IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
WILLIAM STANLEY DANIEL,	)	**Supreme Court No. SC91656**
	)	
Respondent.	)	

INFORMANT'S REPLY BRIEF

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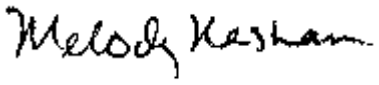

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ARGUMENT

I.

THE RECORD AS SUBMITTED BY INFORMANT IS PROPERLY THE BASIS OF THIS COURT'S *DE NOVO* REVIEW AND RESPONDENT'S COMPLAINTS REGARDING THE RECORD AS SUBMITTED ARE UNTIMELY.

Respondent seems to misunderstand the posture of this case. Disciplinary cases are unique. There is no underlying order or determination by a tribunal of which this Court is conducting an appellate review. This Court has exclusive, original jurisdiction of disciplinary matters. "The power to admit and license persons to practice as attorneys and counselors in the courts of record of this state, or in any of them, is hereby vested exclusively in the supreme court and shall be regulated by rules of that court." § 484.040 RSMo 2000. The Disciplinary Hearing Panel is tasked only with making a recommendation regarding discipline to this Court. Rule 5.16(c), (d), (g) (2009). The Disciplinary Hearing Panel's recommendation is purely advisory. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005); *see also* Rule 5.16(g) (2009).

The Supreme Court of Missouri seeks to determine the character and the fitness of attorneys to practice law in this state. This Court is not limited to the evidence presented before the advisory Disciplinary Hearing Panel. It considers the evidence it determines is necessary and relevant to decide whether discipline is warranted to protect the courts, the public, and the profession. By granting Informant's motion to supplement the record in

this matter, the Court decided to consider the additional evidence submitted in its review of Respondent's fitness to continue to practice law in Missouri.

This Court in *In re Cupples*, 952 S.W.2d 226, 233 (Mo. banc 1997), emphasized that it would "focus upon the merits of the disciplinary proceedings, as should the attorneys participating in those cases." Mr. Cupples argued that he was not afforded the opportunity to take and record in full the evidence he wished to introduce. *Id*. at 232. The Court rejected his argument, noting that although the Master had ruled certain evidence inadmissible, Mr. Cupples had, in fact, made an offer of proof, and he had the opportunity in this Court "to brief and argue the facts and the law that he believed were pertinent to this Court's deliberations." *Id*. at 232-233.

The Court in *Cupples* also noted that a procedural error, if one had been made, would not have been of assistance to Cupples.

> This Court's inherent right to discipline attorneys has been recognized as 'an inherent power' of this Court. *In re Sparrow*, 90 S.W.2d 401, 403 (Mo. banc 1935). Mere procedural error is insufficient to divest our jurisdiction. The purpose of disciplinary proceedings is to protect the public and the profession from persons unfit to practice law. *In re Lang*, 641 S.W.2d 77, 79 (Mo. banc 1982).
>
> While rights of great importance to the individual, and the bar as well, are litigated in

> disbarment cases, and loose procedure should not be countenanced, the courts have repeatedly held that the action being in the nature of an inquiry for the protection of the courts, the public and the profession, strict rules of procedure should be relaxed to the end that the fitness of an attorney to continue in the profession should be determined on the merits rather than on less worthy grounds.

In re Pate, 232 Mo.App. 478, 119 S.W.2d 11, 24 (1938).

Mere procedural error by the Advisory Committee or the Master also is insufficient to implicate due process rights. This Court conducts the judicial component of the attorney disciplinary proceedings. *In re Mills*, 539 S.W.2d 447, 450 (Mo. banc 1976). This Court is charged with determining all fact issues necessary to a decision. *In re Frick*, 694 S.W.2d 473, 474 (Mo. banc 1985). Cupples was not precluded from arguing his exceptions to the Master's report in proceedings before this Court. Rule 68.03(g). Nor was Cupples precluded from making any argument due to a lack of evidentiary support in the record. Cupples was given a full opportunity to

> brief and argue the facts and the law that he believed were pertinent to this Court's deliberations.

Cupples, 952 S.W.2d at 232-233. "The basic right of an attorney informed against cannot reasonably be of a higher order, or more sacred, than the right of the courts and the public to be protected from any professional misconduct or unfitness of those having licenses to perform the important functions of the legal profession." *In re Connor*, 207 S.W.2d 492, 497 (Mo. banc 1948), citing *Grievance Committee of Hartford County Bar v. Broder*, 112 Conn. 263, 152 A. 292 (1930).

The Oklahoma disciplinary cases cited by Respondent in his brief actually support Informant's position that this Court may, and properly did, supplement the record as it existed before the Disciplinary Hearing Panel. "A complete record is necessary for review of a bar disciplinary proceeding. The material to be reviewed is never to be deemed settled beyond our ability to expand it. The record always remains within this court's plenary power to order its supplementation." *State ex rel. Oklahoma Bar Ass'n v. Carpenter*, 863 P.2d 1123, 1129 n. 14 (Okla. 1993), citing *State ex rel. Oklahoma Bar Ass'n v. Moss*, 794 P.2d 403, 404 (Okla. 1990); *State ex rel. Oklahoma Bar Ass'n v. Samara*, 683 P.2d 979, 983 (Okla. 1984); and *State ex rel. Oklahoma Bar Ass'n v. Armstrong*, 791 P.2d 815, 816 (Okla. 1990). See also *State ex rel. Oklahoma Bar Ass'n v. Bolton*, 880 P.2d 339, 345 n. 19 (Okla. 1994) ("The record always remains within this court's plenary power to expand by an order calling for its supplementation." (citations omitted)). *Application of Sanger*, 865 P.2d 338, 343 n. 24 (Okla. 1993) ("Although the proof to be reviewed is *never* to be deemed *settled beyond this court's power to order*

that it be expanded, no additional evidence is needed for today's review." (emphasis original)).

Further the Oklahoma court's discussion regarding the *de novo* review applicable in its disciplinary proceedings also supports the supplementation of the record.

> The distinction between our *de novo* consideration that is every lawyer's constitutional due and the other two forms of corrective process *is critical.* It is mandated by this court's unique, constitutionally invested status as a tribunal that exercises exclusive, original and nondelegable cognizance over legal practitioners and over the regulation of the practice of law. *Every aspect of a disciplinary inquiry before any Oklahoma Bar Association's [Bar] authority, from beginning to end, falls under that jurisdictional rubric.* Since this power cannot be *shared* with any other institution, *the entire process* must be given our *de novo* consideration. Stated another way, since the findings of fact made by the PRT are neither binding nor persuasive, and do not constitute *another tribunal's decision, it is this court's duty to pass on the sufficiency and weight of the evidence as a tribunal of first instance with original and exclusive cognizance of the case.*

State ex rel. Bar Ass'n v. Livshee, 870 P.2d 770, 773 (Okla. 1994) (emphasis original) (footnotes omitted). The other Oklahoma cases cited by Respondent, similarly, are of no

assistance to him. "Because this court's cognizance of disciplinary proceedings cannot be shared with any other institution, every aspect of the Bar's adjudicative process must be supervised by our *de novo* consideration. This attribute of nondelegable jurisdiction serves to distinguish the conduct of bar disciplinary functions from trial *de novo* – a retrial in a different court – or even from *de novo* appellate review on the record, which stands for an independent, non-deferential examination of another tribunal's record." *State ex rel. Oklahoma Bar Ass'n v. Carpenter*, 863 P.2d at 1128 n. 9. Finally, *Spielmann v. Hayes*, 3 P.3d 711, 712 (Okla. App. 2000), cited by Respondent, is not a disciplinary case, but instead involved an appeal to the Court of Civil Appeals of Oklahoma from a trial court's order regarding a protective order under the Oklahoma Protection from Domestic Abuse Act. The *de novo* appellate review applied in *Spielmann* is not the *de novo* review applicable in disciplinary cases, as detailed above.

Oklahoma law, of course, is not precedential in Missouri. The disciplinary process in Oklahoma, however, is similar to that in Missouri in that the Oklahoma Supreme Court has exclusive jurisdiction over disciplinary matters, and a hearing panel makes a recommendation to the court that is advisory only. Okla. Stat. tit. 5, Ch. 2, § 13; Okla. Stat. tit. 5, Ch. 2, App. 1-A, § 6.13.

The Missouri cases cited by Respondent as defining a *de novo* review do not apply to this case. *Sims v. Wyrick*, 552 F.Supp. 748, 750 (W.D. Mo. 1982), involved a *de novo* review, as defined by the Federal Magistrates Act, by a federal district judge of a federal magistrate's recommendation that a petition for *habeas corpus* be denied. *Niehaus v. Madden*, 155 S.W.2d 141, 142 (Mo. 1941), involved an appeal from a trial

court's order regarding a contract to adopt and will contest. *THF Chesterfield North Dev. LLC v. City of Chesterfield*, 106 S.W.3d 13, 18 (Mo. App. 2003), involved the judicial review of a decision by a city planning commission by the Missouri Court of Appeals. The *de novo* review in the *Chesterfield* case was governed by statute, § 536.150 RSMo. 2000. Hence, they involved a review of another tribunal's findings and holding and/or a review governed by a statute not applicable here.

Respondent's allegation (Resp. Brief at p. 16) that the October 7, 2008, letter from Thomas F. Simon to Respondent, and this Court's February 2, 2009 Order were not in the record is without merit. The October 7, 2008 letter was in Exhibit 4 admitted at the hearing before the Disciplinary Hearing Panel on November 5, 2010. (App. A180-182; A203-206). The Disciplinary Hearing Panel's recommendation specifically references the October 7, 2008 letter in its Finding numbered five. (App. A365.)

With regard to the February 2, 2009 Order of this Court, Respondent submitted it to the Disciplinary Hearing Panel himself with his January 25, 2011 Respondent's Reply Brief on Due Process. (App. A349-353.) Respondent also admits that the Disciplinary Hearing Panel was in possession of this Order, and that the Presiding Officer provided a copy of it to Respondent. (Respondent's Brief at p. 23.) Further, the Disciplinary Hearing Panel's recommendation specifically references the February 2, 2009 Order in its Finding numbered eight. (App. A366.) Respondent's complaint that those documents were not in the record is disingenuous. Moreover, both of those documents are records of this Court of which the Court may take judicial notice. *In re Murphy*, 732 S.W.2d 895, 902 (Mo. banc 1987), *citing McIlvain v. Kavorinos*, 236 S.W.2d 322, 326 (Mo. banc

1951) (the Court "may of course take judicial notice of [its] own records for proper purposes").

Finally, the Record and Motion to Supplement the Record in this matter were filed on March 29, 2011. Respondent registered no objection until he submitted his brief on or about June 2, 2011 (and which was not filed until September 6, 2011). Respondent complains that the motion to supplement was granted before he could object, but provides no explanation as to why he did not ask for reconsideration of that order, or otherwise object in a timely manner. Further, he does not proffer a substantive argument as to why these documents are not admissible in this proceeding. His late complaint should not be countenanced.

In the interest of protecting the courts, the public and the profession, the record as filed with this Court properly should be reviewed in its entirety to determine the merits of this disciplinary proceeding. Respondent's protest regarding the supplementation of the record should be denied.

II.

RESPONDENT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BECAUSE HE WAS SENT NOTICE REGARDING THE IMMINENT SUSPENSION OF HIS LICENSE TO PRACTICE LAW, THE NOTICE WAS NOT RETURNED, AND THE COURT HAD NO REASON TO BELIEVE RESPONDENT HAD NOT RECEIVED THAT NOTICE.

Respondent complains that the notice by regular mail that he was sent by this Court's Bar Enrollment Director was insufficient and violated his due process rights. He argues that Certified Mail Return Receipt Requested or personal service by a Deputy Sheriff or Special Process Server would have passed constitutional muster. (Respondent's Brief at p. 18.) The specific forms advocated by Respondent are not required. Rather, as delineated in Informant's Brief, notice reasonably calculated, under all the circumstances, to apprise interested parties of the potential taking is sufficient. *Jones v. Flowers*, 547 U.S. 220, 226, 126 S.Ct. 1708, 1713, 164 L.Ed.2d 415 (2006). As in *Bhatti*, the notice sent by the Bar Enrollment Director, by regular mail, was sufficient. *In re Foreclosures of Liens for Delinquent Land Taxes by Action in Rem Collector of Revenue v. Bhatti*, 334 S.W.3d 444, 447-449 (Mo. banc 2011).

Respondent also claims that he "was denied his due process rights on November 5, 2010, when he was not allowed to put on evidence in mitigation, explain, testify at length in his own defense, and make a closing argument to the DHP." (Respondent's Brief at p.

13 (emphasis original).) Respondent is being afforded a full opportunity to present his defense to this Court, the ultimate decision-maker. Respondent did testify at the November 5, 2010, hearing, although perhaps not "at length" as he wished. (App. A162-198). Also, the Disciplinary Hearing Panel admitted every exhibit Respondent offered in that hearing. (App. A192.) Respondent argued briefly that he was denied due process. (App. A192 – A194.) The Presiding Officer then requested briefing on that issue. (App. A194.) Respondent indicated he "had some explanation of the evidence" and "by way of mitigation," but his explanations were interrupted. (App. A197.)

Respondent, however, submitted two briefs (with exhibits) to the Disciplinary Hearing Panel, ostensibly, regarding only due process, but he included in that briefing argument regarding the evidence both as to the due process and unauthorized practice of law issues. (App. A257-A 284; A329-A344) Respondent's argument has not been limited in the briefing, or otherwise, in this Court. As "[t]his Court conducts the judicial component of the disciplinary proceedings," Respondent has been afforded the opportunity to fully present his case. *Cupples*, 952 S.W.2d at 232.

Further, as noted, *supra*, mere procedural error, if indeed one occurred, is not enough to divest this Court of its jurisdiction over this disciplinary matter. *Cupples*, 952 S.W.2d at 232. Rather, this Court will rule on the merits and determine whether discipline is necessary to protect the courts, the public, and the profession. This Court, not the Disciplinary Hearing Panel, makes the ultimate decision as to discipline, and Respondent has not been precluded from presenting any evidence to this Court. Respondent answered the Information, he appeared and testified before the Disciplinary

Hearing Panel, he filed two briefs with the Disciplinary Hearing Panel, he filed a brief with this Court in which he had the opportunity to argue the facts, law and process, and he will have the opportunity to appear and argue orally his position. As in *Cupples*, *supra*, Respondent has, and will have, the opportunity to "brief and argue the facts and the law that he believed were pertinent to this Court's deliberations." *Id*. at 232, 233.

Respondent again complains in his second point relied on that he had no opportunity to respond to the record as supplemented. He complains specifically, however, only about whether a prior admonition issued to him arose from a personal injury claim or a property damage claim. (Respondent's Brief at pp. 15-16.) In any event, he accepted that admonition (after Informant's counsel mailed it to him by regular mail because Respondent failed to pick up the certified mail by which it was first sent). (App. A405 - 412.) He doesn't object specifically or substantively to other documents.

He also complains that Informant didn't place an asterisk next to any documents listed in the appendix. When Informant submitted its brief, those documents had been admitted into the record, over a month prior, *unopposed*. There was nothing untoward regarding the Table of Contents in Informant's Appendix.

Respondent's due process rights were not violated. He was entitled to notice reasonably calculated to apprise him of the imminent loss of his license to practice law. *Flowers*, 547 U.S. at 226, 126 S.Ct. at 1713. The notice sent to Respondent by the Bar Enrollment Director met that standard.

III.

RESPONDENT'S DUE PROCESS RIGHTS WERE NOT VIOLATED AND HIS SUSPENSION DID NOT VIOLATE SEPARATION OF POWERS.

Respondent's argument that the Court should have spent $5.59 to send him notice of his imminent tax suspension by Certified Mail Return Receipt Requested specifically was rejected by this Court in *Bhatti*, 334 S.W.3d at 450:

> The cost of notices sent by the statutorily required first-class mail is not relevant to the analysis of whether a due process violation occurred under *Mullane* [*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950),] or [*Jones v.*] *Flowers*, [527 U.S. 220, 126 S.Ct. 1708 (2006)]. The issue here is whether the sheriff knew or had reason to know that the notice he sent to Owner was ineffective, and if so, whether the sheriff took reasonable, additional steps to notify Owner of the potential taking of the property. *Flowers*, 547 U.S. at 234, 126 S.Ct. 1708. The circuit court found that, despite believing that Owner did not receive the notice, there was no due process violation as Owner failed to present evidence that the sheriff knew or should have known that the notice of the tax sale was ineffective. Under these facts,

> *Flowers* does not require the sheriff to take any additional steps to notify the owner.

In this case, the Bar Enrollment Director had no reason to believe that Respondent did not receive the notice. Respondent admits that the address on the notice the Court sent to him is correct. (App. A165.) Informant presented evidence that the notice was not returned to the Court. (App. A396, ¶ 8.) Respondent did not present any evidence that the Court had any reason to believe that the notice it sent was ineffective. Due process did not require the Bar Enrollment Director to send the notice by Certified Mail.[1]

Respondent argues that OCDC's application to him of the prohibition against the unauthorized practice of law is "untenable." That argument is without basis since Rule 5.27 specifically outlines the necessary steps a suspended or disbarred attorney must take to care for his or her clients. Informant has no information establishing that Respondent ever complied with Rule 5.27, and posits that he must not have since he represented a client in St. Louis County on July 8, 2010, and July 28, 2010, after even he admits he had actual notice on or about February 9, 2010 from Chief Disciplinary Counsel Alan D. Pratzel that his license had been suspended. (See App. A276 – 278; A181; A276-278; A207 – 225, ¶ 16.F.) Further, Respondent admits that he called the Court in early February 2010 and was told he had been suspended. (App. A17 – 18.) Finally, Respondent admits in his brief that, on February 9, 1010, he "very circuitously [] learned

[1] Additionally, as detailed on page 29 of Informant's Brief, Respondent has a history of not claiming certified mail.

by hearsay that his "license was suspended." (Respondent's Brief at p. 25.) Respondent, however, ignored the information given to him, *i.e.*, that his license to practice law had been suspended, and continued to practice law in Missouri in defiance of this Court's order.

Respondent's "separation of powers" argument thread also is of no assistance to him. Discipline is imposed solely by this Court. It is not imposed by the Missouri Department of Revenue, and there are no facts in this case suggesting otherwise. It should not be surprising that the Supreme Court of Missouri expects Missouri attorneys to comply with the laws of this State. The Court, through its Rules, specifically includes the payment of Missouri taxes and filing of Missouri tax returns, which is required by law, in its expectations of Missouri attorneys. Rule 5.245 (2008).

IV.

THE UNAUTHORIZED PRACTICE OF LAW IS NOT A VAGUE CONCEPT.

Respondent's arguments that what constitutes the "unauthorized practice of law" is vague, and that his appearances post-suspension were *pro bono* and therefore not the unauthorized practice of law, are without merit. The law of Missouri clearly defines Respondent's conduct as the practice of law:

> The **"practice of the law"** is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or anybody, board, committee or commission constituted by law or having authority to settle controversies.

§484.010 RSMo 2004.[2] In his Answer, Respondent admitted "represent[ing] a party in the Circuit Court of St. Louis County in Judge David Lee Vincent's court on or about

[2]Of course, the practice of law ultimately is defined by the Court. "Although the legislature may assist the court by providing penalties for the unauthorized practice of law and thus may define that term, the legislature may in no way hinder, interfere, or frustrate the court's inherent power to regulate the practice of law." *In re Thompson*, 574

January 8, 2010." (App. A68, ¶ 6). In his Brief on Due Process Issues, Respondent admits he filed a Motion to Dismiss on July 8, 2010, in St. Louis County Circuit Court, after he had actual knowledge of his suspension and tax situation from the Court, the MDOR, and the Chief Disciplinary Counsel. (App. A276 - 278.) At the Panel hearing, he stipulated that he filed another Motion to Dismiss in Missouri on July 28, 2010, which was after he was served with the Information regarding this case. (App. A181; A276 – 278; A207 - 225, ¶ 16.F.) Also at the Panel hearing, Respondent admitted that the "charity work for [his] minister" was the practice of law. (App. A174.)

> Presiding Officer: Okay. You admit that, that you were practicing on the occasions mentioned in that affidavit?
>
> Mr. Daniel: It was charity work for my minister on that date.
>
> Presiding Officer: Whatever. I'm not asking you about what that case was about. You were practicing as a lawyer on those dates?
>
> Mr. Daniel: Yes.

S.W.2d 365, 367 (Mo. banc 1978). "It is the responsibility of the judiciary to determine what constitutes the practice of law, both authorized and unauthorized." *In re First Escrow, Inc.*, 840 S.W.2d 839, 842 (Mo. banc 1992). Respondent's conduct, however, isn't even a close call.

(App. A174.)[3] Respondent's practice in St. Louis County Court after the suspension of his license, even if only in service to his minister and without pay, constituted the practice of law, and it was unauthorized on those dates.

[3] The Presiding Officer references an affidavit, but Informant's counsel referred to the evidence as "pleadings that Mr. Daniel filed in July of this year in the Missouri court." (App. A173.) In any event, Respondent admitted that he knew the practice of law included "charity work." (App. A174.)

V.

THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW WITH NO LEAVE TO APPLY FOR REINSTATEMENT UNTIL ONE YEAR AFTER HE FILES WITH THIS COURT A CERTIFICATE OF TAX COMPLIANCE ISSUED TO HIM BY THE MDOR BECAUSE RESPONDENT KNOWINGLY ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW.

Respondent's argument that "[n]o further penalty is required or indicated" ignores the elephant in the room: Respondent wholly disregarded this Court's order of suspension and he still has not cured his tax deficiencies. Informant posits that imposing no further discipline would send the wrong message to the bar, *i.e.*, willfully ignore a Supreme Court suspension order by continuing to practice law and there might be no further consequence.

This Court recently reprimanded an attorney who engage in the unauthorized practice of law while suspended for failing to pay his bar enrollment fee. *In re Kennedy*, No. SC91979 (Mo. banc, Aug. 29, 2011). At the time of this Court's discipline, however, Mr. Kennedy had cured his deficiency and his license was in good standing with this Court. His reprimand, therefore, constituted additional discipline for his rule violations. If Respondent is issued no discipline in excess of the suspension already in place, his further misconduct would go undisciplined. Informant requests this Court to discipline

Respondent and to suspend his license to practice law for at least one year after he obtains and files with the Court a Certificate of Tax Compliance issued to him by the MDOR.

Finally, Respondent's repeated reference to the burden of proof in a disciplinary matter must be corrected. Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Crews*, 159 S.W.3d at 358. The burden is not "clear and convincing."

CONCLUSION

For the reasons set forth above and in its initial brief, the Chief Disciplinary Counsel respectfully requests this Court:

(a) find that the notice provided to Respondent satisfied his due process rights;

(b) find that Respondent violated Rule 4-5.5 (2007);

(c) suspend Respondent indefinitely, with leave to apply for readmission one year after he files a Certificate of Tax Compliance with this Court; and

(d) tax all costs in this matter to Respondent, and, pursuant to Rule 5.19(h) (2010) assess Respondent $1,000.00 fee for suspension.

Respectfully submitted,

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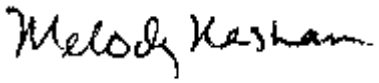
CHIEF DISCIPLINARY COUNSEL



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2011, two copies of Informant's Reply Brief and a CD containing the Reply Brief in Microsoft Word format have been sent via First Class mail to:

William Stanley Daniel
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St. Louis, MO 63119-4938

Melody Nashan

CERTIFICATION: RULE 84.06(c)

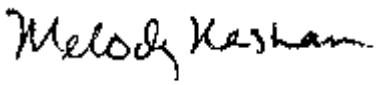
I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

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

3. Contains 4,646 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro Security Agent software was used to scan the disk for viruses and that it is virus free.



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