IN THE SUPREME COURT
STATE OF MISSOURI

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

INFORMANT'S BRIEF

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This action is one in which the Chief Disciplinary Counsel is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by this Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

I. INTRODUCTION

In this attorney disciplinary matter, an Information was initiated against Respondent Allison L. Bergman ("Respondent") in September 2013. **App. 2**. The matter was heard by a disciplinary hearing panel in May 2014 upon a four-count Information. **App. 963**. A written decision of the Disciplinary Hearing Panel was issued in October 2014, sustaining the evidence on three of the four counts presented at the hearing. **App. 963-984**.

The disciplinary hearing panel found several violations of the Rules of Professional Conduct, primarily arising from a conflict of interest involving an undisclosed personal and sexual relationship between Respondent and Charles Mader, a key officer of a corporate client, Kansas City Terminal Railway Co. ("KCT"). **App. 967-968; 977-978**. The specific violations found to exist were Missouri Supreme Court Rules 4-1.7 (conflict of interest: current clients); 4-1.8(j) (conflict of interest: prohibited transactions); 4-1.13 (organization as client); 4-8.4(c) (misconduct involving dishonesty); and 4-1.5 (fees). **App. 977-981**.

The conduct occurred during the period of July 2007 through January 2012, inasmuch as Respondent served as General Counsel of KCT from July 2007 to the end of January 2012 while Charles Mader simultaneously served as a KCT executive officer during a nearly identical tenure until they were both terminated from their positions and corporate offices on February 15, 2012. **App. 3-6; 22; 26; 28; 151 (Tr. 69)**.

After finding professional misconduct and after consideration of aggravating and mitigating factors, the Disciplinary Hearing Panel recommended that a disciplinary sanction be imposed against Respondent of an indefinite suspension from the practice of law with no leave to apply for reinstatement for two years. **App 982-983**. The Office of Chief Disciplinary Counsel accepted the hearing panel's findings and recommendation. **App. 985**. Respondent rejected the decision and a briefing schedule was activated. **App. 986-987**.

II. DETAILED FACTUAL STATEMENT

A. BACKGROUND: RESPONDENT AND KCT

Respondent Allison L. Bergman ("Respondent") became licensed as an attorney in Missouri in 1997. **App. 291-292 (Tr. 208-209)**. Respondent has practiced law from a Missouri office at all times from 1997 to present. **App. 292 (Tr. 209)**. She remains in good standing to practice law in Missouri. **App. 290 (Tr. 207)**. Respondent is also licensed to practice law in Kansas. **App. 290 (Tr. 207)**.

Over her seventeen years in the profession, Respondent has devoted most of her time in the practice areas of corporate governance **(App. 292-295; Tr. 209-212)**; contract law **(App. 20)**; real estate law **(App. 20; 954)**; and business transactions **(App. 20; 321)**. Respondent has made major contributions to sophisticated business transactions. **App. 304 (Tr. 221)**. Respondent also has substantial experience in legal matters affecting railroads and freight transportation. **App. 20; 305-306 (Tr. 222-223); 679-683; 694-**

695; 954-955.

In 1998, Respondent joined the Lathrop & Gage law firm in Kansas City, Missouri. **App. 22**. Lathrop & Gage had represented Kansas City Terminal Railway Co. ("KCT") for nearly one hundred years, dating back to 1906 when KCT was incorporated in Missouri. **App. 121 (Tr. 39)**. In 1999, Respondent first performed legal services for KCT. **App. 22**. The level of legal work performed by Respondent on behalf of KCT increased significantly in late 2002 in connection with a series of complex real estate matters. **App. 553 (Tr. 468)**. In 2003, Respondent served as Assistant General Counsel of KCT and as its Assistant Secretary. **App. 22**. In 2005, Respondent became a partner at Lathrop & Gage. **App. 22**.

In June of 2007, Respondent was appointed outside General Counsel of KCT and became its corporate Secretary. **App. 122 (Tr. 40); App. 293 (Tr. 210)**. As General Counsel, Respondent was responsible for overseeing all legal services needed by KCT. **App. 123 (Tr. 41)**. Under the KCT Bylaws, Secretary is a designated officer position. **App. 857**. As Secretary, and pursuant to the KCT Bylaws, Respondent was responsible for noticing, attending and keeping records of all meetings of the KCT Board and shareholders. **App. 857**. The Secretary is also the custodian of records and all written contracts of the corporation. **App. 857**.

The KCT Board looked to its General Counsel for independent advice regarding the company's relationship with its officers. **App. 282 (Tr. 199)**. The President and Chairman of KCT'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.

Q. And outside of board meetings, did the Kansas City Terminal board expect its general counsel to perform legal services in the best interest of Kansas City Terminal?

A. Yes.

Q. Regardless of who they were interacting with, the general counsel was representing the Kansas City Terminal as a whole; is that correct?

A. Correct.

App. 232 (Tr. 149).

KCT is one of the largest railroad terminals in the United States. **App. 115 (Tr. 33)**. KCT owns one hundred miles of railroad track in the Kansas City area, on both sides of the state line. **App. 115-117 (Tr. 33-35)**. KCT is also responsible for maintaining tracks owned by other railroads. **App. 115-117 (Tr. 33-35)**. KCT collects about $35 million in annual revenue, most of which is distributed back to the shareholders. **App. 121 (Tr. 39); 324 (Tr. 241); 661**. KCT has approximately twenty employees. **App. 661**.

The shareholders of KCT consist of five major railroads, Union Pacific, BNSF, Kansas City Southern, Norfolk Southern, and Canadian Pacific. **App. 115 (Tr. 33)**. The shareholders are actually business competitors, but they have come together cooperatively for purposes of establishing a railway terminal in Kansas City. **App. 315 (Tr. 232)**.

Each shareholder of KCT is allotted a certain number of seats on the KCT Board of Directors. **App. 229 (Tr. 146)**. The corporate Board of Directors of KCT consists of twelve outside members, with staggered terms such that the composition of the KCT Board of Directors may change from year to year. **App. 120 (Tr. 38); App. 329-331 (Tr. 244-246); App. 853**. However, members of the KCT Board of Directors typically serve for several years. **App. 666-677**. The company president also has a seat on the KCT Board. **App. 126 (Tr. 44); App. 270 (Tr. 187)**.

The corporate Bylaws of KCT provide that the "**property, business and affairs of the Corporation shall be controlled and managed by the Board of Directors.**"

App. 296 (Tr. 213); App. 853 (emphasis added). Respondent testified that there was nothing particularly unique about the KCT Bylaws. **App. 314 (Tr. 231)**.

The appointments of Respondent to serve as General Counsel and Secretary were approved by the KCT Board of Directors. **App. 500 (Tr. 415)**. The position and hiring of Respondent as Secretary and General Counsel was subject to the control of the KCT Board of Directors. **App. 297 (Tr. 214)**. Everything Respondent did as General Counsel for KCT was subject to the ultimate control of the KCT Board of Directors. **App, 298 (Tr. 215)**. At all relevant times Respondent was accountable and answerable to the KCT Board of Directors. **App. 298 (Tr. 215)**.

During her tenure with KCT from late 2002 to January 2012, Respondent had an opportunity to meet most, if not all, KCT Board members. **App. 316 (Tr. 233)**. Respondent kept updated contact information for all of the directors. **App. 316 (Tr. 233)**. She attended nearly every meeting of the KCT Board of Directors from December 2002 to December 2011. **App. 314 (Tr. 231)**. Respondent had a significant and active role during KCT Board meetings. **App. 317 (Tr. 234)**. The Board meetings occurred four times a year, during which Respondent facilitated all corporate business. **App. 682**. In 2010, Respondent told a writer in connection with a cover story of the ***Super Lawyers*** magazine that Respondent was "in a novel position of being the woman in the boardroom who's running the show." **App. 679-682**. Respondent even participated in the special Executive Committee portion of the KCT Board meetings. **App. 319 (Tr. 236)**.

In mid-2007, Respondent prepared an agreement on behalf of KCT under which

Interlocker LC would become an independent contractor to perform engineering consulting work for KCT under a continuous service agreement. **App. 347 (Tr. 264)**. Interlocker LC is a business entity wholly owned by Charles Mader. **App. 847; App. 345 (Tr. 262)**. Although the continuous service agreement between KCT and Interlocker was executed, it became moot a few months later in October 2007 when Mader became a full-time employee of KCT rather than an independent contractor. **App. 347-348 (Tr. 264-265)**. Mader was being groomed or "test-driven" to become the eventual president of KCT upon the anticipated retirement of its then president, William Somervell.[1] **App. 372 (Tr. 289)**.

In connection with a meeting of the KCT Board of Directors in September 2007, Respondent was instructed by the Board to prepare an employment agreement between Charles Mader and KCT to implement the written resolution adopted at the Board meeting. **App. 371 (Tr. 288); App. 686**. Such an employment contract was unique for KCT, as Respondent was not aware of any other executive or employee for KCT ever having a written employment contract. **App. 372 (Tr. 289)**.

Respondent delegated the task of the initial draft of the Mader employment contract to a Lathrop & Gage employment attorney, Tedric Housh. **App. 373 (Tr. 290)**. Mr. Housh prepared a draft of Mader's employment agreement and emailed it to Respondent with several questions regarding additional potential terms for further

[1] At the disciplinary hearing, neither Mader nor Somervell provided testimony.

consideration. **App. 711**. Respondent thanked Housh for the quick turnaround, and stated that she would review the draft of the Mader employment agreement over the weekend. **App. 711**.

Thereafter, Respondent had some involvement in changing the terms of Mader's employment agreement. **App. 378 (Tr. 295)**. Respondent testified that she was not sure which changes to the Mader employment agreement were made by her. **App. 378 (Tr. 295)**. She had a conversation with Mr. Housh about revising Mader's employment contract. **App. 379 (Tr. 296)**. Although Respondent was obligated to make sure that the Board's resolution was carried out (**App. 379; Tr. 296**), Respondent is not sure that she physically received back a signed copy of Mader's employment contract, but she is confident that her secretary put a signed copy of the final version in the firm's files. **App. 380 (Tr. 297)**.

Respondent's legal work as general counsel for KCT was directed by the company president, among a few other key executives. **App. 320 (Tr. 237)**. From mid-2009 to January 2012, Respondent's legal work was directed and supervised on a daily, if not weekly basis, by Mr. Mader. **App. 341 (Tr. 258); App. 571 (Tr. 486); App. 127 (Tr. 45)**. Even while Mader was vice president and general manager of KCT from October 2007 to June 2009, Mader assigned legal work to Respondent as well. **App. 126 (Tr. 44); App. 153 (Tr. 71); 7**. Prior to becoming president, Mader was given an increased amount of managerial authority within KCT as the eventual replacement for Somervell. **App. 235 (Tr. 152).**

Respondent claims that the highest ranking individual at KCT and the highest authority in the company was its president. **App. 308-309 (Tr. 225-226)**. Respondent appeared to acknowledge that at all relevant times KCT (and its various subsidiary corporations and affiliated entities) was the client, and that the corporation's president was not her client. **App. 299 (Tr. 216); App. 323 (Tr. 240)**. However, at one point in her testimony, Respondent testified that Mr. Somervell [the company president until his retirement in mid-2009] was her "client." **App. 336 (Tr. 253)**. Respondent testified that in instances of arguments at KCT Board meetings, she would often take the side of the company president rather than the Board of Directors. **App. 578 (Tr. 493)**.

KCT was a valued client of Lathrop & Gage, especially as a matter of historical pride. **App. 300-301 (Tr. 217-218)**. Respondent worked with KCT management on an annual basis to establish a budget for KCT's legal matters. **App. 322-323 (Tr. 239-240)**. From 2001 to 2011, Lathrop & Gage billed KCT an average of about $400,000 annually, with a high in 2011 of $662,000 and a low in 2001 of $339,000. **App. 696; 849**.

From 2007 to 2011, KCT was Respondent's most important client, representing the majority of her professional time. **App. 300 (Tr. 217)**. From June 2007 to January 2012, Respondent was regarded as the supervising and billing partner with respect to all KCT legal matters. **App. 325 (Tr. 242)**. During Respondent's tenure from 2007 to 2011, all Lathrop & Gage billings to KCT were submitted under Respondent's signature. **App 325 (Tr. 242)**. All Lathrop & Gage's legal bills to KCT were sent to the company's president (Somervell in June 2007 through June 2009 and Mader from June 2009 to

January 2012). **App. 326-327 (Tr. 243-244)**. Payment of all billing invoices from Lathrop & Gage had to be approved by the company president. **App. 127 (Tr. 45)**.

On or about January 20, 2012, KCT commenced an internal investigation of Mader's outside business activities involving companies in which he had a personal interest. **App. 149 (Tr. 67); 5**. On February 15, 2012, KCT terminated Mader's employment as president and removed him from the board of directors. **App. 151 (Tr. 69); 5**. The decision by the KCT Board to terminate Mader's employment was based upon Mader's activities and involvement with outside business interests which resulted in a loss of trust. **App. 239-240 (Tr. 156-157)**.

On February 15, 2012, KCT also terminated Respondent as its General Counsel, removed her as corporate Secretary, and effectively ended its century-old attorney-client relationship with Lathrop & Gage. **App. 152 (Tr. 70); 5-6; 26**. The KCT Board attributed misconduct to Respondent:

> Q. Was your decision to terminate your general counsel based upon any direct information relating to what you deemed to be misconduct of Ms. Bergman or the Lathrop & Gage firm?
>
> A. Let me make sure I understand the question. Your question is: Was our decision to terminate Ms. Bergman based on any misconduct on her part?
>
> Q. Yes.
>
> A. Yes.

Q. And what was that misconduct that you deemed to be attributable to her?

A. Failure to disclose her relationship with Mr. Mader, work on various personal projects for Mr. Mader that we felt were also in conflict with her role as general counsel. And perhaps in more of a general view of this, the information on these issues that was presented to the board was surprising to the board. It was disappointing to the board. And I can say from having participated in the meetings that the board members of the Terminal, based on the results of the investigation, the information that was presented to us, were very upset, angry, disappointed, even betrayed. It was the collective opinion, based on all of that information that was presented to the board, that we had no choice but to discontinue Mr. Mader and discontinue Ms. Bergman. And I will say, part of the disappointment was because the role that Ms. Bergman played as general counsel was one of extreme trust and reliance and an independent source of guidance and information. When we felt that that was comprised, there was no choice but for us to make the decisions that we made. It's in retrospect, I think, all of us would agree that those decisions were the correct

> decisions. It's unfortunate that we had to make them, but I believe we did the right thing.

App. 283-284 (Tr. 200-201).

B. UNDISCLOSED PERSONAL RELATIONSHIP BETWEEN RESPONDENT AND MADER

At the time of the disciplinary hearing, Respondent made a written admission that

> From 2002 until January 2012, Respondent and Mader were in a personal, close relationship. At times the relationship was romantic and sexual. At all times from 2002 to January 2012, the relationship between Mader and Respondent was a very close, deep, meaningful, sustained, loving, caring, intimate, and special friendship with frequent social and personal interactions with each other. The sexual relationship between Respondent and Mader did not exist prior to the 1999 beginning of the attorney-client relationship between Respondent and her client, KCT.

App. 6-7; App. 81.

Respondent testified that the relationship with Mader started **after** she was assigned to handle legal work for KCT in connection with the construction of a "triple track flyover structure" that involved several real estate transactions. **App. 553-554 (Tr. 468-469)**. Respondent met Mader while working on the project. **App. 554 (Tr. 469)**. At

the time, Mader was employed by a company that performed engineering services under a contract with KCT. **App. 554 (Tr. 469)**.

At no time from 2002 to 2007 (while Mader worked as an independent contractor for KCT) or from 2007 to January 2012 (while Mader was an employee and corporate officer of KCT) did Respondent make a written disclosure to the KCT Board of Directors concerning the personal relationship with Mr. Mader. **App. 335 (Tr. 252); 557-558 (Tr. 472-473)**. KCT provided no written waiver of any conflict of interest potentially created by this relationship. **App. 249-250 (Tr. 166-167)**. Neither Respondent nor Mader ever revealed the existence of their personal relationship, involving sexual relations, to the KCT board of directors. **App. 8; 250 (Tr. 167)**. Prior to KCT's internal investigation commenced in January 2012, Respondent's relationship with Mader was not known, formally or even informally, by KCT's Board of Directors or KCT's constituent shareholders. **App. 8; 250 (Tr. 167)**. Respondent's client, KCT, never gave informed consent to Respondent's continuing representation of it in light of her close personal relationship, involving sexual relations, with its constituent. **App. 8; 250 (Tr. 167)**.

Testifying for KCT as a long-term key company executive and officer, Bradley Peek stated:

> Q. Are you aware of any written document in which Ms. Bergman disclosed a personal, close sexual relationship with Charles Mader to any other officer, director, or board member of Kansas City Terminal other than Mader?

A. No, I'm not.

Q. Are you aware of any written document by which Kansas City Terminal gave its consent to having Allison Bergman serve as the company's general counsel while also involved in a close, personal, intimate, and sexual relationship with Charles Mader while he served as president of Kansas City Terminal?

A. No, I'm not.

Q. Are you aware of any written document by which Allison Bergman, as the supervising billing partner responsible for submitting hundreds of thousands of dollars in legal bills to Kansas City Terminal, disclosed that she was involved in an intimate, close, and sexual relationship with the person who ultimately would approve those bills?

A. No, I'm not.

Q. Are you aware of any written document by which Kansas City Terminal gave its consent to having Allison Bergman serve as the company's general counsel while also involved in a close, personal, intimate, and sexual relationship with Charles Mader while he served as general manager of Kansas City Terminal?

A. No, I'm not.

* * *

Q. As the current general manager of the company and as the former president of the company, in your role with the company, is that type of disclosure something that you would have expected be provided to you and to the board members?

MR. BROWN: I make the same objection. It's just another way of asking the same question.

MR. BALLEW: Overruled. You may answer.

A. Yes, it is.

App. 169-171 (Tr. 87-89).

With respect to the KCT Board of Directors, there was direct evidence that only one member of the Board (other than the company president who automatically served on the Board, i.e. Mader himself) had knowledge of the personal relationship between Mader and Respondent. **App. 328-332 (Tr. 245-249)**. Respondent testified that from June 2007 to January 2012, she had only **one conversation** with an outside KCT Board member regarding her relationship with Mr. Mader. **App. 330-332; 334 (Tr. 247-249; 251)**. In 2009, Respondent had a brief conversation with one particular director, a Mr. Bump, in the hallway. **App. 332 (Tr. 249)**. No follow-up was made by Respondent regarding this conversation. **App. 332 (Tr. 249).**

In August and September 2007, at the time the KCT Board of Directors was

considering whether to hire Mader as an employee for grooming as the eventual president, none of the twelve outside KCT Board members were aware of the personal relationship between Respondent and Mader. **App. 557-558 (Tr. 472-473)**. The KCT Board of Directors met in September 2007 to officially approve the hiring of Mr. Mader as a Vice President and General Manager. **App. 335 (Tr. 252); 684-693**. Respondent was present for that Board meeting, but made no disclosure to the Board or its Executive Committee regarding her relationship with Mr. Mader. **App. 684-693; App. 335 (Tr. 252)**.

Mader's employment was approved by the Board at such meeting, at a salary of $150,000 per year with "potential" for increases. **App. 685**. The meeting minutes (prepared by Respondent) reflect that Respondent was involved in the discussions regarding the hiring of Mr. Mader. **App. 685**. During Executive Committee sessions at the KCT Board meetings, Mader's compensation, performance and agenda were discussed in Respondent's presence.[2] **App. 235 (Tr. 152)**. Mader was not permitted to

[2] For instance, at the December 2008 Board meeting, Respondent gave a report to the Executive Committee of the KCT Board that Mader was to receive a 9% salary increase for 2009 and a $40,000 year-end bonus for 2008. **App. 951-953**. According to the Minutes prepared by Respondent, Respondent "relayed" the Executive Committee's determination regarding Mader's compensation "to fulfill a **commitment** that the Board made to Mr. Mader at the time of his hiring in 2007." **App. 953** (emphasis added). The

participate in these Executive Committee discussions. **App. 235 (Tr. 152)**. The KCT Executive Committee used these discussions to speak candidly about Mader. **App. 236 (Tr. 153)**.

In discussing why her relationship with Charles Mader was not disclosed to the KCT Board of Directors, Respondent 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

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Minutes of the September 2007 meeting of the Executive Committee which approved Mader's hiring (also prepared by Respondent) do not expressly reflect a so-called "commitment" to Mader. **App. 684-686**. Rather the minutes reflect only that there was a **"potential"** for annual bonuses and merit increases. **App. 685** (emphasis added). See also **App. 833** (wherein the KCT Board was asked to waive the waiting period under the KCT Bylaws for a $40,000 year-end bonus to be paid to Mader for 2007).

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.

App. 335-337 (Tr. 252-254) (emphasis added).

Even though Respondent worked with the KCT Board to establish annual legal budgets for 2009, 2010 and 2011 and even though Respondent submitted over $1 million in legal bills directly to Mr. Mader for payment from corporate funds in 2009, 2010 and

2011, Respondent did not feel that it was incumbent upon her to advise the Board of Directors that she was in a close, personal and sometimes sexual relationship between herself and Mr. Mader. **App. 338-339 (Tr. 255-256); App. 696**.

After Somervell retired in June 2009 and was succeeded by Mader, no one higher in authority than Mader was aware of the relationship other than one director, Mr. Bump. **App. 330 (Tr. 255)**. Respondent discussed with Somervell and Mader whether the relationship would present a conflict of interest regarding her representation of KCT, but never similarly discussed the issue with any outside member of the KCT Board of Directors. **App. 594 (Tr. 509)**. Respondent's retention of KCT as a client was dependent upon her ability to maintain the good graces of Mr. Somervell and Mr. Mader. **App. 643 (Tr. 557)**.

In 2006, Mader contacted an estate planning attorney at Lathrop & Gage regarding his estate plan. **App. 360 (Tr. 277)**. Mader wanted to provide an inheritance in his estate plan for Respondent of an undetermined value. **App. 359-360 (Tr. 276-277)**. After learning of this, the estate planning attorney declined further representation of Mader. The attorney's working file ended up on Respondent's desk. **App. 361 (Tr. 278)**. Respondent denies looking in the file and denies having any conversation about the contents of the file. **App. 362 (Tr. 279)**. Respondent was aware that Mader had named Respondent as the attorney-in-fact under a healthcare power of attorney. **App. 362 (Tr. 279)**. After the Lathrop & Gage attorney declined to assist with Mr. Mader's estate plan, Respondent referred Mader to another attorney with whom she was familiar. **App. 363**

(Tr. 280). Mader may have said something at that time (in 2006) to Respondent that he intended to leave an inheritance to Respondent. **App. 364 (Tr. 281)**.

Respondent testified that "there was nothing about my relationship with [Charles Mader] that did affect or could have affected my ability to serve that client [KCT]." **App. 539 (Tr. 454)**. Douglas Banks, testifying as a long-term KCT Board member, stated that "because of the conflict that that relationship [between Respondent and Mr. Mader] created, we would have had no choice but to vote to end Ms. Bergman's role as general counsel." **App. 259 (Tr. 168)**. In other words, had the relationship been disclosed when Mader was hired, the Board would have sought another person to become general counsel and/or it "would have had to rethink considering [Mader] for the position. **App. 259 (Tr. 168); 282 (Tr. 199)**.

With regard to the consequences of the Board's determination that it needed to terminate the services of its General Counsel and effectively end an attorney-client relationship of more than a century, Mr. Peek testified on behalf of KCT, as follows:

> Q. Let me first ask you, Mr. Peek, are you currently an officer of Kansas City Terminal?
>
> A. Yes, I am.
>
> Q. And have you been an officer of Kansas City Terminal since 2000?
>
> A. Yes.

Q. In your capacity as an officer of Kansas City Terminal and testifying here today on behalf of Kansas City Terminal, can you describe for this panel the harm caused by Ms. Bergman's undisclosed relationship with Charles Mader?

MR. BROWN: I renew my objection, if I understand it.

MR. BALLEW: You can answer the question. The objection's overruled.

A. During January of 2012 when allegations were made against Mr. Mader there were also allegations relating to the relationship that he had with Ms. Bergman. So it put the company in a position of not being able to seek legal advice regarding any of those allegations from its current general counsel and secretary. So during those initial weeks prior to bringing on other counsel, we were required to rely on the advice of our owners who weren't familiar with the background and day-to-day activities of KCT.

Q. Well, let me ask -- I'll ask you a slightly related question, which is: Did the need to change counsel create any additional legal expense for Kansas City Terminal?

MR. BROWN: Well, I object to the form of the question because it posits that there was a need to change counsel rather

> than did they change counsel. And so the question -- it's argumentative. And whether they needed to or whether they decided among themselves to change counsel is an entirely different thing.
>
> MR. BALLEW: I'm going to overrule the objection and believe the -- both the impact and, to some extent, mitigating and aggravating circumstances are addressed in this question.
>
> A. Yes, there were additional expenses involved in bringing other counsel up to speed.

App. 172-174 (Tr. 90-92).

Earlier in the disciplinary hearing, there was an extended discussion about whether the panel should hear testimony about the harm suffered by KCT after it terminated the services of its General Counsel. **App. 138-145**. The presiding officer sustained an objection as to whether KCT could obtain legal advice regarding Mader's employment contract (**App. 138-139; Tr. 56-57**) and further sustained an objection to any line of questioning as to what consequence there was to KCT after they fired its lawyer and did not have a lawyer anymore. **App. 141 (Tr. 59)**.

An offer of proof was made on behalf of the Informant, as follows:

> When you are the now number one senior member of management of a company of this size and you don't have your general counsel to turn to when you are reviewing such

> things as an employment agreement or trying to decide what to do in those weeks and months without, you know, having to go hire a new law firm, that's got to learn everything that Lathrop & Gage had learned over 100 years of an attorney/client relationship, I think Mr. Peek will testify that he was left on an island without general counsel for these weeks leading into February of 2012 and for a certain period of time after that until, really, the ship became righted again.

App. 143 (Tr. 61).

> To whatever extent there would be a legal question about Exhibit 18 [Mader's employment agreement], whether it was now or as existed in January and February of 2012, the company had nowhere to turn to obtain that legal advice because its general counsel was also being fired. The person that supervised the drafting of this agreement was no longer available to the company. I believe the testimony will show that the violations of the rules left the company in such a state that its legal affairs still went on, but there was no one there to fill that role.

App. 139 (Tr. 57).

The President and Chairman of the KCT Board, Douglas Banks, testified:

Q. In conjunction with the decision [to terminate Mader's employment], did you or any other board member have occasion to review Mr. Mader's employment agreement with Kansas City Terminal?

A. Yes.

Q. And I believe if you flip to tab 18, is that a copy of the employment agreement that you consulted in January and February of 2013 – or excuse me, 2012 with regard to your decision to terminate Mr. Mader?

A. Yes.

Q. As you contemplated what action to take with regard to Mr. Mader's employment and his status under the employment agreement that is Exhibit 18, were you able to consult with Kansas City Terminal's General Counsel Allison Bergman regarding the provisions and consequences of Exhibit 18?

A. I don't believe we did, no.

Q. And do you recall why Ms. Bergman was not consulted regarding providing legal advice or counsel to the board with respect to Charles Mader's employment agreement?

A. Well, at the time the results of the investigation were reported to the board members, we were also advised of the

relationship that Ms. Bergman had with Mr. Mader. And it was the board's decision that there was -- it was not necessary or proper for us to make that consultation.

App. 240-241 (Tr. 157-158).

Mr. Banks went on to testify:

Q. And, again, I'm just asking about your personal experience, what you personally experienced in those months during this -- when this situation came to light.

A. It was a very unpleasant time. It was a very disappointing, stressful time that I would have preferred not to have gone through. Each of us board members represent the company that we're employed with. And at least speaking personally -- I can't speak for the other board members, but for me personally, it was a very unpleasant time because of the pressure being put on me as my company's representative on the board basically saying, you know, you better get through this and you better make sure that our interests at Kansas City Terminal are protected. My management was very concerned about the results of the investigation, and that put a lot of pressure on me personally to hopefully do what my company

needed to be done as their representative on the board. But it was -- it was a stressful, unpleasant time.

* * *

Q. And were you involved in the decision to terminate the services of Lathrop & Gage?

A. Yes.

Q. Can you kind of explain the -- maybe the rationale for that decision?

A. I think the rationale was, first of all, given the long, long history of the relationship between the firm and the company, we were very, very disappointed that we couldn't see any way to go--continue going that direction. It was a long-term relationship that I think all of us, as members of the board, respected and understood, but given the circumstances and the information that we had as a result of the investigations, we felt that there was no other choice but to break from that long-standing relationship.

Q. And what do you mean by the circumstances of the results of the investigation?

[extended discussion about rel

> A. Upon learning of the personal relationship between Ms. Bergman and Mr. Mader, upon learning of the ownership interest and billing of legal fees for the Tallgrass Railcar, knowing of the personal relationship between Ms. Bergman and Mr. Mader, the board felt that the conflict of interest, as a result of that, the loss of trust and reliability because we had not been informed of the relationship, the billing of legal fees for Tallgrass Railcar, which were not related to KCT -- the combination of all those things was certainly enough for the board to make a determination that Ms. Bergman could no longer be general counsel. And that we felt at that time it was in the company's best interest to terminate or end the relationship with Lathrop & Gage overall.

App. 242-248 (Tr. 159-165).

In late June of 2007 (shortly after being appointed General Counsel), Respondent attended a CLE presentation during which there was a discussion of Missouri Supreme Court Rule 4-1.8(j)[3] involving sexual relations between an attorney and client. **App. 327 (Tr. 244); App. 558-559 (Tr. 473-474)**. Respondent reviewed the rule at that time. **App. 327 (Tr. 244)**. Respondent read the rule and decided she was not in violation. **App.**

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

328 (Tr. 245). She did not prepare a memorandum to herself on the subject. **App. 328 (Tr. 245)**. Although she was concerned the rule could raise an issue, Respondent did not seek an ethics opinion on the subject from anyone. **App. 327 (Tr. 244)**. She did not conduct any legal research on the subject. **App. 328 (Tr. 245)**. Respondent did not discuss the rule with anyone at KCT. **App. 328 (Tr. 245)**.

The final version of Mader's 2007 employment agreement provided for a $150,000 severance payment to Mader in the event his employment was terminated by KCT without cause. **App. 718**. The severance provision was not part of the initial draft agreement prepared by Mr. Housh. **App. 711**. This severance payment was not discussed during the Executive Committee session of the KCT Board meeting nor reflected in the Board Resolution. **App. 383 (Tr. 300-301); 686; 924**. The severance payment to Mader was a subject specifically discussed between Respondent and Somervell, then KCT president. **App. 388 (Tr. 305)**. Respondent testified that she could have created a "Chinese Wall" screening method such that could have become isolated with no involvement in the transaction. **App. 391 (Tr. 308)**. However, she did not take such action to screen or isolate herself from the transaction. **App. 391 (Tr. 308)**. Respondent did not advise Mr. Housh that she was in a close, personal, intimate and sexual relationship with Mader. **App. 373-374 (Tr. 290-291)**.

The President and Chairman of KCT's Board of Directors, Douglas Banks, testified:

Q. Did Ms. Bergman put the legal interests of the Kansas City Terminal at risk by failing to disclose her relationship with Charles Mader?

MR. BROWN: I object to that as asking for a conclusion.

MR. ODROWSKI: I think the witness can testify his understanding as --

MR. BALLEW: Yeah. I'm going to allow the question and then the follow-up question as to what risk there was.

A. Can you repeat, please?

Q. Yes. Did Ms. Bergman put the legal interests of the Kansas City Terminal at risk by failing to disclose her relationship with Charles Mader to the Kansas City Terminal board?

A. We, as a board, believed that she did, yes.

Q. Do you believe that beginning in September of 2007 there was a significant risk that Ms. Bergman's representation of the Terminal would be materially limited by a personal interest in maintaining her relationship with Charles Mader?

A. Yes.

App. 262-263 (Tr. 179-180).

Respondent denied that her relationship with Mader constituted a conflict of

interest. **App. 342 (Tr. 259)**. Respondent denied any violation as alleged in Count I of the Information. **App. 345 (Tr. 262)**. Respondent denied that from June 2007 to January 2012 there was a significant risk that her representation of KCT would be materially limited by her personal relationship with Mader. **App. 364 (Tr. 281)**. Respondent denied that her failure to disclose the relationship with Mader to the KCT Board of Directors was an intentional omission involving deceit, dishonesty, fraud and misrepresentation. **App. 364 (Tr. 281)**.

Respondent denied that the failure to disclose the personal relationship with Mader to the KCT Board of Directors prevented the Board from making informed decisions regarding legal matters handled by Lathrop & Gage while Respondent served as general counsel from June 2007 to January 2012. **App. 364 (Tr. 281)**. Respondent denied that her sexual relationship with Mader during the period of June 2007 to January 2012 constituted a violation of Rule 4-1.8(j). **App. 365 (Tr. 282)**. Respondent denied that her representation of KCT with respect to Mader's employment agreement constituted a conflict of interest. **App. 390-391 (Tr. 307-308)**.

Respondent did not have any contact with Mader in February or March of 2012. **App. 358 (Tr. 275)**. From April 2012 through the time of her testimony to the disciplinary hearing panel in May 2014, Respondent and Mader had resumed a close, personal relationship. Respondent's relationship with Mader from April 2012 to May 2014 also involved sexual relations. **App. 358-359 (Tr. 275-276)**. Mader did not provide testimony on Respondent's behalf at the disciplinary hearing.

C. TALLGRASS: RAILCAR PURCHASE, ATTEMPTED LEASE, AND UNCORRECTED BILLING ERRORS

In December 2007, Respondent performed the legal work to form Tallgrass Railcars LLC in Missouri. **App. 430-431 (Tr. 347-348); 678**. In submitting the Articles of Organization to the Missouri Secretary of State on behalf of Tallgrass Railcars LLC, Respondent understood the requirement that she was certifying as truthful all of the information in the Articles. **App. 432 (Tr. 349)**. Tallgrass Railcars LLC was a private joint venture between Mader, Somervell and a company called Watco. **App. 727; 751-752; 962; 786**. However, Respondent claimed she did not become aware of the actual ownership of Tallgrass until nearly four years after she formed the company, i.e. not until October and November of 2011. **App. 461-462 (Tr. 378-379)**.

Whether Respondent had knowledge that the formation of Tallgrass was not an authorized KCT transaction and whether Respondent had knowledge that KCT had decided **not** to purchase a railcar were contested issues before the Disciplinary Hearing Panel. The panel found that "Respondent knew, prior to the closing of the railcar purchase [on December 21, 2007], that Somervell and Mader were using the entity to make a **personal purchase** of the railcar rather than on behalf of KCT." **App. 972**. (emphasis added). In contrast, Respondent claims that at the time of submitting the Articles of Organization for Tallgrass, all she knew was that the company would be purchasing a railcar and that the company would be owned by KCT. **App. 432 (Tr. 349)**.

Prior to February 1, 2012, Respondent had never discussed the formation of

Tallgrass with any member of the KCT Board of Directors. **App 441 (Tr. 358)**. There had been no specific KCT Board authorization for the railcar purchase or for the formation of an affiliated company. **App. 248-249 (Tr. 165-166)**. It is undisputed that KCT had no actual connection to Tallgrass or to the purchase of the railcar. However, in mid-2007 there had been a preliminary consideration given by KCT management to a railcar purchase, but the idea did not gain any traction within KCT because KCT did not need a private railcar. **App. 159 (Tr. 77)**.

When asked if she was deceived by Somervell and Mader regarding their December 2007 purchase of a railcar, Respondent 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.
>
> Q. Well, wouldn't a board resolution authorizing this railcar have avoided the whole situation?

A. In retrospect, Mr. Odrowski, I wish I would have had a resolution for everything. Yeah. Absolutely.

App. 442-443 (Tr. 359-360). Respondent denied that being in a relationship with the purchaser caused her to lower her guard with respect to the transaction. **App. 450 (Tr. 367)**.

Respondent discussed the formation of Tallgrass with Mader in 2007. **App. 456 (Tr. 373)**. Respondent's time entries reflect numerous meetings and phone calls with Mader and Somervell regarding Tallgrass and the railcar purchase. **App. 457-461 (Tr. 374-378); 764-785**. Respondent claimed that she had no conversations with Mader or Somervell indicating that they were going to purchase the railcar in a personal capacity along with Watco, a KCT vendor. **App. 467-461 (Tr. 374-378)**. Respondent claims she presumed the railcar was purchased as a KCT asset. **App. 460 (Tr. 377)**.

At the time Tallgrass was formed in December of 2007, no new client intake form was submitted to the Lathrop & Gage intake department. **App. 434-435 (Tr. 351-352)**. Respondent claims that it was her secretary's job to make sure the new client intake form was timely submitted. **App. 435 (Tr. 352)**. Respondent did not follow-up to see if the intake form had been timely submitted. **App. 435 (Tr. 352)**. The new client intake form for Tallgrass was not submitted until April of 2009. **App. 788**.

The client intake form was prepared by Respondent's secretary, Diann Bond, and contains a typed signature for Respondent. **App. 788; 793**. Respondent admitted that she had ultimate responsibility for the intake form. **App. 467 (Tr. 384)**. Respondent is

identified as the "submitting attorney," "billing attorney" and "originating attorney" for Tallgrass on the form. **App. 788**. No client engagement letter was generated for this new client. **App. 793**. Respondent admitted this was a mistake. **App. 467 (Tr. 384)**. According to the form, Tallgrass was listed as a KCT affiliate. **App. 790**. The form directed that all bills for Tallgrass be sent to KCT at its designated billing address. **App. 791**.

Respondent admitted that there is no document, other than the client intake form submitted under her typed signature, which identifies Tallgrass as a KCT affiliate. **App. 436 (Tr. 353)**. Respondent 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.

App. 436-437 (Tr. 353-354).

Respondent had access to, and reviewed, the KCT annual budget authorized by the KCT Board of Directors for 2007. **App. 439 (Tr. 356)**. The annual budgets contained specific approval for certain capital expenditures. **App. 440 (Tr. 357)**. Additionally, there were opportunities for company management to come before the KCT Board to request additional money for capital expenditures.[4] **App. 440-441 (Tr. 357-358)**. There was no provision in the company's 2007 capital budget for the purchase of a railcar. **App. 157-158 (Tr. 75-76)**. A $185,000 expenditure for a railcar would have been a matter for KCT Board consideration and would have needed approval from the Board as a capital expenditure. **App. 157-158 (Tr. 75-76); 249 (Tr. 166)**. At the December 13, 2007, KCT

[4] For instance, in September 2007, a specific Board resolution was adopted to authorize the $44,000 purchase of a Dodge Durango. **App. 689**.

annual Board meeting (one day **after** Respondent formed Tallgrass with the Missouri Secretary of State and one week **before** the closing of the railcar purchase), there was no discussion of a $185,000 capital expenditure for a railcar nor any indication that the Board would have approved the formation of an affiliated entity to purchase and take title to a railcar. **App. 157-158 (Tr. 75-76); 832-839**.

Respondent prepared the sales agreement and bill of sale for the purchase of the railcar, as verified by her time entries. **App. 446 (Tr. 363)**. The purchase price for the railcar was $185,000, as follows: $166,500 paid by Watco Companies, Inc. and $18,500 paid by Interlocker LC in the form of a check signed by Mader. **App. 962**. The closing occurred on December 21, 2007. **App. 710; 962**.

With respect to the closing and exchange of funds for the purchase of the railcar, Respondent testified as follows:

> Q. Did you facilitate the closing of the railcar purchase?
>
> A. I facilitated closing arrangements. I prepared documents so that the closing could occur, but **I was not physically present at the closing**. It did not happen at my office.
>
> Q. You spent and billed time on December 20th and 21st to facilitate the closing of this agreement; is that correct?
>
> A. One of the two time entries specifically says I was facilitating closing arrangements, which is not the closing. And the second time entry says facilitate closing. And I think, in

retrospect, I wish I would have added the word arrangements a second time. I didn't. But I did not facilitate the closing. The contract contemplated that the closing could happen at my office or not, and it didn't. My recollection is that I either emailed these documents to Mr. Somervell and Mr. Mader, or that I left them at the front desk for them to pick up.

Q. You prepared Paragraph 4 of the asset purchase agreement that permitted the closing to take place on December 21st at your office; is that correct?

A. I believe I probably did and the document says here it could be closed at my office or at such other time or place as was agreed to by the parties.

Q. Did you facilitate the exchange of money at the closing that is reflected by Exhibit 14?

A. No. I have not seen those checks until this investigation.

MR. BALLEW: Excuse me, I did not hear the answer.

A. No, I did not facilitate the closing, and **I wasn't present when any money was exchanged**. And I did not see the exhibit that you referred to until this investigation.

Q. You prepared the agreement, facilitated the closing, but you did not know where the purchase proceeds were coming from, is that correct?

A. I -- that was a compound question. I didn't facilitate the closing; I facilitated closing arrangements. I put together documents. I didn't know where the money was coming from, but I assumed it was coming from Mr. Somervell's operating budget.

Q. You discussed this -- the arrangements for closing and the negotiation of this purchase agreement with the seller's attorney; correct?

A. I believe that is correct.

Q. That's Joseph Hemberger?

A. Correct.

Q. And in your conversations with Joseph Hemberger, the attorney for the seller, is it your testimony that the source of the sales proceeds was not discussed?

A. Source of the sales proceeds?

Q. Yes. Where the money was coming from. You talked to Hemberger about that?

A. No.

App. 447-450 (Tr. 364-367) (emphasis added).

If Respondent was physically present for the closing of the railcar purchase, she would have become aware that this was not KCT authorized transaction. **App. 962**. Respondent claimed she did not attend the closing for the purchase of a $185,000 railcar because "it was not a big deal." **App. 619 (Tr. 534)**.

Respondent claimed that she did not have knowledge of the identity of the managing member of Tallgrass even though she had "facilitated" the closing arrangements and had submitted to Articles of Organization to form the entity. **App. 453 (Tr. 370)**. The asset purchase agreement prepared by Respondent contained warranties and representations on behalf of the purchaser, Tallgrass, that Tallgrass had "full power, authority and legal capacity" to execute and deliver the Agreement and that Tallgrass would not be in violation of any agreement, commitment or obligation by virtue of the consummation of the transaction. **App. 707**.

Respondent had prepared a draft of the railcar purchase agreement in August 2007. **App. 450 (Tr. 367); 914-923**. Under this draft, KCT was the purchaser of the railcar. **App. 916**. The August 2007 draft agreement provides a mailing address for the purchaser to the attention of the President at KCT's address for its principal place of business in Kansas City, Kansas. **App. 919**. In the final version of the agreement, however, as executed on December 21, 2007, the purchaser was identified as Tallgrass Railcars LLC with a mailing address to a P.O. Box in Kansas City, Missouri, not connected to KCT.

App. 708.[5] When Respondent prepared an initial draft of the railcar purchase agreement in August 2007, the signature block for the purchaser expressly identified the signatory for KCT by typing his name on the document. **App. 920-923**. However, when the purchaser switched to Tallgrass, the typed signature blocks no longer identified a specific signatory for the purchaser (although the specific signatory for the seller remained identified). **App. 709-710**.

Respondent admitted that it would be a problem for Mader, Somervell and Watco to jointly own a company that owned one or more railcars. **App. 394 (Tr. 311)**. KCT is a major customer of Watco. **App. 182 (Tr. 100)**. Respondent does not view Watco's $166,000 payment towards the railcar purchase as a *per se* kickback, but she did acknowledge that a situation where a KCT employee personally receives a kickback from one of KCT's primary vendors would absolutely be a concern for General Counsel. **App. 394-395 (Tr. 311-312)**. Respondent admitted that it would be a breach of their respective fiduciary duties to KCT for Somervell and Mader to own a railcar with Watco. **App. 395-396 (Tr. 312-313); App. 415-416 (Tr. 332-333)**.

On that point there is no disagreement. Testifying on behalf of KCT, Douglas Banks testified:

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[5] The PO Box in the final December 21, 2007, version of the railcar purchase agreement is the same PO Box used by Respondent in preparing personal correspondence at Mader's request for Mader's personal real estate business. **App. 843-845; 708**.

> Q. If the company's president and Watco privately agreed to own a railcar together, is that -- is that something you believe should have been reported to the Kansas City Terminal?
>
> A. Absolutely.
>
> Q. And why is that?
>
> A. Watco is the -- is a very large supplier, contractor for the Kansas City Terminal Railway. Watco provides all of the local customer switching here in Kansas City, and track maintenance of the switching trackage. That kind of a relationship would create a large degree of concern on a joint ownership outside of the board's authority.

App. 258-259 (Tr. 175-176).

Respondent did not arrange for the preparation of an operating agreement for Tallgrass until February 2008. **App. 779**. On February 13, 2008, Respondent met with Mader for about an hour regarding the railcar transaction. **App. 779; App. 429 (Tr. 346)**. Another Lathrop & Gage attorney, Lisa Hansen, joined the meeting so that Respondent could talk with Mader about the Tallgrass LLC operating agreement including the ownership structure. **App. 429 (Tr. 346)**. At that point, Respondent claims to have left the room and claims that Respondent was not present for any discussion regarding the ownership of the LLC. **App. 429-430 (Tr. 346-347)**.

Two weeks later, on February 26, 2008, Ms. Hansen sent a draft of the Tallgrass

operating agreement to Respondent. **App. 808**. The draft of the operating agreement identifies the ownership structure of the limited liability company as follows: Watco Companies, 50% ownership with a $166,500 initial capital contribution; William Somervell, 25% ownership with a $9,250 initial capital contribution; and Charles Mader, 25% ownership with a $9,250 initial capital contribution. **App. 895**.

At various other places in the draft operating agreement prepared by Ms. Hansen and sent by email to Respondent, Mader and Somervell are identified as members or parties to the agreement in their personal and individual capacities. **App. 894; 871**. Mader was identified as the initial manager of the LLC in the draft of the operating agreement. **App. 880**.

Although Lisa Hansen knew of the ownership structure of Tallgrass as of February 2008, Respondent denies knowing at that time that the entity was owned personally by Mader and Somervell. **App. 473 (Tr. 390)**. Respondent claims that she did not open the attachment to the email from Ms. Hansen containing the Tallgrass operating agreement and ownership structure. **App. 473 (Tr. 390)**.

According to the Operating Agreement, the stated purpose of the LLC was "to purchase, own, maintain, lease and sell railcars for **entertainment purposes** and any activities related or incidental thereto." **App. 871** (emphasis added). From the face of the document, there was nothing in the draft of the operating agreement which would have suggested that Tallgrass was to be a subsidiary or affiliated company of KCT, or that the transaction had been authorized by the KCT Board of Directors, or that the railcar

would have fulfilled some legitimate business purpose of KCT. **App. 868-895**.

In 2008 (while they both were KCT employees and occupied fiduciary positions with KCT), Mader and Somervell attempted to lease the railcar back to KCT for $2,000 per month. **App. 753-763**. This transaction was never authorized by the KCT Board of Directors. **App. 156 (Tr. 74)**. Respondent prepared the paperwork for this transaction. **App. 487 (Tr. 404)**. Respondent admitted to representation of both sides of the transaction. **App. 487 (Tr. 404)**. Respondent claims that she thought the transaction was not intended to be an arm's length transaction, but rather a "captive" transaction between two related entities. **App. 487-488 (Tr. 404-405)**. Respondent admitted, however, that there was nothing about the face of the document or from its four corners that would reflect a captive transaction rather than an arm's length transaction between opposing parties. **App. 488 (Tr. 405)**. The lease agreement was never fully executed. **App. 762**.

At all times from December 2007 to December 2011, Respondent had access to the entire Tallgrass legal file at Lathrop & Gage. **App. 474 (Tr. 393)**. All Respondent had to do was check the file to see who owned Tallgrass. **App. 475 (Tr. 392)**. The ownership structure of Tallgrass was in place as of the closing of the railcar purchase on December 21, 2007, and the ownership had not materially changed. **App. 480 (Tr. 397)**.

Respondent claims that none of the documents for the purchase transaction (including copies of the checks representing the payment of the purchase price, **App. 962**), nor the attempted lease transaction, nor the LLC operating agreement ever made it back to her files as General Counsel. **App. 632 (Tr. 547)**. Respondent, as General

Counsel and custodian of all KCT records and written contracts, claimed that prior to being fired in February 2012 she had not reviewed a single signed document relative to Tallgrass or the purchase of a $185,000 railcar. **App. 633 (Tr. 548)**.

In 2009 and early 2010, there was a shareholder-led audit performed of KCT operations. **App. 660**. The audit was a very serious thing. **App. 425 (Tr. 341)**. Somervell was the target of much of the audit's findings. **App. 942**. The audit report identified five subsidiary or affiliated companies. **App. 661; App. 422 (Tr. 339)**. Tallgrass Railcars LLC is **not** mentioned in the audit report as having any affiliation with KCT. **App. 660-665; 422 (Tr. 339)**. Respondent had been given a draft copy of the audit findings to obtain management's response. **App. 442 (Tr. 339)**. Respondent received a final copy of the audit report dated February 5, 2010. **App. 660-665; App. 422 (Tr. 339); 944**. Similarly, in early 2011, Respondent prepared a corporate ethics policy so that everyone from Mader on down to the rank and file employees could, among other problems, avoid conflict of interest situations. **App. 416-417 (Tr. 333-334)**. The document identifies the same five affiliated entities. **App. 811 (fn. 1)**. Tallgrass is **not** one of them. **App. 811**.

Respondent saw the refurbished railcar at a private railcar convention in October 2011, likely at Mader's invitation. **App. 462 (Tr. 379)**. In early November 2011, she referred to the railcar as "Chuck and Bill's railcar." **App. 463 (Tr. 380); App. 866**. On November 7, 2011, Respondent requested that another Lathrop & Gage attorney, Lisa Hansen, perform legal work relative to "Chuck and Bill's railcar." **App. 463 (Tr. 380);**

App. 866.

Respondent saw the railcar both before it was purchased by Tallgrass and four years later after it had been renovated. **App. 396 (Tr. 313); App. 512 (Tr. 427)**. She was aware that the railcar had gone through an extraordinary amount of renovation. **App. 396-397 (Tr. 313-314)**. She presumed that KCT funds were used for the renovation, but did not have any knowledge about that. **App. 622 (Tr. 537)**. In November 2011, an attorney for Watco left voice messages and an email for Respondent requesting her to provide information regarding the ownership structure for Tallgrass. **App. 787**. On November 14, 2011, Respondent responded to the email as follows: "50% Watco Companies / 25% Bill Somervell / 25% Chuck Mader." **App. 786**. Respondent admitted that from October / November 2011 to the end of her tenure with KCT at the end of January 2012, she did not discuss or disclose the ownership structure of Tallgrass with anyone other than the Watco attorney. **App. 478 (Tr. 395)**.

Exhibit 21 is a compilation of billing entries related to Tallgrass and to the purchase and attempted lease of the railcar. **App. 764-785; App. 427 (Tr. 344)**. Exhibits 26 and 52 are examples of the billing statements signed by Respondent and submitted to KCT. **App. 821-823; 896-897**. The billing statements included line items for work and expenses performed on behalf of various affiliated or subsidiary companies of KCT. **App. 821-823; 896-897**. There are **no** billing statements which contain a separate line item for Tallgrass. **App. 821-823; 896-897; 427 (Tr. 344)**. None of Respondent's time entries ever specifically identify "Tallgrass." **App. 764-785; 428 (Tr. 345)**. The KCT

chief financial officer, Bradley Peek, testified that all billings related to affiliated companies should have a separate line item on the bill to help him keep track of the numbers. **App. 165 (Tr. 83)**.

No outside member of the KCT Board of Directors authorized Lathrop & Gage to bill KCT for any legal work performed for Tallgrass or the purchase and attempted lease of a railcar. **App. 166 (Tr. 84)**. In 2012, KCT performed an audit of legal bills regarding Tallgrass and the purchase and attempted lease of the railcar. **App. 166-167 (Tr. 84-85)**. KCT paid Lathrop & Gage approximately $10,000 for legal work performed on behalf of Mader and Somervell for them to purchase a railcar and attempt to lease it back to KCT and for the preparation of the organizational and operating documents of Tallgrass. **App. 167 (Tr. 85)**. Respondent admitted that there were attorney fees erroneously billed to KCT for legal work performed for Tallgrass, but testified the amount was $3,500. **App. 478-479 (Tr. 395-396)**.

Respondent never issued credits to KCT for fees erroneously billed to KCT. **App. 168 (Tr. 86)**. KCT never received corrected billing statements from Respondent. **App. 168 (Tr. 86)**. Respondent never advised KCT of any billing problem with respect to Tallgrass. **App. 169 (Tr. 87)**. Respondent admitted that she had an obligation to correct the billing statements once she learned that the purchase of the railcar and the formation of Tallgrass were not authorized KCT transactions. **App. 483 (Tr. 400)**.

Respondent claims that she did not have an opportunity between November 2011 and January 31, 2012 to take action to correct the KCT billings, primarily because, as a

member of the law firm's executive committee, she was attending to the law firm's December "gold rush" for "year-end numbers" for billable hours and fee collections. **App. 484-485 (Tr. 401-402)**. Respondent testified that "I didn't feel any particular compunction to go back and pay back a bunch of money. If anybody should have, it should have been Bill [Somervell] or Chuck [Mader], not me." **App. 484 (Tr. 401).**[6]

Respondent testified:

> Q. We're talking about a time period from November 6, 2011, to January 31st, 2012 correct?
>
> A. That's correct.
>
> Q. And you did not have the time in that period to correct the billing statements?
>
> A. Sure. I'm sure I could have found the time. But as I said, I was very busy. I was managing matters at the firm. And going back and rectifying what I thought to be a couple thousand dollars from a bill that had been paid three or four years prior was not my number one priority.

[6] In December 2011, Respondent did attend the annual KCT Board meeting. At the Board meeting, at Mader's request, Respondent found time to confront a KCT shareholder about the shareholder's alleged breach of fiduciary duty in overbilling KCT. **App. 577 (Tr. 492)**.

App. 486 (Tr. 403).

Respondent denied any form of deceit or dishonesty in submitting legal bills for Tallgrass legal work to be paid by KCT. **App. 493 (Tr. 408)**. Respondent denied any wrongful conduct regarding the billing to KCT for Tallgrass work. **App. 493-494 (Tr. 408-409)**.

D. PROTECTION OF CORPORATE INTERESTS

Mader's employment contract required him to "diligently and conscientiously devote his full and exclusive time and attention and his best efforts to the discharge of his duties." **App. 716**. When Mader was originally hired in September 2007, no direction or authorization from KCT Board and its Executive Committee was communicated to Respondent which would have permitted Mader to have outside business interests other than the performance of official business on behalf of KCT. **App. 392-393 (Tr. 309-310)**. Respondent is not aware of any document that authorized Mader to have outside business activities while a full-time KCT employee. **App. 413 (Tr. 330)**. Respondent admitted that the terms of the employment agreement would have prevented such activities. **App. 413-414 (Tr. 330-331); 716**.

Respondent opined that Mader's employment agreement terminated in June 2009 when Mader was promoted to president, notwithstanding that the term of the agreement lasted until 2010 with a renewal until 2013. **App. 413-414 (Tr. 330-331); 716**. There is no document terminating Mader's employment agreement (until February 2012) and

Mader continuously remained an employee of the company up through February 2012. **App. 414-415 (Tr. 331-332)**. Whether or not the employment agreement was still in effect as a subsisting agreement in February 2012 when Mader was fired would have been a legal issue within the purview of legal advice from KCT's counsel. **App. 137-138 (Tr. 55-56)**.

In 2007, Mr. Mader formed Interlocker LC and Black Boot Properties LC. **App. 678; 840; 847**. In 2010 and 2011, Mader, through Interlocker, performed independent consulting work for the City of Newton, Kansas. **App. 898-899; App. 410 (Tr. 327)**. Respondent was aware that Mader performed independent consulting work for the City of Newton, Kansas, while a full-time employee of KCT. **App. 898; App. 403-404 (Tr. 320-321); App. 406-407 (Tr. 323-324)**. In fact, Respondent actually put the City in touch with Mader through an introduction of Mader to the City Attorney. **App. 407-408 (Tr. 324-325)**.

Respondent performed legal work for Black Boot, and acknowledges an attorney-client relationship between herself and Black Boot. **App. 349 (Tr. 266)**. Black Boot purchased two six-plex apartment buildings directly across from Respondent's residence. **App. 350 (Tr. 267)**. Respondent assisted Mader in purchasing the buildings, including reviewing loan documents for him. **App. 355 (Tr. 272)**. Mader made arrangements with his bank to give Respondent authority to make wire transfers on behalf of Black Boot, but Respondent testified she was not aware that this authority had been bestowed upon her. **App. 357; (Tr. 274); App. 831**. Black Boot represented an active for-profit business

for Mader. **App. 351-352 (Tr. 268-269)**. Respondent performed some incidental services for Black Boot at Mader's request, such as helping to draft letters to tenants and letting persons in the building if no one else was available. **App. 352-353 (Tr. 269-270)**.

Both Somervell (until June 2009 when he retired) and Mader were full-time employees of KCT, which sometimes required them to be available to work in the evenings and on weekends. **App. 399-400 (Tr. 316-317)**. Respondent acknowledged that Mader's ownership of a 12-unit apartment complex could potentially have taken time away from his full-time duties as an employee of KCT. **App. 400 (Tr. 317)**. Respondent was aware that Mader's activities for Black Boot may have occurred on regular workdays. **App. 401 (Tr. 318)**. Respondent testified that she did not believe that Mader's activities on behalf of Interlocker and Black Boot interfered with his full-time employment for KCT. **App. 413 (Tr. 330)**.

Respondent is familiar with the fiduciary nature of the duties of corporate officers. **App. 302 (Tr. 219)**. Respondent was aware that corporate officers have a duty of care, a duty of loyalty and a duty to serve the corporation's best interests. **App. 307 (Tr. 224)**. Respondent admitted that as the corporate Secretary and as General Counsel she would have a duty to take affirmative action if the corporation was not being managed in the best interests of the shareholders. **App. 307 (Tr. 224)**. Respondent admitted that the General Counsel and corporate Secretary had a duty to report a breach of fiduciary duty to the highest authority that can act within the company. **App. 311-312 (Tr. 228-229)**. Respondent admitted that she had a fiduciary duty both the KCT Board of Directors and

to the corporation itself. **App. 312-313 (Tr. 229-230)**.

Respondent admits that the purchase of the private railcar for entertainment purposes by Mader and Somervell created a situation of officer misconduct by Mader and Somervell. **App. 637 (Tr. 552).** Respondent came to that conclusion in November 2011. **App. 637 (Tr. 552)**. Respondent admits that the subject should have been reported to the Board of Directors. **App. 639 (Tr. 554)**.

There was a KCT Board of Directors meeting in December 2011. **App. 640 (Tr. 555)**. Respondent made no report to the Board of Directors in December 2011 about any of the Tallgrass transactions. **App 640 (Tr. 555)**. At Mader's suggestion, however, Respondent did confront a KCT shareholder (BNSF) at the December 2011 Board meeting about a potential problem Mader believed existed between KCT and BNSF. **App. 642 (Tr. 557)**.

Respondent acknowledged that the use of KCT funds to refurbish the railcar for the private, personal benefit of Mader and Somervell would have constituted a breach of their respective fiduciary duties to KCT. **App. 622 (Tr. 537)**. When Respondent saw the railcar in its refurbished state in October 2011, Respondent developed a feeling that something was amiss. **App. 622-623 (Tr. 537-538)**. Respondent testified: "It didn't feel like it was a KCT car," in part because it did not contain a KCT logo nor promote KCT's image in any way. **App. 624 (Tr. 539)**. Respondent took no action thereafter to investigate the ownership, use or expenditures for the railcar. **App. 627 (Tr. 542)**. She recognized the situation needed to be addressed between herself and Mader, but did not

get to it before she was fired as General Counsel in February 2012. **App. 627 (Tr. 542); App. 631-632 (Tr. 546-547)**. Respondent testified: "And in the scheme of things, I would have gotten to it. I would have cleaned all this up. I just hadn't got to it before I was dismissed." **App. 634 (Tr. 549)**.

In 2009 and 2010, an audit of KCT was performed at the direction of its shareholders. **App. 660**. For instance, the audit found that KCT management had spent excessive amounts on entertainment, including 41 occasions when KCT executives entertained Lathrop & Gage attorneys totaling $4,800. **App. 662**. Many of the audit findings raised other corporate ethics issues. **App. 660-665**. As a result of the audit findings, the KCT Board directed that a corporate ethics policy be drafted and adopted. **App. 177 (Tr. 95)**. As General Counsel, in 2011, Respondent developed a written ethics and conflicts of interest policy for KCT. **App. 302 (Tr. 219); App. 809-820; 417 (Tr. 334)**. The ethics policy Respondent drafted mandated honesty, integrity and mandatory reporting of violations. **App. 302 (Tr. 219)**.

The ethics policy was adopted in April 2011. **App. 809**. The ethics policy addresses nepotism concerns, avoidance of conflicts of interest, as well as employees with outside business interests. **App. 809-820**. The ethics policy applied to all senior members of management, including Mader. **App. 179 (Tr. 97)**. Respondent admitted that as General Counsel she was under an obligation to report any violation of the ethics policy by an employee, even including a violation attributed to Mader. **App. 416 (Tr. 333)**.

The nepotism section of the ethics policy prevented a KCT employee, including Mader, from supervising the work of a "significant other." **App. 819; 416 (Tr. 333)**. The "outside activities" section of the policy stated: "Involvement in an outside business enterprise that may require attention during business hours and prevent full-time devotion to duty is prohibited. Even if the outside involvement does not affect full-time performance of duties, there are legal considerations which relate to service by employees of the KCT as directors or officers of a company other than the KCT." **App. 813**. The conflict of interest section states: "An employee may not acquire any direct or indirect interest in, or have material dealings with, any person or entity which, to the knowledge of the employee, supplies or is likely to supply the KCT with property, materials or services or is otherwise contracting or is likely to contract with the KCT." **App. 813**. Respondent was given a role by the KCT Board in the enforcement of the ethics policy and in the determination of various compliance issues. **App. 815 (fn 3); 418 (Tr. 335)**.

There was no evidence at the disciplinary hearing that any KCT Board member was aware of the ownership interest of Mader and Somervell in the Tallgrass railcar until its 2012 investigation. **App. 419 (Tr. 336)**. Until 2012, The KCT Board was not aware of any breach of fiduciary duty by Mader or Somervell regarding Tallgrass. **App. 251-252 (Tr. 168-169)**.

Mader made no disclosure to the KCT Board regarding his activities and involvement on behalf of Black Boot. **App. 420 (Tr. 337)**. Until 2012, the KCT Board was not aware of Mader's ownership of Black Boot nor of the extensive real estate

renovation and leasing activities Mader performed on behalf of Black Boot. **App. 251-252 (Tr. 168-169). App. 251-252 (Tr. 168-169)**.

Two KCT Board members may have been aware that Mader was performing consulting work for the City of Newton, Kansas, but no formal disclosure on that subject was ever made to the full KCT Board. **App. 420 (Tr. 337)**. The KCT Board was not aware of Mader's violation of the nepotism policy in supervising the work of a "significant other." **App. 251-252 (Tr. 168-169)**.

Respondent denied any violation of Rule 4-1.13 with respect to an alleged failure to protect the best interests of her client, KCT. **App. 421 (Tr. 338)**.

POINT RELIED ON

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE PREPONDERANCE OF EVIDENCE ESTABLISHES THAT RESPONDENT IS GUILTY OF NUMEROUS INSTANCES OF PROFESSIONAL MISCONDUCT, AS FOLLOWS:

(A) RESPONDENT ENGAGED IN A LONG-TERM REPRESENTATION OF A CLIENT IN VIOLATION OF RULE 4-1.7(a)(2) BECAUSE THERE WAS A SIGNIFICANT RISK THAT THE REPRESENTATION WOULD BE MATERIALLY LIMITED BY RESPONDENT'S PERSONAL INTERESTS;

INVOLVING DISHONESTY;

(B) RESPONDENT ENGAGED IN AN UNDISCLOSED SEXUAL RELATIONSHIP WITH A CLIENT IN VIOLATION OF RULE 4-1.8(j);

(C) RESPONDENT VIOLATED RULE 4-8.4(c) BY INTENTIONALLY FAILING TO DISCLOSE THE RELATIONSHIP TO THE KCT BOARD OF

DIRECTORS OVER A 4½ YEAR PERIOD, THUS ENGAGING IN CONDUCT (D) RESPONDENT VIOLATED RULES 4-1.7 AND 4-1.4(b) FAILING TO DISCLOSE THE PERSONAL RELATIONSHIP TO THE KCT BOARD OF DIRECTORS WHEN IT WAS CONSIDERING VARIOUS IMPORTANT DECISIONS IN THE COMPANY'S BEST INTERESTS;

(E) RESPONDENT VIOLATED RULES 4-1.5(a) AND 4-8.4(c) BY BILLING, AND RECEIVING PAYMENT FOR, APPROXIMATELY $10,000 IN FEES FOR LEGAL WORK PERFORMED FOR THE PERSONAL BENEFIT OF MADER AND SOMERVELL AND BY ENGAGING IN DISHONEST AND DECEITFUL CONDUCT IN BILLING KCT FOR LEGAL WORK NOT AUTHORIZED BY, NOR BENEFICIAL TO, THE COMPANY;

(F) RESPONDENT VIOLATED RULE 4-1.13(b) BECAUSE SHE KNEW THAT (i) MADER WAS ENGAGED IN IMPROPER ACTIVITIES ON BEHALF OF TALLGRASS, BLACK BOOT AND INTERLOCKER; AND (ii) SOMERVELL WAS

ENGAGED IN IMPROPER ACTIVITES ACTIONS ON BEHALF OF TALLGRASS; AND (iii) SUCH ACTIONS WERE IN VIOLATION OF THEIR LEGAL OBLIGATIONS TO THE COMPANY AND WERE LIKELY TO RESULT IN SUBSTANTIAL INJURY TO THE COMPANY, YET SHE FAILED TO PROCEED AS REASONABLY NECESSARY IN THE BEST INTERESTS OF THE CORPORATION.

POINT RELIED ON

II.

IN ORDER TO PROTECT THE PUBLIC AND MAINTAIN THE INTEGRITY OF THE LEGAL PROFESSION, THE COURT SHOULD SUSPEND RESPONDENT'S LAW LICENSE FOR AN INDEFINITE PERIOD OF AT LEAST TWO YEARS BECAUSE:

A. SUSPENSION IS THE BASELINE STANDARD UNDER THE ABA STANDARDS AND PRIOR MISSOURI CASES; AND

B. THERE EXISTS SEVERAL AGGRAVATING FACTORS TO BOLSTER THE APPROPRIATENESS OF SUSPENSION.

ARGUMENT

I.

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE THE PREPONDERANCE OF EVIDENCE ESTABLISHES THAT RESPONDENT IS GUILTY OF NUMEROUS INSTANCES OF PROFESSIONAL MISCONDUCT, AS FOLLOWS:

(A) RESPONDENT ENGAGED IN A LONG-TERM REPRESENTATION OF A CLIENT IN VIOLATION OF RULE 4-1.7(a)(2) BECAUSE THERE WAS A SIGNIFICANT RISK THAT THE REPRESENTATION WOULD BE MATERIALLY LIMITED BY RESPONDENT'S PERSONAL INTERESTS;

(B) RESPONDENT ENGAGED IN AN UNDISCLOSED SEXUAL RELATIONSHIP WITH A CLIENT IN VIOLATION OF RULE 4-1.8(j);

(C) RESPONDENT VIOLATED RULE 4-8.4(c) IN INTENTIONALLY FAILING TO DISCLOSE THE PERSONAL RELATIONSHIP WITH MADER TO THE KCT BOARD OF DIRECTORS OVER A 4½-

YEAR PERIOD, THUS ENGAGING IN CONDUCT INVOLVING DISHONESTY;

(D) RESPONDENT VIOLATED RULES 4-1.7 AND 4-1.4(b) BY FAILING TO DISCLOSE THE PERSONAL RELATIONSHIP TO THE KCT BOARD OF DIRECTORS WHEN IT WAS CONSIDERING VARIOUS IMPORTANT DECISIONS IN THE COMPANY'S BEST INTERESTS;

(E) RESPONDENT VIOLATED RULES 4-1.5(a) AND 4-8.4(c) BY BILLING, AND RECEIVING PAYMENT FOR, APPROXIMATELY $10,000 IN FEES FOR LEGAL WORK PERFORMED FOR THE PERSONAL BENEFIT OF MADER AND SOMERVELL AND BY ENGAGING IN DISHONEST AND DECEITFUL CONDUCT IN BILLING KCT FOR LEGAL WORK NOT AUTHORIZED BY, NOR BENEFICIAL TO, THE COMPANY;

(F) RESPONDENT VIOLATED RULE 4-1.13(b) BECAUSE SHE KNEW (i) THAT MADER WAS ENGAGED IN IMPROPER ACTIVITIES ON BEHALF OF TALLGRASS, BLACK BOOT AND

INTERLOCKER; (ii) SOMERVELL WAS ENGAGED IN IMPROPER ACTIVITIES ON BEHALF OF TALLGRASS; AND (iii) THAT SUCH ACTIONS WERE IN VIOLATION OF THE OFFICERS' FIDICIARY OBLIGATIONS TO THE COMPANY AND WERE LIKELY TO RESULT IN SUBSTANTIAL INJURY, YET SHE FAILED TO PROCEED AS REASONABLY NECESSARY IN THE BEST INTERESTS OF THE CORPORATION.

A. Conflict of Interest

Respondent's personal relationship with Charles Mader gave rise to a conflict of interest which violated Missouri Supreme Court Rule 4-1.7(a)(2), from at least September 2007 (if not a few months sooner) until February 1, 2012. As the principal attorney representing the Kansas City Terminal Railway Co., Respondent was ethically bound to act in the best interest of KCT, independent of her personal relationship with its chief executive officer. The evidence established that Respondent's personal relationship significantly impaired her representation of her client, KCT, on numerous occasions, and that she thereby violated multiple Rules of Professional Misconduct.

There are occasions when the highest officer within a company engages in personal wrongdoing to the harm of the company. The company's general counsel must be in a position to detect, stop, and redress such wrongdoing. There is a very slim chance

that a lawyer will be able to fulfill her role when the corporation's two most trusted advisors are engaged in a personal and intimate relationship, particularly where the relationship has not been disclosed to the board of directors.

Any time a legal issue or transaction arose that pitted the legal interests of Mader against the legal interest of KCT, Respondent faced a concurrent conflict of interest pitting her personal interests in maintaining the personal relationship with Mader and her professional interests is attending to the legal needs of her client. A conflict involving a lawyer's personal interests can be as serious and as harmful as a conflict that might arise when a lawyer attempts to concurrently represent the interests of two adverse clients. The conflict between a client and a lawyer's personal interests arising under Rule 4-1.7(a)(2) is no less problematic than a conflict arising under Rule 4-1.7(a)(1) or any other type of conflict contemplated by Rule 4-1.7.

One early manifestation of the conflict was Respondent's preparation of the continuous service agreement between Mader / Interlocker and KCT in July 2007. When Mader formed Interlocker, its original purpose was to contract with KCT. When Respondent prepared the continuous service agreement between Interlocker and KCT in July 2007, no objections were raised or questions were asked because only Mader (and Somervell) knew of the relationship between Mader and Respondent. The continuous service agreement may appear to have been innocuous, until one considers the evidence that Mader was identified at least by August 2007 as the company's next president.

The conflict between KCT's interests and Respondent's own personal interests in

maintaining the relationship with Mader became more pronounced when Respondent worked on Mader's employment contract. The conflict should have been obvious to Respondent. The conflict would have been obvious from KCT's perspective had the Board been made aware of the relationship. Mr. Banks, President and Chairman of KCT's Board of Directors, testified that had he known of the relationship in 2007, he would have recognized the conflict and sought another person to serve as general counsel. The evidence suggests that Respondent played some role in revising the employment agreement to provide for a $150,000 severance payment in the event Mader's employment was terminated without cause. Respondent certainly opened the door for greater scrutiny of her actions by not screening herself from the negotiations regarding the agreement, although doing so may have created its own problems. The client, acting through its board of directors, expected "hands on" legal work from Respondent and also expected Respondent to provide independent advice to the board. Mader's employment contract was very important to the board and unique to KCT, which had never had a written employment contract with any other employee or officer. The employment agreement clearly created a conflict of interest for Respondent. The conflict of interest should have effectively precluded Respondent from providing legal advice to the KCT Board regarding Mader's employment.

The terms of the employment agreement required Mader to "diligently and conscientiously devote his full and exclusive time and attention" to the business of KCT. It is clear that did not happen. In 2007 through 2011, Mader was heavily involved in

purchasing and refurbishing a private railcar for entertainment purposes. He was also heavily involved in renovating the Black Boot apartment units and operating the rental company as a for profit business. Respondent even assisted him in various facets of that business. On top of that, Mader decided to moonlight for the City of Newton, Kansas. Respondent was aware of, even encouraged, this consulting work. Respondent's representation of KCT, her most important client, became limited by her personal relationship with its chief executive.

The Tallgrass transactions illustrate even graver risks to the integrity and quality of the legal representation provided by Respondent. Either Respondent had actual knowledge about the details of the Tallgrass transactions, as the Disciplinary Hearing Panel concluded, or Respondent was blinded for four years by Mader regarding the true status and purpose of the company. Either way KCT's legal interests were jeopardized by the personal relationship between Mader and Respondent.

The evidence substantiates a number of potential mistakes and missteps by Respondent in handling the Tallgrass matters, such as:

1) not timely submitting a new client intake form for Tallgrass;

2) not obtaining a signed engagement letter from the client;

3) "facilitating the closing" and/or "facilitating closing arrangements" but not personally attending the closing which

was supposed to have been at Respondent's own office;

4) drafting warranties and representations regarding the execution of the railcar agreement by the purchaser, but not knowing who would actually sign the agreement on behalf of the purchaser;

5) forming an LLC with the Secretary of State's office without knowing the true ownership and management structure of the company;

6) believing that there was authority in an operating budget for a $185,000 capital expenditure without specific Board approval;

7) "running the show" at the December 13, 2007 annual Board / Shareholder meeting without a mentioning that a purported subsidiary company was organized the day before the meeting and that the company would be expending $185,000 to purchase a private railcar a week later and expend even more funds to perform extensive renovations on the railcar;

8) drafting a purchase agreement that required written notices to be directed to an unfamiliar PO Box instead the client's usual place of business;

9) not reviewing a signed copy of the purchase agreement after the closing;

10) receiving a copy of a very serious audit report critical of the former company president and not following up about glaring omission of Tallgrass as a corporate affiliate or subsidiary;

11) not verifying the source of the purchase proceeds for the railcar;

12) having discussions about the transaction with an opposing attorney representing the seller without any specific awareness as to the source of the purchase proceeds and the actual ownership of her own client;

13) not obtaining a corporate resolution for the purchase of the railcar;

14) drafting a lease agreement for the railcar between two supposedly related entities to strictly resemble an arm's length transaction rather than a captive arrangement;

15) not specifically identifying "Tallgrass" in any billing entry and not creating a specific billing line item for Tallgrass similar to all other KCT corporate affiliates and/or subsidiaries;

16) not finding time for three months to correct a bill that should have been paid by Mader;

17) having an uneasy feeling upon seeing the refurbished railcar but not undertaking any investigation as to the facts of the acquisition of the railcar or the funds used for renovations; receiving an email with a draft of an operating agreement involving a client for whom you serve as general counsel but never reviewing the document to find out more about the management, purpose and ownership of the company;

18) stepping out of the room when Mader talked about the specifics of the operating agreement and the ownership structure of the company; and

19) never reviewing the actual Tallgrass legal file while serving as General Counsel for KCT and all of its subsidiary and affiliated companies and while also serving as custodian of all KCT records and contracts.

All of these circumstances should be viewed as foreseeable and substantial risks to the client's legal interests when the general counsel for a major corporation is simultaneously involved in a personal, sexual relationship with the company's top executive.

The risks to Respondent's ethical representation of KCT were exacerbated upon

the adoption of the corporate ethics policy in April 2011. The impetus for the corporate ethics policy was the abuse of office by Mader's predecessor, Somervell, as determined by a 2010 audit of the company's operations. Accordingly, it was very important to the KCT board to impose ethical standards and policies from the highest office down to the rank and file employees. The ethics policy, as adopted in April 2011, provides a stark reminder of the company's expectations of Mader in easy to understand black letter fashion. Nepotism was prohibited, such that employees could not supervise the work of their family members or "significant others." Personal transactions with KCT vendors were to be avoided. Outside business activities were to be disclosed and vetted.

Corporate officers are not immune to lapses in business ethics and breaches of fiduciary duty. Respondent was given a role in the enforcement of the ethics policy and a role in the investigation and determination of various compliance issues. There was a substantial risk that Respondent would be unable to fulfill that role as to any violation or compliance issue involving Mader.

The disciplinary hearing panel correctly found a violation of Rule 4-1.7(a)(2). The hearing panel also correctly found that Respondent did not satisfy the requirements of Rule 4-1.7(b), which might have allowed the representation notwithstanding the conflict if certain safeguards were satisfied and the conflict were waived by the client with informed consent, confirmed in writing. There was no credible evidence that Respondent ever attempted to obtain a written waiver of the conflict or sought informed consent from the client.

Based upon Respondent's admission in characterizing the nature of the relationship, Rule 4-1.7(a)(2) would have been violated by Respondent even if their relationship was asexual or abstinent. However, because the relationship was sexual, Rule 4-1.8(j) has special application to this case. Rule 4-1.8(j) can be considered a specific example of what is prohibited by Rule 4-1.7(a)(2). Rule 4-1.8(j) establishes a bright line rule that sexual relations with a client are conclusively deemed to create a conflict of interest between the client's interests and the lawyer's personal interests.

The general rule under 4-1.8(j) is that "A lawyer shall not have sexual relations with a client." Here, the client is an organization. Comment 19 to Rule 4-1.8 states that "When the client is an organization, Rule 4-1.8(j) prohibits a lawyer for the organization (whether inside 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." Rule 4-1.13(d) and (e) and Comment 1 to the rule make clear that an officer or any employee may be considered a "constituent" of the organization. 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.

Respondent admitted that the relationship with Mader involved sexual relations. Respondent also admitted that the attorney-client relationship between herself and KCT existed before she had sexual relations with Mader, inasmuch as she began performing legal work for KCT as early as 1999.

No cases were discovered that discussed the timing of the onset of the sexual relationship in the context of a lawyer's sexual relationship with a constituent of a corporate client. Respondent appears to suggest there is a loophole in the application of this rule to the present case because she was already five years into a sexual relationship with Mader when he became a full-time employee and officer of KCT in October 2007. Respondent's argument is misguided for a number of reasons. First, Mader's employment did not change Ms. Bergman's attorney-client relationship nor otherwise interrupt the continuity of her representation of KCT. The attorney-client relationship between Respondent and KCT was not interrupted because Mader began receiving a paycheck from KCT.

Second, the fiduciary nature of the attorney-client relationship and the potential adverse impact a conflict might have on the legal representation are Rule 4-1.8(j)'s paramount concerns. Tremendous harm and a complete breakdown of the attorney-client relationship, as in fact occurred in this case, can result when a corporation's top officer and its top attorney are engaged in a sexual relationship without the knowledge and consent of the board.

Third, the timing of the beginning of the sexual relationship had little or no bearing upon the harmful consequences in the present case. The adverse consequences to KCT would have resulted no matter if the sexual relations commenced in 2002, or were initiated in 2008, after Mader had become an employee and officer. There is no nexus between the timing of the sexual relationship and the harm suffered by KCT.

Fourth, the obvious fact exists that there could be no preexisting sexual relationship with the client in this case, because the client was the organization (KCT). Similarly, the "preexisting sexual relationship" exception to Rule 4-1.8(j) requires a "consensual" relationship. In the context of a corporate client, the corporation must give its consent to the sexual relations. That consent would have to come from the KCT board of directors because all business and affairs of a corporation are controlled and managed by the board. See KCT Bylaws **(App. 853, § 4.1)**. See also R.S.Mo. § 351.310; *Decker v. National Accounts Payable Auditors*, 993 S.W.2d 518 (Mo. App. 1999) (the daily activities of a corporation are controlled and managed by the board of directors). Consent from the KCT board for the relationship between Respondent and Mader was never sought nor obtained in the present case.

The Disciplinary Hearing Panel correctly found that "Respondent has committed professional misconduct in violation of Rule 4-1.8(j) by: (1) engaging in a sexual relationship with Mader from and after October 2007 when Mader became a 'constituent' of KCT who regularly consulted with Respondent concerning KCT's legal matters; and (2) engaging in a sexual relationship with Mader from and after June 2009 when Mader became president of KCT and directly supervised, directed and regularly consulted with Respondent concerning KCT's legal matters."

B. Failure to Disclose Personal Relationship

The disciplinary hearing panel also correctly found that Respondent engaged in professional misconduct in failing to disclose the personal relationship with Mader to the

KCT Board and in failing to explain the risks that the representation of KCT would be materially affected by the relationship. **App. 977**. Both Rule 4-1.7 and Rule 4-1.4(b) require open communication from the attorney to the client regarding a conflict like the one in this case. Rule 4-1.7 requires disclosure of the conflict. Rule 4-1.4(b) requires disclosure of the relationship to permit the organization to make informed decisions regarding the representation. For example, a disclosure of the relationship was necessary for KCT to have made informed decisions regarding whether to hire Mader; whether to promote Mader to president; whether to increase Mader's compensation; whether to expand the scope of the audit to any potential irregularities or improprieties attendant to a situation where the company's chief officer and top attorney are involved in a close relationship; whether to approve annual legal budgets submitted by Respondent; whether to modify Mader's authority to approve for payment all legal bills submitted by Respondent; and ultimately, whether to continue to retain the services of Respondent as General Counsel and Secretary for any given period of time. Respondent denied KCT the ability to reach informed decision-making on these important issues affecting the best interests of the organization.

Count I of the Information alleged that Respondent's failure to disclose the relationship with Mader to the KCT Board of Directors was conduct involving deceit, dishonesty, fraud or misrepresentation in violation of Rule 4-8.4(c). The written decision of the Disciplinary Hearing Panel did not specifically address this allegation or make any finding as to Respondent's mental state in failing to disclose the relationship to the KCT

Board of Directors. The preponderance of the evidence supports a finding of knowing conduct involving deceit and dishonesty.

The motivation for a conscious and deliberate decision not to disclose the conflict of interest is made apparent by the testimony of Douglas Banks, the Chairman of the KCT Board of Directors. Mr. Banks testified "because of the conflict that that relationship [between Respondent and Mr. Mader] created, we would have had no choice but to vote to end Ms. Bergman's role as general counsel." **App. 259 (Tr. 168)**. In other words, Respondent would have lost her most important client and the favorable publicity that went along with it, *e.g.*, recognition as a "Super Lawyer" **(App. 679)**; the "woman in the boardroom who's running the show" **(App. 682)**; "Lawyer of the Year" (**App. 694**, ***Missouri Lawyers Weekly*** article quoting Mader) and "one of the premier railroad attorneys in the country" (**App. 682**, ***Super Lawyer*** cover story quoting Mader). At the very least, the evidence supports a culpable mental state and dishonest and selfish motive, which should be considered an aggravating factor in sanction analysis.

The evidence is undisputed that Respondent is a very sophisticated attorney whose skills and acumen are very suited for complex legal situations. As general counsel for a multi-million dollar corporation with an annual legal budget around $500,000, Respondent understood the expectations placed upon her. She certainly did not suffer from naivety or inexperience. She seemed to have otherwise navigated pretty well around a boardroom composed of business competitors. In addition to handling tension among the shareholders, Respondent's position also appears to have required her to manage

disagreements between the directors and company management. She testified she understood fiduciary obligations.

At board meetings four times a year, Respondent had active interactions with the board members. She ran the show. There were at least seventeen KCT board meetings attended by both Respondent and Mader, including the September 2007 meeting when the board and its executive committee first considered whether to "test drive" Mader for the position as top officer of the corporation. It defies credulity to believe it never occurred to Respondent that she should reveal her relationship with Mader to the board. Certainly disclosure must have occurred to Respondent after she had a brief conversation with Mr. Bump, who told her there had been a call to the "whistleblower hotline" about the relationship. Respondent did not follow up.

Respondent became actually aware of a potential ethical issue with the relationship while attending a CLE in June 2007 when the topic of sexual relations between an attorney and client was discussed. Respondent read the rule, but again took no further action.

The issue of disclosure should have resurfaced when Somervell retired and Mader took over as president in June 2009. Respondent suggested that her justification for not making a full disclosure to the board in 2007 was that Somervell knew about the relationship and that was good enough for her. With Somervell's departure, Respondent's reliance on that excuse was extinguished.

Finally, the issue of disclosure of the conflict of interest should have revealed itself

as a glaring problem in 2010 and early 2011, as the board and Respondent turned their focus to corporate ethics and averting future problems associated with conflicts of interest and nepotism, especially at the highest levels of the company. As an example, the audit was critical of Somervell for spending $100 of the company's money to buy his wife flowers for Valentine's Day. The audit was also critical that the company spent a total of $4,800 to entertain Lathrop & Gage attorneys. The audit process must have alerted Respondent to the impropriety of maintaining the secrecy of the relationship from the board of directors.

The evidence supports Informant's assertion that Respondent knew she had a fiduciary obligation to make a full disclosure of the relationship to the board of directors, but made a conscious and deliberate decision to keep it a secret for a period of 4½ years. After considering seven hours of testimony directly from Respondent, the Disciplinary Hearing Panel expressly found that Respondent was *not* a credible witness. **(App. 976. ¶ 78)**. The panel further found that Respondent engaged in dishonest billing practices. **(App. 979)**. The failure to disclose an obvious conflict of interest to the KCT board of directors was an equally, if not more, instance of dishonest conduct.

C. Tallgrass Billing Misconduct

It is undisputed that Respondent erroneously billed KCT for legal work performed for the personal benefit of Mader and Somervell with respect to the formation of Tallgrass and its purchase and attempted lease of the railcar. KCT's chief financial officer gave his estimate that this represented a $10,000 billing error. Respondent, as the supervising

and billing attorney, gave an estimate of $3,500. So long as Respondent is held accountable for the billing activity, any discrepancy in the amount at issue is not critical. What is critical is why there was an erroneous bill in the first place and what action Respondent took to correct the error. Respondent's conduct violated Rule 4-1.5(a) and 4-8.4(c). The Disciplinary Hearing Panel correctly found a violation of these rules by a preponderance of the evidence. **App. 979-980**.

The most important finding by the hearing panel with regard to this issue is found in paragraph 57 of the panel's written decision **(App. 972)**. "Respondent knew, prior to the closing of the railcar purchase, that Somervell and Mader were using the entity to make a personal purchase of the railcar, rather than on behalf of KCT." Respondent, of course, adamantly denied having such knowledge. However, there were many, many aspects of the Tallgrass transactions which point to Respondent's full awareness of the true state of facts.

There is an extensive paper trail regarding the Tallgrass transactions. The paper trail supporting the conclusion that Respondent knew who owned the railcar includes Lathrop & Gage emails, billing entries, and the firm intake form, all of which track Respondent's activities with respect to any legal matter involving Tallgrass, and the various drafts and executed documents pertaining to the creation of Tallgrass, the railcar purchase, the attempted lease transaction and various documents which identified actual, authorized KCT affiliated companies. Moreover, Respondent's skill, expertise, and acumen regarding contract law and business transactions, as well as Respondent's

position as general counsel of Tallgrass and as the designated supervising attorney for Tallgrass, with access to the entire Tallgrass file (including documents prepared by Lisa Hansen), from December 2007 to January 2012, all substantiate Respondent's knowledge of ownership. Taken together, there is overwhelming evidence that Respondent's denial of knowledge of the ownership structure and the purpose of the railcar purchase is not credible. Importantly, the panel noted Respondent's lack of credibility after listening to her testify for at least six hours: "Respondent's testimony comprised approximately 1 ½ hours of the first day of the hearing and the entire second day. To the extent that her testimony conflicts with or is inconsistent with the findings of the panel set forth above, the panel has determined that Respondent's testimony was *not* credible." **App. 976.**

Even if the panel's credibility determination is given little weight, so as to give Respondent the benefit of the doubt that she did not find out about the ownership of Tallgrass until October or November 2011, Respondent's failure to take prompt corrective action with regard to the Tallgrass billing is inexcusable. Giving Respondent the benefit of the doubt as to her knowledge of the ownership of the railcar, Respondent is nevertheless guilty of making billable hours and law firm collections her priority over attending to the fiscal interests of her most important client by correcting a serious billing mistake.

D. Failure To Protect KCT's Best Interests

KCT was entitled to expect that its chief legal officer, Respondent, would protect the company's legal interests with zeal, diligence, and competence. One of Respondent's

duties was to oversee KCT's officers and their appropriate use of corporate assets. Likewise, Respondent had a duty to oversee that KCT's corporate officers, Mader and Somervell, met their fiduciary duties by avoiding conflicts of interest, and not improperly diverting corporate opportunities. She 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. She had a responsibility to safeguard KCT's relationship with important vendors, such as Watco. From April 2011 to January 2012, Respondent was tasked with overseeing compliance with the newly adopted corporate ethics policy, which prohibited nepotism, undisclosed personal transactions with vendors, and undisclosed outside business activities. In these respects, Respondent failed to fulfill her professional duties to the corporation under Rule 4-1.13. Rule 4-1.13 is tailor-made for corporate clients such as KCT, and it is particularly applicable to those attorneys who serve as general counsel to an organization.

Respondent had a high level of knowledge of Mader's activities with Tallgrass, Black Boot, and Interlocker at all times from July 2007 to January 2012. Respondent condoned and encouraged these extracurricular activities and even personally assisted Mader in connection with these endeavors. Rather than "proceed as is reasonably necessary in the best interests of the organization [KCT]" as required by Rule 4-1.13(b), Respondent acted in *Mader's* best interests.

Rule 4-1.13(b) guides corporate attorneys confronting the possibility that an officer or employee is acting in a way that violates a legal obligation to the corporation.

The rule instructs the lawyer to 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.

The rule goes on to suggest specific measures that may be taken by the corporate attorney to address the misfeasance of the officer or employee. The suggested corrective measures include, in serious instances of misconduct, referral of the matter to the "highest authority that can act on behalf of the organization," which in this case was the board of directors. Given what Respondent knew about Mader's conduct, she was ethically bound to have gone to the corporation's board of directors with a recommended plan to stop to any further misconduct.

Comment 3 to Rule 4-1.13 expressly notes that review by the "board of directors may be required when the matter is of importance commensurate with their authority." "The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body." Comment 4, Rule 4-1.13. See also KCT Bylaws **(App. 853, § 4.1)** (all business and affairs of a corporation are controlled and managed by the Board); R.S.Mo. § 351.310; *Decker v. National Accounts Payable Aud**itors***, 993 S.W.2d 518 (Mo. App. 1999) (the daily activities of a corporation are

controlled and managed by the board of directors). Respondent's failure to take any corrective action was a violation of Rule 4-1.13(b).

ARGUMENT

II.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LAW LICENSE FOR AN INDEFINITE PERIOD WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE SUSPENSION IS THE BASELINE STANDARD UNDER THE ABA STANDARDS, PRIOR MISSOURI CASES, AND THE RECOMMENDATION OF THE PANEL IN THAT RESPONDENT KNOWINGLY FAILED TO DISCLOSE A SERIOUS CONFLICT OF INTEREST OVER A LONG PERIOD OF TIME AND VIOLATED MULTIPLE OTHER RULES OF PROFESSIONAL CONDUCT.

In determining a sanction for attorney misconduct, the Missouri Supreme Court historically relies on three sources. The Court looks to its own precedent to maintain consistency, fairness, and ultimately, to accomplish the well-established goals of protecting the public and maintaining the integrity of the profession. The Court also examines the attorney's conduct in accordance with the theoretical framework set forth in the *ABA Standards for Imposing Lawyer Sanctions* (1991 ed.). The *Standards* should provide a baseline sanction for specific acts of misconduct, taking into consideration the

duty violated, the lawyer's mental state (level of intent), and the extent of injury or potential injury. Once the baseline sanction is known, the ABA *Standards* allow for consideration of aggravating and mitigating circumstances. See *In re Ehler*, 319 S.W. 3d 442, 451 (Mo. banc 2010). In addition to precedent and the ABA *Standards*, the Court also considers the recommendation of the Disciplinary Hearing Panel.

This Court's precedent, the ABA *Standards* analysis, and the DHP recommendation support imposition of a long-term suspension. Many prior cases from this Court have imposed an actual suspension for professional misconduct involving conflict of interests. *See In re Carey*, 89 S.W.3d 477 (Mo banc 2002) (one-year suspension); *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995) (six-month suspension); *In re Snyder*, 35 S.W.3d 380 (Mo banc 2000) (six-month suspension).

Because Respondent's conflict of interest was accompanied by conduct involving dishonesty, the length of the suspension should be substantial. The disciplinary hearing panel recommended suspension with no leave to apply for reinstatement for two years. Informant submits that the panel's recommendation is appropriate when the totality of the record is considered. The ABA *Standards* analysis, including consideration of the presence of several aggravating factors, also points to an actual suspension.

The panel concluded that Respondent committed multiple violations of the conflicts rules (4-1.7 and 4-1.8(j)), the dishonesty rule (4-8.4(c)), the excessive fee rule (4-1.5), and various violations of the rule governing her ethical duties as an attorney representing an organization (4-1.3). Sanction analysis requires identification of the most

serious instance of misconduct, with the additional rule violations to be considered in aggravation of sanction. Here, the conflict of interest inherent in engaging in an undisclosed sexual relationship with the client's chief executive officer, without the knowledge or consent of the client (KCT), is believed to be Respondent's most serious instance of misconduct.

ABA Baseline Sanction: Suspension

The applicable "black letter rule" is Standard 4.3. It is set forth below. Standard rule 4.31, concerning disbarment, is omitted.

> 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
>
> 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
>
> 4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client

> may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

Suspension is the appropriate baseline sanction in this case because the evidence established the following.

Duty Violated

There is no question that the duties violated by Respondent were owed to the client, and that the client was KCT as managed and controlled by its board of directors. The nature of the legal profession necessitates the utmost good faith and the highest loyalty and devotion to a client's interests. The relationship between attorney and client is fiduciary and binds the attorney to scrupulous fidelity to the cause of the client, which precludes the attorney from gaining personal advantage from abuse of that reposed confidence. *Shaffer v. Terrydale Management Corporation*, 648 S.W.2d 595, 605 (Mo. App. 1983).

Respondent knew or should have known that, by maintaining a close personal relationship, including sexual relations, with an officer and trusted constituent of an important and valued client, a conflict of interest had arisen under Rule 4-1.7(a) and the prohibition under Rule 4-1.8(j) was applicable.

State of Mind

The record overwhelmingly suggests that Respondent knowingly engaged in a

conflict of interest and consciously and deliberately failed to disclose the circumstances of the conflict for an entire 4½-year period. This is not a situation where a lawyer was careless in evaluating her professional obligations. This is not a situation where a lawyer had a momentary lapse in judgment or ethics. There is not a matter of oversight or mere inattention to detail. Rather, the evidence shows that Respondent's misconduct was characterized by, at the least, a knowing mental state. Her misconduct was dishonest and deceitful.

Client Injury and Potential Injury

The fact that KCT paid $10,000 to Lathrop & Gage for legal bills fraudulently submitted by Respondent should not be overlooked, but such harm is not the most significant consequence suffered by the client in the present case. In retrospect, much of the potential injury to the client cannot be evaluated with any sense of certainty. If Respondent had been replaced by a substitute general counsel in October 2007 when Mader was hired, likely the Tallgrass transactions would never have occurred. 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.

Tallgrass represents several distinct types of harm that extend beyond a billing problem. No company wants its employees receiving kickbacks from suppliers. There are other reasons why companies insist upon disclosure and vetting with regard to employees' outside business activities. Tallgrass could have resulted in disaster between KCT and its most important supplier, Watco. It is likely that KCT funds were

misappropriated by Mader and/or Somervell to pay for the extensive renovations to the railcar. Those funds would never have been diverted from the company's coffers if the railcar was never purchased. Company funds could have been saved if Respondent reported the Tallgrass situation to the KCT board in February 2008 when the operating agreement was provided to Respondent and when the ownership, purpose, and management of the company was discussed at meetings attended by Respondent. Likely the scope of the audit in 2009 and 2010 would have encompassed a private railcar owned by Mader and Somervell had the KCT Board and shareholders become aware of this company during the audit period.

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. Mader was highly compensated, over $200,000 per year, and yet the evidence shows that he did not give his full and exclusive attention to the business of KCT. The potential for a $150,000 severance payment to Mader regarding his employment contract illustrates another type of potential injury. As it turns out, Mader was terminated "for cause" and, thus, the severance payment was not an issue. The ABA *Standards*, however, require consideration of potential as well as actual, injury.

Some of the harm and injury suffered by the client is not quantifiable by objective standards or monetary terms. There was sadness experienced by many people at the sudden collapse of an attorney-client relationship that had lasted for more than one

hundred years. Across the state, there are probably not many clients who can boast about having the same law firm for more than a century. In more practical terms, the sudden discharge of Respondent from the general counsel position caused KCT to be without a trusted advisor to help right the ship during a time of upheaval and crisis. It was enough that the company had to fire its president; the KCT board was forced into a position of having to fire its top officer and its top attorney on the same day. That put the company in a vulnerable position of uncertainty and disarray. Although a team of lawyers stepped up as the events in late January and early February 2012 unfolded, no attorney nor group of attorneys had the type of institutional knowledge and experience needed for a seamless transition. These were difficult and anxious times for the KCT board members and the company's interim management team. The absence of a trusted general counsel created a huge void for the company.

No doubt things went seriously awry in 2012 with respect to the anticipated legal work for KCT and its legal priorities set forth in the 2012 budget, which had just been compiled and approved a few months earlier. The KCT board members and its shareholder representatives spent untold numbers of hours coordinating with auditors and attorneys with respect to various legal proceedings and investigations as a result of the circumstances that led to the firing of Mader and Respondent.

Aggravating Circumstances

Aggravating circumstances shown by the evidence may be used to increase the degree of discipline to be imposed. In that regard, Section 9.2 of the *ABA Standards for*

Imposing Lawyer Sanctions lists ten types of aggravating factors. Many compelling aggravating factors are present in this case.

Dishonest or Selfish Motives. The evidence suggests that Respondent made a conscious and deliberate decision not to disclose her personal relationship with Mader to the KCT board because such disclosure would likely have resulted in Respondent being discharged as general counsel. Respondent would not have experienced the prestige and favorable publicity of representing the largest railroad terminal in the country.

Pattern of Misconduct. The conflict of interest and the failure to disclose the conflict of interest took place over a period of 4½ years, from September 2007 (if not sooner) through the end of January 2012. There was never a point in that time when the conflict did not exist or when Respondent's professional duties to the client were not being violated. The circumstances regarding Tallgrass endured over a similar period of time, from December 2007 when the railcar was purchased and the company created to the end of January 2012.

Multiple Offenses. It is not surprising that a prohibited conflict of interest will give rise to various other instances where a lawyer's professional duties have been violated. In the present case, the violations fall into four categories: conflict of interest, Rules 4-1.7(a) and Rule 4-1.8(j); failure to disclose the relationship to the client, Rules 4-1.4 and 4-8.4(c); improper billing practices, Rules 4-1.5(a) and 4-8.4(c); and failure to proceed in the best interests of the client, Rule 4-1.13. There have been multiple offenses.

Refusal to Acknowledge Wrongful Nature of Conduct. The disciplinary hearing

panel was particularly disturbed that Respondent refused to acknowledge the wrongful nature of her conduct. **App. 983**. The panel noted that Respondent "persistently and adamantly denied that her representation of KCT involved any violation of the rules of professional conduct." The panel's observation needs no elaboration.

Substantial Experience in the Practice of Law. All of the misconduct at issue was carried out by an attorney with more than ten years of legal experience. Respondent's significant legal experience is set forth in the record, including the biographical information set forth in pages 954-958 of the Appendix and the pair of articles featuring Respondent set forth in pages 679-683 and 694-695 of the Appendix.

In view of the aggravating factors, the baseline standard of suspension, prior Missouri Supreme Court case law, and the panel's recommendation, an indefinite suspension with no leave to apply for reinstatement for a period of twenty-four months is warranted. Respondent puts the public at risk because she failed to properly address conflicts of interests and her disturbing lack of candor towards clients. Sadly, there are times when lawyers "just don't get it." This is one of those times. Respondent should be given an opportunity to reflect upon her conduct and the stringent nature of her fiduciary responsibilities towards a client before she is allowed to resume the practice of law in this state.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court to find that Respondent is guilty of professional misconduct by violating Supreme Court Rules 4-1.4(b); 4-1.5(a); 4-1.7(a), 4-1.8(j); 4-1.13, and 4-8.4(c); to suspend Respondent's law license for an indefinite period with no leave to apply for reinstatement until after the expiration of two years; and to tax all costs in this matter to Respondent, including the $1,000 fee pursuant to Rule 5.19(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2015, a copy of Informant's Brief is being served upon Respondent and Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(c);

3. Contains 20,326 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

_____

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