54. By then, Mader was President and had no contractual limitation on his outside efforts. Thus, Mader violated no contractual employment limitation in consulting with Newton. It was not until April, 2011, that the KCTR Board adopted an ethics policy. LF1131 (Exhibit 25). That policy forbade "[i]nvolvement in an outside business enterprise that may require attention during business hours and prevent full-time devotion to duty…." LF1135. Again, this policy does not prevent outside business interests provided they do not detract from work for the KCTR. See, *Dubinsky*, 361 S.W.2d at 789-90. Peek testified that he never saw anything in the conduct of Mader that he felt needed to be reported to .he Board. Tr. 122-23. And even more important, as noted, the Newton consultation began *before* the ethics policy took effect and KCTR had actual knowledge of Interlocker.

The CDC failed to meet its burden that Ms. Bergman had a conflict of interest that prevented her from reporting outside activities of Mader in Black Boot or in the work Interlocker did for the City of Newton, Neither activity violated either his contract or the ethics policy.

4. The Tallgrass Railcar

In June, 2007, President Somervell announced that he wanted KCTR to purchase a railcar. He directed Bergman to begin preparing an agreement to make

the purchase for KCTR. Tr. 353. The KCTR Bylaws give the President authority to:

> exercise a general supervision over the finances of the Corporation and submit to the Board for its determination any propositions for the expenditure of money not embraced in the ordinary operating expenses. …
>
> He may make such contracts and execute such certificates, documents and other instruments as may be incident thereto, as the ordinary conduct of the Corporation's business may require.

LF1182 (Ex.49). Aware of these bylaws, Bergman's inquiry would necessarily be limited to whether the President had authority within his operating budget to make the purchase. Bergman did inquire. Somervell told her "it was going to come out of his operating budget." Tr. 355. Indeed, "he had made other expenditures out of his operating budget." *Id.*

Brad Peek, the Chief Financial Officer, testified that Somervell told him he was going to buy a railcar "*for* the Kansas City Terminal…." Tr. 129 (emphasis added). Peek testified that he believed Bergman's bills to KCTR for the potential railcar purchase during that period were justified "while the company was in the exploratory mode of acquiring the railcar." Tr. 129.

The documentary evidence shows beyond cavil that President Somervell directed Bergman to prepare contracts for KCTR to purchase the railcar.

- The initial August, 2007, draft agreement showed the parties to the Asset Purchase Agreement as Century Rail Enterprises (Seller) and Kansas City Terminal Railway Company (Purchaser). The contract draft also refers to "the Conrail Car," the nomenclature Bergman used in her billing to describe the transaction, because the railcar Somervell sought to purchase for KCTR was originally constructed for the Conrail corporation. LF1237 (Exhibit 59); LF1086 (Exhibit 21)(billing nomenclature).
- A September, 2007 draft showed Michael K. Fox as the Seller and left Kansas City Terminal Railway Company as the Purchaser. LF1246.
- The Bill of Sale confirmed this arrangement. LF1253.
- An August 26, 2007, an email from Mader to Bergman indicated that "*KCT* will pay 120,000 at signing and the balance in one year. We will also pay interest on the unpaid balance at rate of 6.5%." LF1256. (Exhibit 63)(emphasis added).
- On September 22, 2007, the Seller, Mr. Fox, sent a letter to Mader that stated: "As you are aware, Century Rail Enterprises ... and Kansas City Terminal Railway Company … are currently negotiating the sale of railcars … to KC Terminal." LF1262 (Exhibit 66).

- On October 11, 2007, Lathrop and Gage provided a memorandum outlining the tax implications to "Kansas City Terminal Railway" of either buying or leasing "an historic railroad car." LF 1266 (Exhibit 68).

All of this begs this question: How did matters move from KCTR being the purchaser to Tallgrass, LLC becoming the purchaser? Bergman, concerned with liability to KCTR for the ownership of the railcar, suggested to President Somervell that "we form an ... entity to hold the asset so that we could insulate the Terminal from liability" should there be a derailment or "any number of things that could happen." Tr. 526. Bergman also testified that under the KCTR Bylaws, the President had authority to form an affiliate without Board approval. Tr. 533. With a simple one page, on-line filing, Bergman organized Tallgrass Railcars, LLC on December 12, 2007 as directed by Somervell. LF1000 (Exhibit 7). Bergman listed herself as the organizer. *Id.* Articles of Organization do not list the owners of the limited liability company. *Id.*

With the limited liability company now formed, Bergman modified the final Asset Purchase Agreement dated December 21, 2007, to show the Tallgrass entity as the purchaser of the railcar (and she still referred to the purchased asset as "the Conrail Car" in her time entries). LF1031 (Exhibit 15). Bergman did not attend the closing. Tr. 433. She never saw the checks from Mader and Watco for the purchase price. Tr. 433. Bergman understood that Tallgrass was an affiliate of KCTR. Tr. 434. The Lathrop & Gage client intake sheet confirms that

understanding. Tr. 434 (Exhibits 23 and 23A). She did not learn otherwise until October/November, 2011. Tr. 439, and the documentary evidence supports when Bergman had actual knowledge of the membership interests in Tallgrass. She had to check the file to answer the inquiry as to ownership of Tallgrass posed by Watco's counsel in November, 2011. LF1108.

Subsequent to the purchase, Lisa Hansen, a qualified tax and corporate attorney at Lathrop & Gage who had previously worked on KCTR matters, was instructed by Bergman to work with KCTR to draft an operating agreement for Tallgrass. Bergman did not work on or even see the Tallgrass Operating Agreement when it was drafted by Hansen or executed. That document would have revealed that Somervell, Mader and Watco owned Tallgrass. Hansen copied Bergman on an email which attached a first draft of the Tallgrass Operating Agreement, LF1130, but the Lathrop & Gage metadata report proves that Bergman did not open the email at all. LF1146-1152 (Exhibit 27). Further, Lathrop & Gage metadata also proves that Bergman did not author, edit, or even view any draft of the Tallgrass Operating Agreement, before or after Hansen emailed a copy to her. *Id*. Bergman time records, which were quite precise, contain no time entries for any Bergman work on the Tallgrass Operating Agreement. Her bills do show her work on a track inspection lease between KCTR and Tallgrass. LF 1104-06 (Exhibit 21). The lease concepts were consistent with Tallgrass being a separate entity from which KCTR (or any other potential lessee) could lease the railcar and Tallgrass protect itself from liability

for railcar accidents and other liability. The lease was never executed, and importantly, KCTR never paid Tallgrass "a dime." Tr. 202 (Douglas Banks); Tr. 111 (Brad Peek, CFO).

In contrast to Bergman, Brad Peek testified he knew that Somervell and Mader were going to buy a railcar in December, 2007, Tr. 77, but Peek never reported anything to the Board. Peek did not become aware that Watco was also an owner of Tallgrass until 2012. Tr. 101. He knew, however, that Somervell and Mader owned the car in December, 2007. *Id.* Indeed, Peek testified that he never witnessed anything that indicated a violation of the KCTR ethics policy that required him to report Somervell or Mader to the Board. Tr. 122-23. Peek approved all of the Lathrop & Gage invoices. Tr. 80. Exhibit 26. Peek also testified that he had no information "that Allison Bergman … knew that Tallgrass was anything other than an affiliate of the Kansas City Terminal." Tr. 133.

The CDC thus seems to argue that the general counsel necessarily assumes the role of super auditor and room monitor. No case supports this. Indeed, this Court's own Rules offer a lawyer contrary advice.

> **When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province.**

> However, different considerations arise when the lawyer **knows** that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization.
>
> **Clear justification should exist for seeking review over the head of the constituent normally responsible for it.**

Rule 4-1.13 Comment 3 (emphasis added).

Rule 4-1.13's comments do not suggest a duty to act against a corporate constituent's directives absent actual knowledge that the corporation is about to be placed at risk by the acts of the constituent – here the president. When the facts are read in the context of what Ms. Bergman actually knew (not what hindsight suggests could have "potentially" been known) and the course of conduct that existed between KCTR and Bergman, little of what the CDC argues makes sense as proof of, or an inference of proof of, a violation of conflict of interest Rules.

Without that proof, the CDC returns to its sex-explains-everything theme when justifying its list of what-might-have-beens. "All of these circumstances should be viewed as foreseeable and substantial risks to the client's legal interests," the CDC says, "when the general counsel for a major corporation is

simultaneously involved in a personal, sexual relationship with the company's top executive." CDC Br. 72. Said differently, but for the sex, the CDC suggests that none of the listed omissions were either foreseeable or substantial risks. But the directives given Bergman by the company President Somervell, and the drafts on the purchase agreement, all would lead any reasonable attorney operating pursuant to Rule 4-1.13 to proceed as did Ms. Bergman. The relationship with Mader is a red herring.

The argument thus seems to be that because Ms. Bergman and Mr. Mader had occasional sexual relationships, that Ms. Bergman should have known that *President Somervell* was up to something. This argument does not withstand logical or legal scrutiny, especially when all the evidence was that the transaction began as a KCTR purchase, changed from its original intent and that no one told Ms. Bergman that the limited liability company she erected to protect KCTR from liability would become an instrument used by Somervell/Mader for a different purpose. Recall that even Mr. Peek, the CFO, agreed that the bills for initially creating and redrafting the purchase agreement were properly owed by KCTR because Somervell was interested in "purchasing a railcar for Kansas City Terminal." Tr. 77 (Emphasis added). And please recall that Peek actually knew (as Bergman did not) that Somervell and Mader were buying the railcar for themselves, and that Peek never reported that to the Board.

Hypothetically, assume for a moment that Somervell and Mader intended to purchase the railcar from the beginning. Under the hypothetical, Somervell asked

Ms. Bergman to prepare the limited liability papers and paid the bills for those. Ms. Bergman would have asked Somervell whether the purchase of the car was a corporate opportunity for KCTR. President Somervell would have informed her that he had had discussions with CFO Peek, who told him that there was no budget for the purchase, and with the Union Pacific, which "didn't gain any traction." Tr. 77 (Peek). Thus, Somervell and Mader were going to buy the car with Watco because Somervell still believed it would benefit KCTR. There was no contractual or ethical provision that prohibited Mader and Somervell from buying, or from partnering with Watco to buy the railcar. See, discussion at C.3 (Black Boot), *supra*, for reasons there was no contractual limitation of Mader. (As President, Somervell had no contract). This was 2007; the ethics policy did not take effect until April, 2011. Thus, no policy of KCTR prohibited the transaction with Watco.

Should Ms. Bergman have said something when she learned about the true ownership of the railcar in late October, 2011? Not on the basis of the ownership structure in place in 2007. KCTR had not leased the railcar from Tallgrass – indeed KCTR had not spent "a dime" in that regard. The 2011 ethics policy prohibited an employee of KCTR from "acquiring any direct or indirect interest in "[a]ny entity with which the KCT or any of its member railroads is or is reasonably expected to be dealing." But neither Mader nor Somervell had acquired an interest in Watco and KCTR had not leased the railcar from Tallgrass.

The ethics policy could not have required disclosure because it was not in place in 2007, or even in 2011 under it sown terms.

Finally on this subject, one must ask whether there was a true conflict of interest. KCTR's President Somervell wanted a railcar *for KCTR*. That is undisputed. He told Bergman he could fund it out of his operating budget. Through the process of considering the purchase and preparing to acquire the railcar, Somervell reached the conclusion that KCTR should not own the railcar. Perhaps his operating budget did not permit its acquisition by year-end. But KCTR's purchase of the railcar was the initial purpose, and the documents had all been prepared to reflect that purpose -- as if KCTR would be the purchaser. Somervell believed that the railcar would still serve KCTR's purposes. And there was no evidence that Somervell or anyone else ever told Bergman that Somervell had arranged for others to purchase the railcar at the last minute, himself and Mader included. KCTR did not buy the railcar, nor did it lease the railcar. Tallgrass never received "a dime" from KCTR.

Importantly, the interests of KCTR and Tallgrass were not divergent, as each wished to serve KCTR's purposes. And as far as Bergman knew, Tallgrass was an affiliate of KCTR. But even if Tallgrass was not an affiliate, there was no evidence that Bergman's work served any entity's interests other than KCTR's interests. Thus, when Bergman drafted the agreements, she did so to protect KCTR's interests. Further, that KCTR wanted to protect its interests by initially drafting the various agreements did not create a conflict for Bergman, who was

representing KCTR's interests as she understood them from Somervell, the corporate constituent who controlled and directed her work.

The CDC has not met its burden that a true conflict of interest existed in the Tallgrass matter.

D. RESPONDENT DID NOT VIOLATE RULE 4-1.13.

The CDC also asserts obliquely that Respondent violated Rule 4-1.13(b). The CDC asserts that "[t]he company's general counsel must be in a position to detect, stop and redress … wrongdoing." CDC Br. 66. What was the supposed wrongdoing? For the CDC it was Mader's outside work. And "[o]ne of Respondent's duties was to oversee KCT's officers and their appropriate use of corporate assets." CDC Br. 83. There was no evidence that Mader or Somervell misused corporate assets.

Rule 4-1.13(b) provides in pertinent part:

> (b) *If a lawyer for an organization* <u>*knows*</u> that an officer, employee, or other person associated with the organization *is engaged in action*, intends to act, or refuses to act *in a matter related to the representation* that is a *violation of a legal obligation to the organization*, or a violation of law which reasonably might be imputed to the organization, <u>*and*</u> is *likely to result in substantial injury to the organization*, the lawyer shall proceed as is reasonably

> necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.

Rule 4-1.13(b)(emphasis added).

There are three elements that must be met before a duty is imposed under the Rule: (1) actual knowledge; (2) a "violation of a legal obligation to the organization," and (3) the likelihood of "substantial injury to the organization." *See,* Herrick K. Lidstone, Jr., Am I My Brother's Keeper? Redefining the Attorney-Client Relationship, COLO. LAW., April 2003, at 11, 17 (Under 1.13(b), the attorney must have: (1) knowledge of the existence of the violation; and (2) an assessment that the violation is likely to result in substantial injury to the organization (Colorado law) and Legal Ethics, Law. Deskbk. Prof. Resp. § 1.13-2 (2013-2014 ed.)("The Rules do not obligate the lawyer to take the uncomfortable role of a whistleblower simply if the lawyer discovers that an employee may be submitting reimbursements for minor personal expenses. Rule 4-1.13(b) requires that there must be a "violation of a legal obligation to the organization, … *and* that is likely to result in *substantial injury to the organization)*.

Application of Rule 4-1.13(b) here requires an analysis of each of the events upon which the CDC focuses.

1. Black Boot

Mader's formation of Black Boot Properties, LLC, predated his employment with KCTR. It involved holding rental property. Even if one assumes *arguendo* that Mader's employment contract with KCTR eliminated the opportunity to invest in real estate altogether – which it did not – the third element of a Rule 4-1.13 violation cannot exist here. There is no likelihood of a substantial injury to KCTR from Mader's outside real estate investment. Peek testified that he knew of nothing that diminished Mader's work efforts at KCTR and this included Black Boot.

Thus, there existed no obligation in Bergman to assume the tattletale role that the CDC imagines exists as to Black Boot. If Peek had had the same real estate investment, this issue would not be before this Court – because there was no sex involved.

2. Interlocker/City of Newton

Mader, through his Interlocker entity, began consulting on a limited basis in January, 2011. The KCTR Ethics policy was not adopted until April 25, 2011. LF1131. Mader became President of KCTR and his employment contract as Vice-President terminated on July 1, 2009. He had no employment contract with KCTR as President. There was no showing at the hearing that Mader did any work for Newton after March, 2011, LF1229, though the legal file contains an unsigned

contract between Interlocker and Newton dated August 29, 2011. LF1230. Bergman neither drafted nor was privy to this draft contract, at the time. Tr. 328.

Even if one assumes retro-applicability of the KCTR Ethics Policy, the policy required Mader to seek KCTR approval for outside work "prior to acceptance…." LF1135. By the time KCTR adopted its ethics policy, Mader had already accepted the work with Newton.

But even if the dates made the Ethics Policy apply and Bergman knew that Mader was doing this consulting work, Rule 4-1.13 raises a duty to report only if there is a risk of substantial injury to KCTR from Mader's outside consulting work. Peek testified that he knew of nothing that diminished Mader's work efforts at KCTR, and this included the Newton issues. Mader's occasional outside work for Newton presented no possibility of a risk of substantial injury to KCTR. There was no duty to report. Again, if Peek had been doing the consulting rather than Mader, this issue would not be before this Court.

3. Tallgrass

Finally on this issue, Tallgrass Railcar, LLC was formed on December 12, 2007, while Mader was under a short-term employment contract with KCTR, but before the Ethics Policy took effect in April, 2011. If Mader's investment in the railcar purchase was in issue of which Bergman knew, and further was a violation of Mader's contract of employment, *and,* Bergman should reasonably have believed that the investment presented a substantial risk of injury to KCTR, then Rule 4-1.13 required Bergman to report the matter to KCTR.

First, she did not know, and would not until later -- October, 2011 -- that Mader had purchased a portion of the car. Tr. 379; 393.

Second, as already shown, the investment did not violate Mader's employment contract. If it was a corporate opportunity, then KCTR had turned that opportunity down. Peek testified that none of this took any noticeable time from Mader's commitment to his KCTR job. Further, if Bergman had reported it, she would have reported it to Somervell, who already knew – or Peek – who also knew. Under applicable law cited above, Peek's knowledge, as the third ranking corporate officer, was sufficient to inform the corporation, even if one assumes that Mader and Somervell were up to no good. Indeed, if Peek had been the investor and not Mader, this issue would not be before this Court.

Third, putting aside the law and assuming for argument's sake alone that KCTR did not have notice – and that Bergman actually knew of Mader's and Somervell's involvement – where is the substantial risk of injury to KCTR? The CDC ignores the first two elements required to impose the duty, and then leapfrogs several logically necessary steps to conclude that the risk that Bergman was required to anticipate was that Lathrop would bill KCTR $868 for work on the Tallgrass Operating Agreement and that more than four years in the future, KCTR would be required to fire Bergman. This later substantial risk that the CDC posits is that KCTR would be left without a lawyer. But Lathrop continued to represent KCTR for several months after Bergman lost her general counsel position. The CDC's argument is that Bergman is responsible for KCTR's decision to fire her,

without hearing her side of the story, and thus leave themselves without a general counsel. That risk or ultimate decision could not be foreseeable to Bergman – and calling it so after the fact is analytically indistinguishable from the argument made by the young man who murdered his parents and sought the court's mercy because he was now an orphan.

None of the elements necessary to impose the Rule 4-1.13 duty exist in the Tallgrass scenario.

E. RESPONDENT DID NOT VIOLATE RULES 4-1.5(A) OR 4-8.4(C).

The CDC charges that Ms. Bergman violated Rule 4-1.5(a) which provides: "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Rule 4-8.4(c) provides: "It is professional misconduct for a lawyer to:… (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Both of these claims center on the CDC's argument that Bergman sent bills to KCTR for Tallgrass Properties, LLC legal work that Tallgrass should have paid in the amount of $10,000. The Rule 4-8.4(c) claim also applies to the CDC's assertion that Bergman kept her relationship with Mader secret from the Board.

1. Rule 4-1.5(a)

CFO Brad Peek testified he believed KCTR was billed $10,000 that should not have been paid relating to Tallgrass legal work. He admitted, however, that "some of the entries [in the billings] in 2007 at the beginning of this were requested by the president while the company was in the exploratory mode of

acquiring the railcar." Tr. 129. Peek didn't "believe we included that in the $10,000 because it was likely requested [by KCTR] and work performed by [Lathrop]." Tr. 129. Thus, the $10,000 figure itself was merely an estimate, did not fully consider what was properly billed during the "exploratory mode," offer any timeline for when the "exploratory mode" ended, and rested on Peek's own admission that it was not possible to determine a precise number. Tr. 101, Tr. 85. But the bills are precise after December, 2007. LF1101-02 (Exhibit 21).

First, Peek admitted that some of the bills relating to the railcar acquisition were properly billed to KCTR. Peek also admitted that he learned in November or December, 2007 that Somervell and Mader were going to acquire the railcar, not KCTR.

Second, if one infers from the evidence that that decision was made by Somervell in December, right before closing of the purchase of the railcar by Tallgrass, it follows that Peek's testimony is accurate when he says that he had no information that Allison Bergman knew that Tallgrass was not an affiliate of KCTR in December, 2007. Bergman had originally suggested the formation of Tallgrass in order to protect KCTR. Indeed, the earliest the evidence permits one to conclude that *someone* at Lathrop and Gage discovered that Tallgrass was not an affiliate of KCTR was in February, 2008, when *Lisa Hansen* of Lathrop prepared the Tallgrass Operating Agreement. And, as shown below, the post-closing bills for the Tallgrass Operating Agreement totaled $868, not $10,000. There is no evidence to show that Bergman knew before late October, 2011, that

Tallgrass was not a KCTR affiliate. Lathrop performed no legal work billed to KCTR related to Conrail/Tallgrass after June, 2008.

The question then becomes, how promptly should a lawyer move to correct more-than-three-year-old bills when the client's CFO had approved the bills three+ years prior, and the client does not yet claim that it was improperly billed? Moreover, how promptly should a lawyer move to correct bills that reflected work for Tallgrass after the closing – in particular the Operating Agreement – which, as shown below, were relatively small in the grand scheme of things?

Several considerations are important here. First, once Bergman learned of the true ownership of Tallgrass in late October, 2011, no one at Lathrop, including Ms. Bergman, billed KCTR for Tallgrass work. Indeed, no Tallgrass bill was sent to KCTR after June, 2008, when the Operating Agreement was finalized by Lisa Hansen. Bergman did not bill after June, 2008. Second, and again, CFO Peek had approved the bills originally and had authorized their payment without protest – and this was so even though he admitted he knew that Somervell/Mader had bought the railcar. Third, more than three years had passed and the billing amounts for the Operating Agreement amounted to $868 (Lisa Hansen alone; 3.1 hours at $280). The lease biils (which KCTR wanted drafted for its purposes so

that it could use the railcar for track inspection) amounted to $4,402.[5] LF1101-1107 (Exhibit 21). Ms. Bergman believed that these hours were billed for KCTR's purposes, as she believed KCTR owned Tallgrass. Tr. 400. Together, these amounted to $5,270 (not the $10,000 the CDC claims). Moreover, the invoice for some of these services reflected a 10% discount, see LF1103 (Exhibit 21). Fourth, during that same period, Bergman wrote-off more than $35,000 in 2009, when a matter was brought to her attention that should not have been billed to KCTR. Tr. 399. When one considers that Lathrop billed KCTR $370,965.23 in 2008, LF1018 (Exhibit 11), the invoices related to the Operating Agreement may have needed correcting, but hardly seem something that warranted emergency treatment. Moreover, the CDC expressly abandoned any claim at the hearing regarding overbilling. Tr. 49. Any revived allegation of overbilling related to Tallgrass is improper.

Rule 4-1.5(a) speaks to the reasonableness of the fee charged. There are few Missouri cases involving this Rule. Those cases that do exist focus on the *amount* of fee charged for work done, rather than what the CDC claims is involved here – billing the wrong entity. Sister-state courts have concluded that "[t]o prove a violation of Rule 1.5(a), the committee 'must present evidence establishing a

[5] This assumes a $200 per hour billing rate for C. Lawrence, who billed 7.6 hours for work on the lease agreement between February and April, 2008. LF1101-06 (Exhibit 21).

generally accepted, reasonable fee for the services in question.' *In re Coffey's Case*, 152 N.H. 503, 510, 880 A.2d 403, 411 (2005)(citation omitted). The CDC offered no such evidence.

The comments to the Rule suggest such a limited focus. "When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible." Rule 4-1.5 (Comment 2).

Here, the hourly rate charged by Ms. Bergman was the subject of an agreed-to rate of compensation by the client. No one claims that that rate was unreasonable or excessive. And, again, the CDC failed to establish what a reasonable fee would be. What the CDC actually complains about is that Ms. Bergman sent a bill that should not have been sent. But that is a different analytical construct.

Respectfully, it makes considerable sense for the Court to confine application of Rule 4-1.5(a) to cases in which there is a claim that the fee is excessive as to the amount charged. Such an analytically concise box for the Rule will permit Rule 4-8.4 to serve its intended purpose – to punish lawyers who charge unreasonable fees by knowing deceit or purposeful dishonesty.

Even if one assumes that the phrase "unreasonable fee" as used in Rule 4-1.5(a) is broader than the amount charged, but includes amounts that should not have been charged, then the evidence permits one to conclude that the "unreasonable" fee is no more than $868 (before discount) – the amount Lisa

Hansen billed to create the Operating Agreement. LF1101-06 (Exhibit 21). And, at the time the invoice was sent, evidence shows that Bergman simply did not know that Tallgrass was anything other than an LLC formed by, affiliated with, and designed to protect KCTR from potential liability. Bergman's review of the KCTR bill for the Tallgrass Operating Agreement would have not raised any flags with her at all – just as CFO Peek's review of that bill did not cause him to question it, even though he admitted to full knowledge that Somervell and Mader had bought the railcar in December, three months earlier. Tr. 77, 129.

2. Rule 4-8.4(c)

Again, Rule 4-8.4(c) provides: "It is professional misconduct for a lawyer to:… (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

As early as 1910, this Court concluded that these words had a definite meaning, within a dentistry licensing statute:

> The words of the statute "fraud, deceit, or misrepresentation" have a well–defined meaning not only at common law, but also in all its branches of English literature….
>
> The word "fraud" is defined in Webster's Dictionary as follows:
>
> * * *
>
> "2. Law. An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing

> belonging to him, or to surrender a legal right; a false representation of a matter of fact (whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed) which deceives and is intended to deceive another so that he shall act upon it to his legal injury.
>
> * * *
>
> The same author defines the word "deceit" in the following language:
>
> "2. Law. Any trick, collusion, contrivance, false representation, or underhand practice, used to defraud another. When injury is thereby effected, an action of deceit, as it is called, lies for compensation. See Fraud."
>
> * * *
>
> And the same author defines "misrepresentation" as follows: "Untrue, improper, or unfaithful representation; esp., false or incorrect statement of account, usually unfavorable; as, a misrepresentation of a person's motives. In popular use, this word often conveys the idea of intentional untruth."

State ex rel. Williams v. Purl, 228 Mo. 1, 128 S.W. 196, 201-02 (1910). Each of these listed acts (or failures to act) involves a scienter element. Each thus requires a purposeful intent and knowingly false effort to mislead or conceal a material, relevant fact from someone who might find the information important in making a

decision. Thus, to prevail on a claim that an attorney violated Rule 4-8.4(a), the CDC must show that the attorney actually intended to deceive by his/her acts.

a. Not Revealing Relationship to the Board of Directors

The CDC charges that Bergman practiced "dishonesty, fraud, deceit, or misrepresentation" for not informing the Board of Directors of KCTR of her relationship with Charles Mader. The CDC's charge involves a specific attempt to keep the Board of Directors in the dark – not the corporation. The CDC's entire argument turns on its notion that the KCTR Board is a distinct and unrelated-to-the-officers constituent of KCTR. CDC also ignores that Somervell, at all times while President of KCTR, was also a Board Director.

As previously explained, Bergman reported the relationship to President Somervell in 2005 and again in 2007. During that period, Somervell was also a Board member. This alone defeats a claim that Bergman acted with dishonesty or committed fraud, deceit, or misrepresentation" as to the information the CDC claimed she never revealed *to the Board.* In addition, CFO Peek knew of the relationship, though apparently not the physical aspects of it. Tr.99. And in 2009, Director Bryce Bump discussed the relationship with Ms. Bergman, in connection with the 2009 Union Pacific audit.

Telling the company president was sufficient to inform the company. *Wandersee*, 263 S.W.3d at 629. The Board of Directors is not a separate entity or client within the company. One cannot commit an act of honesty, fraud, deceit, or misrepresentation when a corporation is the client and one informs the company

president (who is also a board member) of the information the CDC claims was not revealed to the Board.

b. The Tallgrass Billing

The CDC's Tallgrass billing claim depends on this premise: Despite the evidence to the contrary – despite Bergman's knowledge that the CFO would have to (and did) approve the bills; despite the admissions by CFO Peek that the original intent of President Somervell was for KCTR to purchase and own the railcar; and despite a *complete lack of evidence* that Bergman actually knew that the ownership of the railcar switched from KCTR to Somervell/Mader – that Bergman actually knew on December 21, 2007: (a) not only that KCTR did not buy the railcar but also (b) it was Somervell/Mader/Watco that did buy it. And all this ignores the fact that the CFO actually knew that Somervell/Mader/Watco had bought the car, that he approved Bergman's bills, and that the CFO saw nothing that he, as CFO, needed to report to anyone about anything. The CDC's assertion also ignores the fact that when the railcar was purchased, the Tallgrass Operating Agreement documenting the actual ownership of the Tallgrass entity had not been drafted and finalized -- and would not be finalized -- for another six months.

There is no documentary evidence until November 14, 2011, that Bergman knew that Somervell/Mader/Watco owned the railcar – more than three years after the 2007-08 invoices were sent to KCTR and approved by Peek. The CDC is not as careful with the timeline in this regard as the Court must be.

No scienter element is shown as to the Tallgrass bills.

II. Responds to Informant's Point II

The CDC makes much of the fact that Ms. Bergman never admitted any violation of the ethical rules. She did, however express sorrow and regret for the way in which events turned out. Ms. Bergman stated that she would never have compromised the relationship with her largest client over billings which were *de minimus*, in relation to the amount of work that she and attorneys at Lathrop & Gage performed on behalf of the client. And she lost her partnership with Lathrop and Gage, as well as the opportunity to work with her largest client, one that she treasured.

As the arguments in Point I show, however, there is both an established legal and strong factual basis for Ms. Bergman's unwillingness to do the CDC's bidding. But to do so would require Ms. Bergman to accede to a different understanding of the law and the rules, as well as the evidence in this case. Respectfully, Ms. Bergman still contends that this Court need not reach the issue of sanctions, as none are due her.

If the Court considers a sanction, then in the end, this case is reduced to this question: What is the obligation of a lawyer to correct a bill three plus years after the fact (1) when there is no complaint by the client, (2) the CFO knew of the work performed and approved the bill, without question, and (3) when the amount that was overbilled is less than $1,000, and pales in comparison both to what the lawyer has written off or reduced by non-contracted-for discounts to the total bills

sent to the client? And to this Court, she should respectfully add, there is simply no evidence on the record that the amount of the bill measured by the hourly rates is unreasonable, or that the bill was sent with knowledge that it should have been sent to a different entity or with any intent to defraud the client.

If the Court concludes that the duty to correct the bill is immediate upon discovery of its error, and that a failure to make an immediate correction despite no complaint by the client requires a sanction, then the lowest sanction within the Court's discretion is proper. No harm came to the client besides the bill – and that amount was $868 (the time billed for preparing the Tallgrass Operating Agreement). The $868 amount does not factor in the 10%, non-contractual discount that appears on the April, 2008 bill for $747.80. Subtracting this discount, the actual amount in controversy is roughly $120.00. LF1103.

The closest case – and it is not close – is *In re Weier*, 994 S.W.2d 554, 558 (Mo. banc 1999). There, the lawyer had a financial interest in a partnership he formed and did not reveal that to the other partners. The Court found a conflict of interest that warranted a reprimand. The Court's decision was consistent with the comments following A.B.A. Standards for Imposing Lawyer Sanctions, § 4.33 which note that reprimand is the most appropriate sanction where, "a lawyer engages in a single instance of misconduct involving a conflict of interest when the lawyer has merely been negligent and there is no overreaching or serious injury to the client." *Id*. at 558-59.

The CDC has failed to produce any evidence that there is a true conflict of interest in this case, or that Ms. Bergman committed an ethical violation of any sort. In fact, there was no harm to the client, no substantiated ethical violation, and any error in billing was unintentional and of a *de minimus* amount. Respectfully, no sanction is warranted in this case.

CONCLUSION

For the reasons expressed, this Court should dismiss the Information.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief and appendix complies with the requirements of Missouri Rule 84.06(c) and, in that the brief contains 18,434 as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

The brief and appendix was prepared using Norton Anti-Virus and was scanned and certified as virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on the day of May 1, 2015, a true copy of the foregoing was delivered through the Court's electronic filing system, according to the information available on the system at the time of filing, to all counsel of record including the following:

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