Case No. SC94181

IN THE MISSOURI SUPREME COURT

In re Naren Chaganti,

Respondent

RESPONDENT'S BRIEF

/s/ Naren Chaganti
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STATEMENT OF JURISDICTION

This being a disciplinary proceeding jurisdiction in this Court is predicated under Article V, § 5 of the Missouri Constitution.

STATEMENT OF FACTS

A. About Respondent

Naren Chaganti, Missouri bar No. 53,401, has been a member of the Missouri Bar since September 19, 2001. He has never been disciplined by any state bar. He obtained Bachelor's and Master's degrees in Electrical Engineering (Telecommunications & Control Systems Engineering) from India and another Master's degree in Computer Science Engineering in the United States before obtaining a Juris Doctor degree from the George Washington University Law School in Washington, D.C. He is admitted to Virginia Bar and the District of Columbia Bars (both of which are currently inactive memberships) and the California Bar before he obtained the Missouri Bar membership.

B. Respondent's purchase of Whispering Oaks

In 2008 Naren Chaganti purchased a business in Wildwood, Missouri, and named it Whispering Oaks RCF Management Co Inc ("Whispering Oaks"). At all times relevant, he was the sole share holder, officer, employee and manager of Whispering Oaks. The business was a residential care facility, and had a building that was served with 11 centralized air-conditioning units.

C. First contact with Manse

In early spring of 2009 Lafayne Manse, a worker for the local electrical utility AmerenUE, arrived on the property seeking to read the meters for his employer. Conversation ensued and Manse introduced himself as an HVAC technician and offered to service the 11 air-conditioning units for a per-unit price of about $60 once in spring and once in autumn. Manse gave Chaganti a business card stating "Manse Heating &

Cooling" with a phone number. Chaganti told Manse that he was an attorney and gave him his business card with his telephone number.

D. The July 19, 2009 incident

On June 19, 2009 severe heat conditions in the St Louis metropolitan area caused all the units to breakdown. Learning that the residents' health might be impacted, Chaganti contacted Manse to come and fix the air-conditioners, and Manse agreed. Though the contact was made about 4 O' Clock, Manse did not come to work on the air conditioners until about 10 pm. He had, however, sent his associate who had no ability to work to find out what was going on. Learning that there were dozens of government vehicles with strobe lights around the premises[1], Manse delayed his arrival until the situation deteriorated further.

Upon arriving at the premises at about 10 PM, Manse demanded an immediate payment of $2000 to work on the units. When Chaganti protested that it was more than the agreed-upon price, Manse threatened to make a false report to the police that Chaganti was negligent in having the air-conditioning units repaired. After obtaining $2000, Manse worked for a couple of hours, did not finish the job, and left. He did not return the following day.

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[1] Because of the requirement to notify emergency authorities of any potential issue that could impact the health or safety of residents at an RCF, Whispering Oaks notified of the incident to the Department of Health & Senior Services and the local police as well as the fire department for emergency assistance.

E. The Law Suit

After some discussions between the parties about refund, when Manse failed to refund the excess funds, Chaganti filed suit in the Circuit Court for the St Louis County alleging extortion, negligence, and other things. The suit was entitled "*Whispering Oaks RCF Management Co Inc v. Lafayne Manse and Manse Heating & Cooling*".

Attorney Thomas DeVoto appeared for Manse in the suit. The case, being in the Associate Circuit division, was docketed every month or every other month for routine docket call. The parties discussed settlement on numerous occasions.

DeVoto did not produce a copy of the insurance policy despite a request for production, but stated that he had been an insurance defense attorney, and that Manse's insurer State Farm denied coverage. DeVoto told Chaganti that the complaint as written would not be covered under Manse's policy because he had a "completed operations" policy, but if the allegations were rewritten in an amended pleading to cover the policy, then the parties could enter into an RSMo § 537.065 agreement, obtain a judgment against Manse to enforce against State Farm Insurance Co.

F. Manse's attempted contact with Chaganti during litigation

In May 2010 Manse attempted to contact Chaganti directly to settle the suit. Chaganti immediately terminated the call, called DeVoto about the attempted contact, and asked DeVoto not to have Manse contact him directly. (R-7)[2]

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[2] R- refers to Respondent's exhibits introduced at the hearing before the DHP on January 23, 2014.

G. Attempts to settle with a RSMo § 537.065 agreement

DeVoto indicates in his June 2, 2010 letter that Manse was under the impression that parties to a proceeding could contact each other directly. *Ibid*. DeVoto also wrote, "My willingness to recommend a §537.065 agreement remains on the table subject to my client's approval. Please advise." *Ibid*.

Chaganti informed DeVoto that Chaganti had no experience in insurance litigation, and that DeVoto should prepare a draft petition for review and examination by Chaganti, but with truthful allegations. On December 24, 2010, Chaganti wrote to DeVoto inquiring about the proposed pleading. (R-8) DeVoto responded, "I will send you a letter about my proposal." *Ibid*.

On April 12, 2011 Chaganti wrote to DeVoto about the proposed amendment to the pleadings, and further stated that he would take depositions of Manse, his associate and AmerenUE. (R-9)

On May 2, 2011, Manse wrote to Chaganti, stating that he agreed to assist in preparing a pleading that would provide coverage through State Farm. (R-10) In that same letter DeVoto also offered $2000 to settle the suit, stating that his client was "sick and tired of this whole process". *Ibid*.

On May 26, 2011, DeVoto wrote, stating that he acknowledged an offer to settle for $2000 and a § 537.065 agreement, and that there was "no coverage for this loss in the manner in which you have pleaded." (R-11) He suggested writing a pleading to find coverage under the State Farm policy. *Ibid*.

On June 6, 2011, DeVoto once again wrote explaining the "completed operations" coverage to Chaganti, and stated, "if there were a proper allegation" [suggesting damage to the building, or damages of any other kind] State Farm would cover the loss. (R-12) Chaganti responded that he would allege only those things that occurred, and not make allegations to suit the coverage in Manse's policy.

On August 22, 2011 DeVoto once again made an offer to settle for $2000. (R-13) Chaganti rejected the offer. On February 26, 2012, DeVoto made an offer to settle for $2000 and a 537.065 agreement. (R-14) ("We had worked out an agreement wherein my client would be released and the parties would enter into a 537.065 agreement; and that we would discuss how to replead.")

H. Dismissal of the suit while Chaganti was out of the country

In April 2012 Chaganti left the US to care for his family member and by the time he returned the suit was dismissed by the court without prejudice.

After he returned, Chaganti filed a Motion to Set Aside Dismissal, which DeVoto opposed, stating that his client had spent thousands of dollars and would like to have the matter end. The trial court denied the motion to set aside on October 31, 2012.

I. Chaganti's attempt to resolve dispute before re-filing suit

On November 1, 2012, Chaganti mailed a letter to Manse offering to settle before a suit is filed again, this time adding AmerenUE as a defendant. The letter indicates that he believed that DeVoto was no longer representing Manse, "*I could not contact you until the suit was dismissed in view that your attorney refused to permit direct discussion between us to settle the suit*."

On November 5, 2012 DeVoto received the letter by fax from Manse with a cover letter stating, "I feel like I'm being harassed and threatened. Please help me**.**"

On November 16, 2016 DeVoto attached this fax letter to a cover letter and filed a complaint with the OCDC. (R-15)

J. Discovery efforts by Informant

Informant sought tax records and legal invoices of lawyers who worked for Whispering Oaks, the purported client of the Respondent. When Respondent objected, the DHP ruled that they must be produced.

K. Discovery efforts by Respondent

Respondent propounded document requests to Informant. Informant's production indicated a letter from DeVoto to Marc Lapp dated May 13, 2013 recording a meeting in DeVoto's office of the two on May 9, 2013, which listed six documents as having sent to Marc Lapp via mail pursuant to their examination of the DeVoto file. See R-16. That letter did not mention delivering a certain Memorandum (R-17) which was a key piece of evidence in this case. R-17 was separately delivered sometime after September 20, 2013 to Marc Lapp, though it purports to having been made on October 31, 2012. See (R-17)

Respondent served a subpoena *duces tecum* to DeVoto seeking all documents referencing Naren Chaganti, Lafayne Manse and Manse Heating & Cooling. DeVoto filed a motion to quash. Respondent objected stating, DeVoto made his relationship with Manse as a key issue in this proceeding, DeVoto did not produce a privilege log, and Devoto waived any privilege by disclosing his file to Marc Lapp of the CDC. The DHP quashed the subpoena. Respondent then moved to exclude any contents of DeVoto's

files and any testimony by DeVoto or Manse at the hearing because they asserted attorney-client privilege, and asked the DHP to rule expeditiously so that Respondent would be able to file a petition for writ with this Court. The DHP denied the motion without prejudice stating that it would examine DeVoto's file to find out whether any privilege was waived. The DHP ordered DeVoto to produce his file at the hearing.

L. The Hearing on January 23, 2014

When Respondent moved to examine DeVoto's file at the hearing, the DHP did not review DeVoto's file. Instead, the chairman of the DHP felt that the suit might be filed again, and therefore DeVoto could assert attorney/client privilege as to all of its contents. There were clearly many documents not privileged, including letters from DeVoto to Respondent (including the letters of discussions referenced above R-7, R-8, R-9, R-10, R-11, R-12, R-13 & R-14). It was unclear whether Marc Lapp examined these and found to be unsuitable to his case or DeVoto did not disclose them to Marc Lapp at their May 9, 2013 meeting in DeVoto's offices. These include letters to obtain coverage by amending the pleading to include language that would be covered by the State Farm policy, and the letter which acknowledged that Respondent rejected an ex parte contact by Manse (R-7).

When Respondent objected, the DHP asked Respondent what he would find in the file and how he planned to use what he found in the file. Respondent stated that how he planned to use was his trial strategy and that he did not know what was in the file as he did not see it. There could be things said or unsaid that would be important. There could be evidence or indication that DeVoto's relationship with Manse terminated on October

31, 2012. The DHP refused to have the file examined but over objection permitted excerpts of the file that were given to Marc Lapp to make his case, and testimony about the file and its contents by DeVoto and Manse.

Informant's counsel Marc Lapp started questioning Manse and DeVoto using leading questions. When Respondent objected, the DHP stated that a rule barring leading questions might be harmful to Respondent as well. Respondent stated that he would be cross-examining the witnesses, at which time leading questions were permitted.

On cross, DeVoto testified that he summarily rejected a settlement offer made by Respondent. A panel member Cynthia Albin[3] interjected to suggest that attorneys sometimes are pre-authorized to reject some settlement agreements, and asked whether DeVoto had been authorized to reject a $5000 settlement offer. Despite assistance from the panel member, DeVoto did *not* testify that he had any such pre-authorization.

DeVoto testified that the Memorandum (R-17) was dictated on the same day as it purported, but did not explain why it had a date mentioned in the body of the Memorandum. He also initially stated that the Memorandum recorded the events of the day chronologically, but corrected himself after it was pointed that the first paragraph related events "at the end of the hearing," whereas the second paragraph starts "We then

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[3] Cynthia Albin appears to be a spouse of Seth Albin against whom Respondent filed a complaint to the United States Trustee for ex parte communications in a different proceeding. It is uncertain whether she disclosed to the DHP of this conflict.

went into the Judge [sic]…". He then restated that the events in the first paragraph occurred not at the end of the hearing but before a hearing with the judge.

Manse then testified that upon reading the letter from Respondent he felt shock, fear and anger. He then self-reported to AmerenUE, his employer, that he had violated the company's moonlighting policies and non-solicitation of the company's customers. A disciplinary hearing ensued at AmerenUE, at which DeVoto did not represent Manse. A union representative helped Manse at the hearing. Manse told AmerenUE that he never solicited Respondent's business, and that he never represented himself to be an HVAC serviceman. Manse also testified that he did not know that Respondent was a lawyer until the suit was filed.

On cross, Manse admitted that he had given a business card to Respondent that stated that he was an HVAC serviceman. Manse also admitted having received a business card from Respondent that stated that he was an attorney. Manse testified that he was afraid that there could be litigation. When asked how he could be afraid after experiencing litigation for three years, he did not explain. Manse testified that he was afraid of dealing with lawyer, but did not explain why he contacted Respondent while the suit was pending in May 2010. He testified that he was shocked to learn that the suit could be re-filed again, and that he thought that the suit was finally over. He did not explain why if he thought the suit was finally concluded he retained DeVoto for the matter. The DHP did not permit detailed questioning of Manse about his dispute with Respondent.

Manse testified that upon receiving an envelope on November 5, 2012, he examined the envelope and saw that it had Respondent's "From" address on the envelope. Nevertheless he opened it and read the contents. He called DeVoto who asked him to fax the letter to him[4]. Manse did not explain whether DeVoto asked him to write that he felt that he was being "harassed" on the cover sheet in hand-writing. He printed a fax cover sheet from his printer, hand wrote the statement, and faxed it to DeVoto on the same day.

M. Final Argument and Decision by the DHP

Respondent filed final argument stating among other things that Manse and DeVoto were untruthful, that the DHP erred in not permitting meaningful discovery, that Manse's shock indicated that he had no ongoing representation by DeVoto, Manse's fear was of exposure to his employer of his moonlighting activities, and DeVoto Memorandum of October 31, 2012 lacked indicia of authenticity, was self-serving and should be discarded. Informant argued that Respondent be suspended.

The DHP ordered six-month suspension, stating that Respondent was "emotional" but controlled, and that Respondent violated the rule by "closing eyes to the obvious" , *an allegation not made in the Information*, (Information at p.4, ¶ 20) thereby implicitly

[4] The time stamp on the fax coversheet and the letter states, "Nov 5 12 06:27 a" indicating that it was faxed at about 06:27 AM, on Monday November 5, 2012, when mail would not be delivered. It is likely that the mail was delivered on Saturday November 3, 2012.

finding that no evidence existed that Respondent had actual knowledge of the *continued* representation of Manse by DeVoto.

Respondent rejected the DHP rulings. This proceeding follows.

RULES AND PROVISIONS INVOLVED

Rule 4-4.2 provides,

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Comment 4 to the Rule provides, in relevant part:

> "Parties to a matter may communicate directly with each other…."

Comment 8 provides, in relevant part:

> "The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstance."

Informal Opinion No. 950101:

> INFORMAL OPINION 950101
>
> QUESTION: Attorney is a party to a dissolution case. Attorney and Attorney's spouse are represented by counsel. Attorney wishes to discuss the case and negotiate certain

matters regarding the case with Attorney's spouse without the involvement of the spouse's attorney. May Attorney engage in ex parte communications with Attorney's spouse regarding the case without violating Rule 4-4.2?

ANSWER: Yes.

[Rule 4 -- 4.2]

Op.Pty.-33

www_mobar_org/ethics/formalopinions/supplement/ch4_htm[5] (visited 7/19/2014).

[5] Please note that in accord with the rule forbidding active hyperlinks in a brief, "dot" is replaced with an "underscore" in this web site address.

STANDARD OF REVIEW

> "In a disciplinary proceeding, the Disciplinary Hearing Panel's findings, conclusions, and recommendations are advisory in nature. This Court reviews the evidence *de novo,* determines independently the credibility, weight, and value of the testimony of the witnesses, and draws its own conclusions of law. In attorney disciplinary proceedings, the truth of the allegations must be established by a preponderance of the evidence."

In re Carey, 89 S.W.3d 477, 482-83 (Mo. banc 2002) (citations and quotes omitted).

> This Court interprets its rules by applying the same principles used for interpreting statutes. The same principles used to interpret statutes apply when interpreting this Court's rules, with the difference being that this Court is attempting to give effect to its own intent. This Court's primary rule of interpretation is to apply the plain language of the rule at issue. This Court's intent is determined by considering the plain and ordinary meaning of the words in the Rule. If the intent is clear and unambiguous by giving the language used its plain and ordinary meaning, then this Court is bound by

that language and there is neither need nor reason to apply any other rule of construction in interpreting the rule.

In re Hess, 406 SW 3d 37, 43 (Mo. banc 2013) (citations and quotations omitted).

POINTS RELIED ON

RESPONSE TO POINT I

Respondent did not violate the Rules of Professional Conduct Because:

(A) Respondent represented his own interest and not that of a "client" on November 1, 2012

1. Respondent represented his own interests

Rule 4-4.2

2. Comment 4 to the Rule permits communication between parties

Rule 4-4.2 Cmt. 4

3. The Rule of Lenity requires an interpretation that favors Respondent

United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy, 208 S.W.3d 907, 913 (Mo. banc 2006)

(B) There is no evidence that DeVoto continued to represent Manse in the Whispering Oaks matter after October 31, 2012

1. DeVoto did not have a written agreement with Manse

2. Informant did not produce evidence that DeVoto continued to represent Manse after October 31, 2012

3. The DHP erred in denying a meaningful opportunity to conduct discovery to show the termination of any relationship between Manse and DeVoto

4. There is evidence indicating that Manse desired to stop paying DeVoto which suggests termination of their relationship on October 31, 2012.

5. The DHP erred in not striking testimony by DeVoto and Manse who failed to comply with a subpoena

(C) There is no evidence that Respondent had actual knowledge of Devoto's continued representation of Manse in the Whispering Oaks matter after October 31, 2102

1. The DHP erred in denying a meaningful opportunity to conduct discovery to show the termination of any relationship between Manse and DeVoto

2. The DHP erred in admitting a self-serving document created by DeVoto as the critical piece of evidence

3. The DHP erred in not striking testimony by DeVoto and Manse who failed to comply with a subpoena

4. Nothing in the October 31, 2012 Memorandum of DeVoto states that he informed Respondent that he continued to represent Manse after October 31, 2012.

(D) There is no evidence that Respondent had actual knowledge of DeVoto's continued representation of Manse in the Whispering Oaks matter after October 31, 2012

1. DeVoto did not produce any document showing that he informed Respondent of any continuing representation of Manse in the Whispering Oaks matter.

2. Informant relies on a single self-serving Memorandum (R-17) which is inadmissible and insufficient to show actual notice on the part of Respondent.

a) The memorandum does not appear to have been created on October 31, 2012

b) The surprise expressed in the memorandum is contrived

c) The memorandum is not admissible

Palmer v. Hoffman, 318 U.S. 109 (1943)

Kitchen v. Wilson, 335 S.W.2d 38, 43 (Mo. 1960)

d) The memorandum is manifestly prejudicial

e) The Memorandum does not state that DeVoto informed Respondent that Devoto *continued* to represent Manse in the Whispering Oaks matter after October 31, 2012.

3. DeVoto made inconsistent and false statements

4. Manse did not testify truthfully

5. There was neither harm nor prejudice to Manse

RESPONSE TO POINT II

No discipline is warranted in this case against Respondent's license because a plain reading of Comment 4 to the Rule expressly permits the type of communication involved, and in the alternative, because Respondent complied with the rule during litigation and reasonably and justifiably relied on the interpretations of the rule as given in the Restatement as well as a Missouri informal opinion.

Rule 4-4.2

Rule 4-8.4(d)

RESPONDENT'S POINT III

Under the facts of this case neither Rule 4-4.2 nor Rule 4-8.4(d) is violated, and if despite Comment 4, Rule 4-4.2 is interpreted as applying to members represent their own interests, the rule as applied to this case should be declared unconstitutional as it violates the notice provisions of the Due Process Clause and Equal Protection Clause of the federal and State Constitutions.

Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980)

Albanna v State Board of Reg'n for the Healing Arts 293 S.W.3d 423, 431 (Mo banc 2009)

Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 578 A.2d 1075 (1990)

SUMMARY OF THE ARGUMENT

Informant has the burden of proving violation of Rule 4-4.2 by showing that (a) Respondent acted *as a lawyer* and not *as party* on November 1, 2012, (b) Manse was in fact represented by DeVoto with respect to the Whispering Oaks matter after October 31, 2012, (c) Respondent *has actual knowledge* of DeVoto's continued representation of Manse after October 31, 2012. Rule 4-8.4(d) further requires Informant to show that the November 1, 2012 letter *caused or had potential to cause harm* to Manse. Informant failed to meet the burden on each of these grounds.

First, Respondent being the only shareholder, officer and manager of Whispering Oaks, did not represent a "client" at the time he wrote the November 1, 2012 letter. See *State ex rel. Pitts v. Roberts*, 857 SW2d 200, 201-202 (Mo. banc 1993) ("Unlike an individual party, an organization can act only through its employees, agents, et cetera.") Comment 4 to Rule 4-4.2 specifically permits parties to communicate with each other. Neither the comment nor the rule provides any exceptions when the "party" is a member of the bar. Plain language review as well as the rule of lenity requires an interpretation of the comment favoring this Respondent, or the Rule violates the Due Process and Equal Protection clauses of the federal and state constitutions. Informant's only argument that Respondent was a "lawyer" on November 1, 2012 is by reference to a letterhead, which simply states his qualifications. Such argument makes no sense because it suggests that one can do the same thing on a different letterhead.

Second, DeVoto had no written agreement with Manse. And there is no evidence that DeVoto *continued* to represent Manse after the dismissal of the underlying suit on

October 31, 2012. Representations DeVoto made to the trial court were clear that his client wanted the case to end; not that he would continue to represent Manse indefinitely.

Third, there is no evidence that Respondent had *actual knowledge* of any continued representation of Manse by DeVoto. Even DeVoto's self-serving memorandum (R-17) (which is inadmissible for being self-serving and not a "business record" and which had no indicia of being in existence on the date it was purportedly made) did not state that he informed Respondent that he *continued* to represent Manse.

Fourth, the letter of November 1, 2012 caused no harm and had no potential to cause harm to Manse. Manse knew that Chaganti was a lawyer in 2009 when he took Chaganti's business card and Manse tried to contact Chaganti in May 2010 to discuss settlement. Therefore he was not intimidated by a contact with a lawyer. His fear was, if any, due to his own violation of AmerenUE's policies against soliciting work from AmerenUE's customers, rather than due to the letter. If Manse was represented after October 31, 2012 he could have had no fear, and if he were not represented then there was no Rule 4-4.2 violation. Manse's alleged fear and shock do not make sense at all.

Procedurally the DHP did not permit Respondent a meaningful opportunity to conduct discovery, thereby violating Respondent's due process rights. The DHP quashed a subpoena *duces tecum* served upon DeVoto, on the ground that the information demanded via the subpoena was privileged. However, DeVoto did not file any privilege log. Moreover, DeVoto disclosed a part of the allegedly privileged material to the OCDC, thereby waived any claim for privilege. Finally, the DHP offered to review DeVoto's file at the hearing, but did not conduct any such review. It instead asked

Respondent to explain what he would find out and how he would use the information obtained in DeVoto's file at the hearing, which required disclosure of Respondent's trial strategy. The DHP's error is reversible.

Comment 4 states that parties may contact each other. And there was an express informal opinion permitting a lawyer ***engaged in litigation*** to contact his opposing party even ***during the litigation***. As stated above, it was Respondent who rejected an attempted contact with Manse during litigation. And Respondent has not been disciplined by any state bar. Finally, the CDC has in the previous ten years not prosecuted a case under Rule 4-4.2.

Under the circumstances, the Information should be dismissed, or alternatively no discipline is warranted.

ARGUMENT

RESPONSE TO POINT I

Respondent did not violate the Rules of Professional Conduct because:

(A) Respondent represented his own interest and not that of a "client" on November 1, 2012

1. Respondent represented his own interests

2. Comment 4 to the Rule permits communication between parties

3. The Rule of Lenity requires an interpretation that favors Respondent

(B) There is no evidence that DeVoto continued to represent Manse in the Whispering Oaks matter after October 31, 2012

1. DeVoto did not have a written agreement with Manse

2. Informant did not produce evidence that DeVoto continued to represent Manse after October 31, 2012

3. The DHP erred in denying a meaningful opportunity to conduct discovery to show the termination of any relationship between Manse and DeVoto

4. There is evidence indicating that Manse desired to stop paying DeVoto which suggests termination of their relationship on October 31, 2012.

5. The DHP erred in not striking testimony by DeVoto and Manse who failed to comply with a subpoena

(C) There is no evidence that Respondent had actual knowledge of Devoto's continued representation of Manse in the Whispering Oaks matter after October 31, 2102

1. The DHP erred in denying a meaningful opportunity to conduct discovery to show the termination of any relationship between Manse and DeVoto

2. The DHP erred in admitting a self-serving document created by DeVoto as the critical piece of evidence

3. The DHP erred in not striking testimony by DeVoto and Manse who failed to comply with a subpoena

4. Nothing in the October 31, 2012 Memorandum of DeVoto states that he informed Respondent that he continued to represent Manse after October 31, 2012.

(D) There is no evidence that Respondent had actual knowledge of DeVoto's continued representation of Manse in the Whispering Oaks matter after October 31, 2012

1. DeVoto did not produce any document showing that he informed Respondent of any continuing representation of Manse in the Whispering Oaks matter.

2. Informant relies on a single self-serving Memorandum (R-17) which is inadmissible and insufficient to show actual notice on the part of Respondent.

a) The memorandum does not appear to have been created on October 31, 2012

b) The surprise expressed in the memorandum is contrived

c) The memorandum is not admissible

d) The memorandum is manifestly prejudicial

e) **The Memorandum does not state that DeVoto informed Respondent that Devoto *continued* to represent Manse in the Whispering Oaks matter after October 31, 2012.**

3. **DeVoto made inconsistent and false statements**

4. **Manse did not testify truthfully**

5. **There was neither harm nor prejudice to Manse**

Standard of Review

> "In a disciplinary proceeding, the Disciplinary Hearing Panel's findings, conclusions, and recommendations are advisory in nature. This Court reviews the evidence *de novo,* determines independently the credibility, weight, and value of the testimony of the witnesses, and draws its own conclusions of law. In attorney disciplinary proceedings, the truth of the allegations must be established by a preponderance of the evidence."

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> This Court interprets its rules by applying the same principles used for interpreting statutes. The same principles used to interpret statutes apply when interpreting this Court's rules, with the difference being that this Court is attempting to give effect to its own intent. This Court's primary rule of

> interpretation is to apply the plain language of the rule at issue. This Court's intent is determined by considering the plain and ordinary meaning of the words in the Rule. If the intent is clear and unambiguous by giving the language used its plain and ordinary meaning, then this Court is bound by that language and there is neither need nor reason to apply any other rule of construction in interpreting the rule.

In re Hess, 406 SW 3d 37, 43 (Mo. banc 2013) (citations and quotations omitted).

Argument

A) Respondent represented his own interest and not that of a "client" on November 1, 2012.

1. Respondent represented his own interests

As stated in the Standard of Review, a rule is interpreted similar to a statute, and if the plain language of the rule is clear, then no interpretation is necessary. The plain language of Rule 4-4.2 requires a lawyer "representing a client".

The Informant argues that at the time the letter of November 1, 2012 was written, Whispering Oaks was the "client", and Respondent was the "lawyer." This ignores that Respondent was the only officer, board member, shareholder, employee and agent of Whispering Oaks, which Informant does not dispute[6]. This Court has held that

[6] Informant, having examined Chaganti in direct, is bound by Chaganti's testimony that he was acting as an officer of Whispering Oaks on November 1, 2012

> A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. ***In legal matters, it must act, if at all, through licensed attorneys***.

Clark v. Austin, 101 S.W.2d 977, 982 (Mo. banc 1937) (emphasis added). Because Chaganti was an "agent" of Whispering Oaks, and because Whispering Oaks could act only through its agents, Rule 4-4.2 does not apply to this situation. See, *e.g.*, Restatement (Third) of the Law: The Law Governing Lawyers § 99 Cmt. e at 73 (2000) ("A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals.") See also, comment to rule 2-100 of the California Rules of Professional Conduct, interpreting a rule identical to Rule 4-4.2 in all material respects, expressly permits a lawyer proceeding pro se to contact even a represented party:

> [T]he rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member

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when he wrote the letter. See *Eidson v. Reproductive Health Service*, 863 S.W.2d 621, 626 (Mo.App.1993). Further, on the issue of whether a party includes a lawyer representing his own business, the Informant failed to produce expert evidence, which requires dismissal.

> has independent rights as a party which should not be abrogated because of his or her professional status.

Cal. Rules of Prof. Conduct, 2-100 discussion ¶ 2.

Surprisingly, in this proceeding against the Respondent, whom the Informant alleged was representing a "client" Whispering Oaks, the Informant demanded production of tax filings and fee invoices of lawyers who represented Whispering Oaks, which are quintessentially privileged documents. See (R-1, R-2 & R-3).

If the Informant believed that Whispering Oaks was the "client" and Respondent was the "lawyer", then the Informant's demand violated the attorney/client confidentiality by demanding the "client's" documents from the so-called "lawyer" representing the "client." Informant wanted to have it both ways; on the one hand, he wanted to allege a lawyer-client relationship between Respondent and his business, while on the other hand, Informant sought confidential documents of Respondent's business.

But because Informant's own demand to produce—and the DHP's compulsion to produce them—Whispering Oaks' tax filings and legal invoices shows that Informant considered them to be one and the same, Informant is estopped from taking the position that the two—Whispering Oaks and Respondent—were "client" and "lawyer" respectively. See *Taylor v. State*, 254 S.W.3d 856, 858 (Mo. banc 2008), which states:

> The doctrine of judicial estoppel provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary

position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The problem with construing Chaganti as a "lawyer" for Whispering Oaks is that even if a different person—such as a non-lawyer vice president, if one existed—wrote a letter to Manse, it would violate the Rule because the vice president worked as an employee or agent of the corporation, whose highest official and member of the board was a lawyer.

Informant also argues that a corporation needs a lawyer to appear in court. Not only was there no pending action in court by November 1, 2012, but also the letter was not a paper filed in court, which is the only situation in which a lawyer is required to represent a company. See *Clark v. Austin*, 101 S.W.2d 977, 982-83 (Mo. banc 1937) ("Since a corporation cannot practice law, and can only act through the agency of natural persons, it follows that it can appear in court on its own behalf only through a licensed attorney.") A lawyer was not necessary to write a letter to Manse, nor did Whispering Oaks retain a lawyer to write that letter. Regular business letters or even letters regarding disputes with vendors do not require lawyers.

Informant's reliance on *In re Atwell*, 115 S.W.2d 527 (Mo.App. 1938) and *State v. Chandler*, 605 S.W.2d 100, 111 (Mo. banc 1980) is misplaced in that these matters do not have a lawyer writing for his own business after termination of a court proceeding.

2. Comment 4 to the Rule permits communication between parties

A plain language reading of Comment 4 is that parties may communicate with each other directly. It does not exclude lawyers who are parties, as does Oregon rule.

See Oregon's Rules of Prof. Conduct 4.2 (adopted effective January 1, 2005) ("In representing a client or the lawyer's own interests, a lawyer shall not communicate with a person the lawyer knows to be represented by a lawyer.")

3. The Rule of Lenity requires an interpretation that favors Respondent

In addition, the rule of lenity applies to give the benefit of an ambiguity in a statute to a person alleged of wrongdoing. The rule of lenity strictly construes a provision in favor of an accused. *Cf. Woods v. State,* 176 S.W.3d 711, 712 (Mo. banc 2005) (applying the rule of lenity in criminal proceedings). In *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy,* 208 S.W.3d 907, 913 (Mo. banc 2006), this Court applied the rule of lenity to a civil case involving certain pharmacy regulations where the consequences may be penal.

The Restatement suggests applying the rule of lenity to disciplinary rules. See Restatement (Third) of the Law: The Law Governing Lawyers § 5 cmts. b, c at 49, 50 (2000) (As lawyers "are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court," courts "should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.") See also, *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (rule of lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose").

Therefore, even if this Court determines that a lawyer representing his own interests is "representing a client" for purposes of Rule 4-4.2, because there is equivocal authority from other jurisdictions and Comment 4, and given that this Court has not had

an occasion to decide this issue on a prior occasion the Court should find that the rule ambiguous as to its applicability to lawyers representing their own interests. Under the circumstances, the rule should not be applied to this case, and if at all the rule should be applied only prospectively and not to this case.

The Informant is in error on this issue.

A. There is no evidence that DeVoto continued to represent Manse in the Whispering Oaks matter after October 31, 2012;

A second prong of Rule 4-4.2 requires showing that DeVoto continued to represent Manse after October 31, 2012 when the trial court denied a motion to set aside involuntary dismissal. Devoto testified that he did not have a retainer agreement with Manse. He billed hourly for his work. He did not represent Manse before the Whispering Oaks suit was filed. He did not represent Manse in a disciplinary proceeding at AmerenUE. These do not indicate a continued relationship with Manse.

1. DeVoto did not have a written agreement with Manse

At the hearing, DeVoto testified that his relationship with Manse was not in writing, and that he was referred to Manse through someone. DeVoto did not produce any invoices to show that he ever invoiced his services to Manse or with what frequency. DeVoto testified that he was not on retainer with Manse. Under the circumstances, no inference can be drawn to impute any actual knowledge to Respondent of continued relationship between Manse and DeVoto.

2. Informant did not produce evidence that DeVoto continued to represent Manse after October 31, 2012

Informant did not produce any evidence that DeVoto continued to represent Manse after October 31, 2012. The proof would have been in the form of an engagement agreement, but DeVoto did not have one with Manse. Additional proof would have been via any invoices DeVoto sent to Manse, but the DHP quashed a subpoena served on DeVoto to determine the facts. The only "evidence" of an alleged continued representation by DeVoto of Manse comes from a Memorandum (R-17) which DeVoto purportedly created and kept in his file until about September 20, 2013 (nearly 10 months after his initial complaint to the OCDC) when he produced it *voluntarily* on that date. This document is excludable as self-serving which will be argued below.

Even that document, which was drafted allegedly on October 31, 2012, does not state that any *continuing* representation by DeVotoon of Manse in the Whispering Oaks matter *after* that date. It only records what DeVoto claimed to have happened on October 31, 2012. Save for this document and attendant testimony by DeVoto, there was no evidence of any continuing relationship between DeVoto and Manse after October 31, 2012. This is a serious deficiency in the entire proceeding.

3. The DHP erred in denying a meaningful opportunity to conduct discovery to show the termination of any relationship between Manse and DeVoto

In addition, the DHP erred in denying discovery into this key aspect of the case, whether DeVoto continued to represent Manse after October 31, 2012. This violated Respondent's due process rights. *Nixon v. Williamson*, 703 S.W.2d 526 (Mo.

App.1985)(Due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner.)

The subpoena *duces tecum* to DeVoto was aimed at discovering the alleged continued relationship. Discovery should be conducted on a "level playing field," without affording either side a tactical advantage. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 929 (Mo. banc 1992). DeVoto did not produce a privilege log to show any indication of waiver of privilege.

Because the principal issue in this matter is the continued relationship, if any, between Manse and DeVoto, and DeVoto made his relationship central to his complaint, the DHP should have ordered disclosure of some documents indicating a relationship or lack thereof. *Cf. State ex rel. McNutt v. Keet,* 432 S.W.2d 597, 601 (Mo. banc 1968) (under the "patient-litigant" waiver doctrine, once a patient's medical condition is at issue in a case, the patient is considered to have waived the privilege over the information that bears on the issue). If there is a letter expressly terminating their relationship, it would have completely absolved the Respondent, and therefore the prejudice to Respondent is manifest. The DHP erred in sustaining the motion to quash subpoena.

Moreover, DeVoto testified that he had disclosed his file to Marc Lapp in May 2013 when Marc Lapp visited DeVoto at the latter's offices. That disclosure constituted an intentional and voluntary waiver of any privilege. But for that disclosure, Marc Lapp would not have been able to present any case against Respondent. In *State ex rel. Tracy v. Dandurand,* 30 S.W.3d 831 (Mo. banc 2000), this Court held that the party claiming the privilege has waived it by providing the documents to a third party. And any

objection on privilege grounds must have been asserted at that meeting or it is waived. *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107, 109 (Mo. App. 1981).

In addition, Manse testified on direct examination that he had spent thousands of dollars in defending himself in the suit. This was an attempt by Informant to show harm to Manse (a required showing for conduct prejudicial to administration of justice). Manse based his claim of "shock, disbelief and fear" by referring to his legal expenses. The DHP nevertheless did not permit looking at any invoices to challenge the accuracy of this statement, which is an error.

The DHP was in further error in applying blanket privilege for all documents subpoenaed of Devoto. Many documents, including Devoto's letters to Chaganti, were not privileged, but they were not disclosed under the subpoena. DeVoto did not produce a single document pursuant to the subpoena. It was prejudicial error to not compel Devoto to provide a privilege log to evaluate the basis of his claim of privilege. As stated above, communication of which a third party received a copy waives privilege. Solicitations by Devoto on behalf of Manse are privileged communications, which privilege is waived when disclosed to Lapp. See Exhibits R-4 & R-16.

4. There is evidence indicating that Manse desired to stop paying DeVoto which suggests termination of their relationship on October 31, 2012.

During the pendency of the underlying litigation, DeVoto repeatedly indicated to Respondent that his client was "sick and tired" of the process, the expenses, and that his client wanted to end the litigation. For example, in a letter, (R-10), DeVoto wrote, "My

client is sick and tired of the whole process…"; and in another, (R-13), he wrote, "further litigation of this matter does not make economic sense for either of our clients."

These statements do not indicate continuing relationship after the suit was dismissed. Indeed, in his paper filed in court opposing plaintiff's motion to set aside dismissal, Devoto argued:

> 4. The constant court appearances have cost Defendant, literally, thousands of dollars, with no end in sight -- as this matter continues to drag on. It was appropriate for the Court to dismiss this matter and there is absolutely no justifiable reason to set aside that dismissal.

This shows that Manse wanted to end the litigation and not have an ongoing and continuing relationship with respect to Whispering Oaks' matter after the suit was dismissed. This is also consistent with Manse's expression of "shock" that the case could be re-filed and with the fact that Devoto did not inform Chaganti that he continued to represent Manse.

Based on these pieces of evidence, Informant cannot meet his burden of showing that Respondent "closed" his eyes to an on-going and continuing relationship between Manse and DeVoto concerning the Whispering Oaks matter after October 3,1 2012.

5. The DHP erred in not striking testimony by DeVoto and Manse who failed to comply with a subpoena

After the DHP refused to permit examination of DeVoto's files, Respondent moved to strike DeVoto's and Manse's testimony as it was highly prejudicial. The DHP erred in not striking their testimony.

B. There is no evidence that Respondent had actual knowledge of DeVoto's continued representation of Manse in the Whispering Oaks matter after October 31, 2012

The third prong of the Rule requires a showing of "actual knowledge" on the part of Respondent of DeVoto's allegedly continued representation of Manse.

1. DeVoto did not produce any document showing that he informed Respondent of any continuing representation of Manse in the Whispering Oaks matter.

DeVoto could have and should have clarified his allegedly continuing relationship with Manse by writing to Respondent, and asking him not to contact his client. The record is clear that DeVoto is prolific in writing letters. Such a letter to Respondent would have mitigated any contact thereby achieving the purpose of Rule 4-4.2.

However, DeVoto did not write any such letter ever, even to this date. It is unclear whether as of this date DeVoto continues to represent Manse on the Whispering Oaks matter, or whether it ended. An attorney, when facing a possibility of an ex parte contact with his client by an adversary, has a duty to inform in no uncertain terms to his opponent that he continued to represent the client. Keeping the fact of any such

attorney/client relationship in the dark exposes an innocent party to proceedings such as this one. Similarly, DeVoto should have advised Manse not to accept any communications from Respondent, and not to open any mail from Respondent, which if he did, would have avoided this charge in the first place. For example, the California Rules of Professional Conduct specifically advise its members:

> To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party

Cal. Rules of Prof. Conduct, 2-100 discussion ¶ 2. DeVoto failed to advise his client not to open an envelope with Respondent's name on it. DeVoto also failed to write to Respondent that all communications should be directed to his office. Because other than self-serving oral assertion at hearing there was no evidence of any continued relationship between Manse and DeVoto, the Informant cannot meet the burden of proof to prevail in this case.

2. Informant relies on a single self-serving Memorandum (R-17) which is inadmissible and insufficient to show actual notice on the part of Respondent.

Informant relies solely on a Memorandum (R-17) that DeVoto claimed to have memorialized a discussion between himself and Respondent that occurred on October 31, 2012 as support (in addition to testimony based on that Memorandum).

On September 20, 2013, nearly 11 months after he purportedly dictated to himself this letter, DeVoto attested that this was a business record kept in the normal course of his business, etc. See *id.* He attested, "This record attached hereto is the original or exact duplicate of the original that *I am voluntarily producing this 20th day of September, 2013*." (Emphasis)

a) The memorandum does not appear to have been created on October 31, 2012

But this document has a number of problems. First, though DeVoto claimed during the hearing that he had given a copy of this letter to Marc Lapp when Lapp visited DeVoto's office on May 9, 2013, it was not mentioned in his letter of May 13, 2013 (R-16)(listing documents produced). Second, the Memorandum was not attached to the November 16, 2013 letter to OCDC, (R-15), which was the best opportunity, closest in time to disclose that document.

Other indicators show that the memorandum was not drafted on October 31, 2012. The first sentence of that memorandum states, "At the end of the hearing to set aside default on 10-31-12, …." The specific mention of a date is indication that the memorandum was drafted on a day other than 10-31-12 and that it purported to memorialize events of 10-31-12. For example, in a letter to Respondent (R-10), DeVoto uses the relative term "this morning" and not a particular date.

The Memorandum also purports to record the day's happenings in a chronological manner, but the first paragraph's starts with "At the end of the hearing," and the second

paragraph starts with "We *then* went into the Judge [sic], and …," (emphasis) which is inconsistent with a chronological order.

At the hearing, Devoto initially testified that the events he described in the first paragraph of this memorandum took place *after the hearing*, but after confronted with the transition phrase "We *then* went into the Judge…" (emphasis) he restated that the events in the first paragraph took place *before the hearing* in the judge's chambers.

The memorandum also states that Chaganti "got mad" after the dismissal, and "*the last thing* he said was that he was going to contact my client." (Emphasis) But the following paragraph states, "Mr. Chaganti *then* threatened to take a deposition of somebody at Ameren UE in order to try to hook Ameren UE for Manse's private business on the side." (Emphasis) The document is internally inconsistent and indicates that it was created some time later.

The Memorandum (R-17) also differs from the complaint to the OCDC (R-15):

> During the course of the last few times that the case was set, or during time when I might run into Chaganti in another division, he would ask me for permission to talk to my client and I would tell him, under no circumstances was he authorized to contact my client.
>
> [¶] After Judge Clifford dismissed the case for failure to prosecute, Chaganti told me that I was no longer Manse's attorney, and that he was going to contact my client despite

> my express, unequivocal, crystal clear instructions not to do so.

(R-15). These contradictions indicate that the Memorandum was not created on October 31, 2012.

b) The surprise expressed in the memorandum is contrived

DeVoto is unlikely to have been surprised or angered by a reference to taking a deposition of AmerenUE as claimed in that memo because the April 12, 2011 letter (R-9) notified him of deposition of AmerenUE, not to mention that the Petition itself alleged that Manse was on Whispering Oaks' premises as an employee of Ameren UE, making a deposition of Ameren UE a possibility.

c) The memorandum is not admissible

In addition to the issue of when it was created, the October 31, 2012 Memorandum (R-17) is not a "business record" and is excludable because it was created for the purpose of this proceeding. See *Palmer v. Hoffman*, 318 U.S. 109 (1943), where the US Supreme Court held that an accident report created by a railroad company in anticipation of a lawsuit by the victim was inadmissible, because it was not prepared in the regular course of business:

> But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the [Business Records] Act. If it did, then any law office in the land could follow the

> same course, since business, as defined in the Act, includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy.

Id., at 113-14. In *Palmer*, a sanitized accident report was not sufficiently reliable to be admitted into evidence. Likewise, a sanitized version of an attorney's file is not a business record. The memorandum is clearly created in anticipation of and to support an ethics complaint and not done in the regular course of DeVoto's representation of Manse in the suit.

DeVoto's testimony proves that this is the case. In the letter to the OCDC (R-15), he states that *numerous* times Chaganti asked to contact Manse directly and that he warned Chaganti not to make such a contact. But these other times were not documented in the way the Memorandum (R-17) was documented. The memorandum was created for the purpose of helping the OCDC in this proceeding, and thus cannot be "business record." See *Kitchen v. Wilson*, 335 S.W.2d 38, 43 (Mo. 1960):

> Assuming that Exhibit 18 was made at or near the time of the examination, yet it does not appear to have been made "in the regular course of business" as required by § 490.680. The term "regular course of business" as used in the Uniform Law "must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

(citing *Palmer*, 318 U.S. 109 (1943)). Self-serving statements must be rejected:

> "Of course, if it should appear that such records have been made and kept solely for a self serving purpose of the party offering them in evidence, it would be the duty of a trial court to refuse to admit them."

Kitchen, 335 S.W.2d 38 at 44. In *Kitchen*, the Supreme Court stated:

> Exhibit 18 is a narrative statement apparently based in part on original business entries but with embellishments, conclusions and opinions added which are not necessary or helpful to the observation, diagnosis and treatment of the patient; it does not qualify as a business record made in the regular course of business.

Id. See also, *Hussey v. Robison*, 285 S.W.2d 603, 608 (Mo.1955); *Carmack v. Bistate Devel. Agency*, 731 S.W.2d 518, 520 (Mo. App. E.D. 1987) (Letter written by passenger's doctor to passenger's attorney was excludable as self-serving statement.); *Wired Music Inc v. O'Brien*, 556 S.W.2d 459, 462 (Mo. App. St.L. 1977) (In an action by supplier of recorded music against buyer for breach of agreement to pay for services, letter written by supplier's salesman to buyer, even if qualified as a business record, was excludable as self-serving.) The Memorandum (R-17) should have been excluded.

d) The memorandum is manifestly prejudicial

Moreover, in light of the DHP's refusal to permit examining DeVoto's client file from which this document was excerpted, gross miscarriage of justice would result if this

document were to be used for the truth of the matters asserted therein. Without Exhibit 17, the Information is unsustainable for want of any contemporaneous writing documenting the alleged October 31, 2012 discussion.

e) The Memorandum does not state that DeVoto informed Respondent that Devoto *continued* to represent Manse in the Whispering Oaks matter after October 31, 2012.

Noticeably, neither R-15 nor R-17, recite that DeVoto told Chaganti that DeVoto *continued* to represent Manse *after* October 31, 2012. At most the document states that Respondent is not to contact Manse. But it did not say that he told Respondent that any and all contacts after October 31, 2012 should be made with DeVoto. DeVoto's documents do not support the Informant's allegations of actual notice.

3. DeVoto made inconsistent and false statements

DeVoto testified that he deliberately chose not to appear at the docket calls, but the legal file contains numerous other reasons to Judge Clifford, indicating his propensity to be less than candid to the tribunal.

After learning that State Farm declined to provide coverage to Manse, DeVoto wrote letters to Chaganti suggesting that DeVoto would provide a draft amended petition with false allegations to suit the policy provisions, while at the same time warning that the effort might not succeed. Devoto also misstated facts to the OCDC in the November 16, 2012 letter:

> I attach hereto a copy of a letter, dated November 1, 2012 that was FAXed to my office from my client. The November 1,

> 2012 letter is from Chaganti to my client wherein Chaganti informs my client that I no longer represent him and that he is free to negotiate a deal or a settlement with Manse, inasmuch as he no longer had an attorney.

(R-15). (underline added) There is no support for the underlined embellishment.

DeVoto made an inaccurate statement to Lapp in the May 13, 2013 letter (R-16) that his file reflected that his client was present in the courtroom when he rejected Chaganti's settlement offer. Devoto's other letter (R-14) and his testimony at the hearing acknowledged that he had rejected a settlement proposal without communicating the same to Manse[7]. See also (R-14).

DeVoto did not report to the OCDC that it was Manse who contacted Chaganti, and that Chaganti broke off the contact and reported the same to Devoto. See R-7. DeVoto's omission of (R-7) in his report to the OCDC and his failure to disclose that letter to Marc Lapp in May 2013 indicate deception.

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[7] Soon after DeVoto admitted that he rejected a settlement offer without consulting with his client, one of the DHP panel members, Cynthia Albin, tried to help Mr. DeVoto by suggesting that sometimes lawyers act on prior authorization to reject settlement offers within a range, and that this could be such a situation. Despite the panel member's invitation—which itself is strange—to explain the summary rejection, DeVoto did *not* testify that he had prior authorization to reject.

DeVoto also misstated the idea of "direct" contact with Manse, because Chaganti testified that he wanted the lawyer to be present when Chaganti presented a case for settlement to Manse. This is consistent with his rejection of communication with Manse in May 2010. (R-7) There is no prohibition to discuss with a represented client in the presence of his lawyer, if the lawyer permits such discussion.

4. Manse did not testify truthfully

On direct, Manse testified that he did not inform Chaganti that he was an HVAC serviceman. Though he exchanged business cards with Respondent, Manse insisted to AmerenUE that he did not solicit Whispering Oaks' work. Manse testified that he learned that Chaganti was a lawyer only *after* the suit was filed. This appears to be an attempt to bolster his testimony that he was afraid when he received the November 1, 2012 letter. However, he attempted to communicate with Chaganti in June 2010, which indicates that he was not afraid that Chaganti was a lawyer. See R-7.

On cross, Manse admitted that he knew Chaganti was a lawyer when he exchanged business cards with Chaganti in May 2009 at Whispering Oaks. He admitted that he gave a business card that advertises "Manse Heating & Cooling" which contained the information that he was an HVAC serviceman.

Manse's note on the coversheet was written *after* his telephone discussion with Devoto, indicating that Devoto advised that Manse write the notation. As Manse acknowledged, that note does not suggest a continuing relationship between the two. It simply states, "Please help me," indicating a start of a new relationship. He did not write "please *continue* to help me."

He clearly was not shocked or afraid of either because Chaganti was a lawyer (he obtained Chaganti's business card when they met at Whispering Oaks) or of the re-filing of a law suit (he attempted to directly contact Chaganti in May 2010 after the suit was filed) (R-7). Manse's statement that he was "afraid" of a lawsuit which lasted three years is not credible.

Manse could not recall approximately how many thousands of dollars he had paid DeVoto. Manse gave several reasons why he was "shocked" upon the initial filing of the suit in 2009, or upon receipt of November 1, 2012 letter, or the possibility of re-filing the suit, or the potential that AmerenUE would learn of his moonlighting activities. Manse indicated that he had thought that the case was finally dismissed, which implies that he understood this to be the case from DeVoto.

If, on October 31, 2012, Chaganti told DeVoto that he would re-file suit against Manse (as stated in R-17), or if Manse continued to have attorney-client relationship with DeVoto, then Manse would have had no reason to be shocked.

Given the lack of credibility of the Informant's witnesses, and given that Respondent's testimony was the only consistent version with the facts, there is no reason to impute to Respondent any knowledge of any relationship between Manse and DeVoto after October 31, 2102.

5. There was neither harm nor prejudice to Manse

Manse was charged with disciplinary violation at work for seeking moonlighting work from his coworkers and supervisor. That was the reason for his fear. But his self-report to AmerenUE was in anticipation of a disciplinary action by AmerenUE due to his

solicitation of work from his co-workers and supervisor. And he was finally not disciplined at work. The true reason for his fear was that he violated the AmerenUE's conflict of interest policy and for soliciting its customers while on company clock, which has nothing to do with the letter of November 1, 2012. DeVoto attempted to use this disciplinary proceeding to shield Manse from future litigation. Informant appears to be misled by DeVoto in this regard, especially in view that DeVoto did not disclose R-7 to Marc Lapp.

RESPONSE TO POINT II

No discipline is warranted in this case against Respondent's license because a plain reading of Comment 4 to the Rule expressly permits the type of communication involved, and in the alternative, because Respondent complied with the rule during litigation and reasonably and justifiably relied on the interpretations of the rule as given in the Restatement as well as a Missouri informal opinion.

Standard of Review

Under the ABA Standards, if misconduct is found, the court performs a two-part analysis. First, the court determines the presumptive sanction based on the ethical duty violated, the attorney's mental state, and the extent of actual or potential harm caused by the conduct. Second, the court considers aggravating and mitigating factors, which may alter the presumptive sanction or decrease or lengthen a suspension. See ABA Standards 9.22, 9.32.

Argument

First, it should be noted that no harm or prejudice resulted to Manse upon receipt of the November 1, 2012 letter, which he could have left unopened and sent to DeVoto if DeVoto were his lawyer at the time. If he was represented, he was protected from overreaching, and if he was not represented, the letter does not violate the rule. Informant failed to show any prejudice to Manse, as required under Rule 4-4.2 or under Rule 4-8.4(d).

On the issue of Respondent's culpability, Informant pointedly fails to disclose to this Court that it was Respondent who, during the early stages of litigation, ***terminated*** a

contact attempted by Manse and ***reported*** to DeVoto of the contact. See (R-7). That letter from DeVoto acknowledging the incident is ample proof that Respondent faithfully complied with the rule. That letter from DeVoto also illustrates his view—that parties may communicate with each other directly—even ***during*** litigation. Had Respondent been of the type Informant describes—overreaching, threatening, intimidating, reprehensible etc—Respondent would have taken advantage of the communication initiated by Manse in May 2010. It appears DeVoto did not disclose this document to Marc Lapp at their May 9, 2013 meeting.

After the suit was dismissed, however, things were different. DeVoto notified Respondent that he would not represent Manse and that Manse did not have funds to pay lawyers. Having learned this, Respondent, as party and only employee of Whispering Oaks, offered to settle. Upon learning of this letter, DeVoto filed a bar complaint perhaps with a view to take advantage of a disciplinary action, thereby *intimidating Respondent into not filing the suit again*.

On his part, Informant attempts to show that a filing of the suit against Manse—before statute of limitations expired—was indicative of some act deserving this Court's opprobrium. But nothing requires a claimant to relinquish his claim because there was a pending disciplinary proceeding.

Respondent reasonably and honestly relied on DeVoto's statements that his relationship with his client ended. If Respondent's license is decided on the issue of *whether DeVoto continued to represent Manse after the suit ended*, such critical fact cannot be decided without adequate evidence.

But what evidence does the Informant have to show a continuing relationship between Manse and DeVoto? Nothing but a self-serving Memorandum (R-17) by DeVoto, without supporting invoices, letters and other indicia of actual relationship. DeVoto and Manse should not have been permitted to testify after they failed to comply with the subpoena that required production of information that could cast doubt on this Memorandum. Nor should the Informant be allowed to make a case on such self-serving document. The Court should not convict one of violating a disciplinary rule with such insubstantial and tenuous proof. Evidence required to convict someone should be much more substantial than a self-serving document that has no indicia of being authentic. Even if it were timely made, a self-serving document, without more, can cause great mischief if that is sufficient to take away someone's license.

The emotional language used by Informant—in stating that a settlement invite from a party to another party is "reprehensible"—overstates his case against Respondent. The term "reprehensible" is usually reserved for crimes of moral turpitude. The CDC should use less inflammatory language to describe this as what it is—a business person wrote a letter to an electrician to resolve a dispute about overcharging for work.

In retrospect, it perhaps preferable to verify every person with whom a lawyer communicates if the person is represented by a lawyer before initiating communication with him or her. But such is not the plain language of the Rule. Respondent relied on Comment 4 that parties may communicate with each other directly. Such reliance cannot be faulted because in Missouri the rules are interpreted based on their plain language. Furthermore the rule of lenity requires interpreting the rule as not applying to this

Respondent, even if it is interpreted to proscribe the challenged conduct to other lawyers prospectively.

Nevertheless, in response to this complaint, Respondent has started asking every person—whether there is a dispute or not—to verify if he is represented by counsel before any substantive communication is made with that person. Because many lawyers also conduct businesses—including their own practices—the Court should not create a rule that is unnecessarily restrictive of a person's multiple engagements.

No discipline is warranted under the facts of this case.

RESPONDENT'S POINT III

Under the facts of this case neither Rule 4-4.2 nor Rule 4-8.4(d) is violated, and if despite Comment 4, Rule 4-4.2 is interpreted as applying to members represent their own interests, the rule as applied to this case should be declared unconstitutional as it violates the notice provisions of the Due Process Clause and Equal Protection Clause of the federal and State Constitutions.

Standard of Review

The standard is the same as in Point I, which is *de novo* interpretation of rules.

Argument

If Rule 4-4.2 is interpreted to state that a "party" does not mean a lawyer representing his own interests, then it is unconstitutional because it violates the notice provisions of the Due Process Clauses of the federal and state constitutions. *Cf. Prokopf v. Whaley,* 592 S.W.2d 819, 824 (Mo. banc 1980)(holding that a statute's constitutionality is determined in its application to a situation). *See Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (due process requires fair notice, impartial decision maker …); *Belton v. Board of Police Com'rs of Kansas City*, 708 S.W.2d 131, 137 (Mo. banc 1986) (The Due Process Clauses require that before depriving a person of a property interest, he must receive notice and an opportunity for a hearing appropriate to the nature of the case.) In addition, the rule violates a lawyer's liberty and property rights without just compensation as required under the Fifth Amendment to the US Constitution. It also violates the Equal Protection Clause of the federal and state constitutions. See *City of*

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (The Equal Protection Clause requires that persons who are similarly situated be treated alike).

If the rule excludes lawyers representing themselves, what is permitted of any other citizen is not permitted of a person by the simple incident of the lawyer's holding a membership in the state bar. Furthermore, the rule, as applied to lawyers representing their own interests, lacks a rational relationship to a legitimate state purpose.

In a physician discipline case, this Court held that holding a physician to a standard other than that enumerated in the statute may raise due process concerns:

> "This Court interprets "unprofessional conduct" in this case to refer, first, to the specifications of the matters "including, but not limited to" those 17 grounds specified in as subparagraphs (a)-(q) of section 334.100.2(4). … this Court recognizes that significant notice issues would arise if grounds not based in statutory language, (whether in subparagraphs (a)-(q) or somewhere else in the statute), were attempted to be used to provide a basis for a finding of unprofessional conduct."

Albanna v State Board of Reg'n for the Healing Arts 293 S.W.3d 423, 431 (Mo banc 2009).

It is up to this Court to decide whether the challenged communication is valid or invalid. For example, California expressly permits communication, and so does Connecticut. See *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075 (1990) (lawyer-party was not "representing a client").

As argued before the only correct interpretation of Rule 4-4.2 is to permit a party (regardless of whether he or she is a lawyer) to make settlement overtures to another party. Alternatively, a rule should be established—and applied prospectively only—that the Rule excludes self-representing attorneys. Otherwise, the Rule violates notice provisions of the due process clause and further treats members of the bar with businesses differently from similarly situated other business owners.

CONCLUSION

The rules expressly permit parties to communicate with each other. Whispering Oaks' sole officer does not become an attorney representing a client simply because he also happened to be a member of the bar. The DeVoto Memorandum on which the CDC relies solely is an excludable self-serving document. DeVoto's own testimony made it clear that he was unreliable and that he sought to use the disciplinary process to achieve an advantage in civil dispute. Any problems of Manse were due to his violation of his company's policies and cannot be attributed to a simple letter suggesting settlement. The information should be dismissed, or alternatively no discipline is warranted because the rule of lenity requires resolving any ambiguity in rules in favor of Respondent. Finally, Due Process and Equal Protection Clauses of the federal and state constitutions require an interpretation of the rule that does not exclude lawyers presenting their own businesses, or the rule is void as unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that the foregoing Brief complies with the limitations contained in Rule 84.06(b). The Brief was prepared using Microsoft Word and 13-point proportionate font, and the body of the brief (excluding the cover page, the signature block and this certificate of service and compliance) contains 13,041 words, as counted by the software program. The undersigned additionally certifies that this Respondent's Brief complies with Rule 84.04(d).

The undersigned further certifies that on the date below, an electronic version of the Respondent's Brief (which has been scanned for viruses using Microsoft antivirus software and is shown to be free of viruses) was filed with the Clerk of Court and served on all interested persons below via the Court's ECF system.

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Date: July 21, 2014

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