IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
ERIC G. ZAHND	)	**Supreme Court #SC96939**
	)	
Respondent.	)	

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

NANCY L. RIPPERGER #40627
STAFF COUNSEL
3327 AMERICAN AVENUE
JEFFERSON CITY, MO 65109
(573) 635-7400
(573) 635-2240 (FAX)
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

STATEMENT OF JURISDICTION

This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, RSMo 2016.

STATEMENT OF FACTS

BACKGROUND INFORMATION REGARDING RESPONDENT

Respondent Eric G. Zahnd ("Respondent") was licensed by the Missouri Bar on October 4, 1996. **R. 1, para. 3; R. 26, para. 3**. Respondent's bar number is 47196. The address Respondent most recently registered with the Missouri Bar is 415 Third Street, Suite 60, Platte City, MO 64079. **R. 1, para. 4; R. 27, para. 4**.

Respondent's license is in good standing. **R. 1, para. 5; R. 27, para. 5**. Respondent does not have a prior disciplinary history. **R. 1, para. 6; R. 27, para. 6**.

Respondent is the Platte County Prosecuting Attorney. He was first elected to this position in 2002 and has served in the position since 2003. **App. 89 (Tr. 345)**. As the elected Platte County Prosecutor, Respondent supervises a staff of ten attorneys and ten support staff. Respondent ultimately is responsible for every case handled by the Platte County Prosecutor's Office ("Prosecutor's Office"). **App. 90 (Tr. 346)**.

BACKGROUND INFORMATION REGARDING THE DARREN PADEN PROSECUTION

Darren Paden and his parents were prominent members of the Dearborn community. **App. 118 (Tr. 449)**. Dearborn is a small town in northern Platte County, Missouri. **App. 150 (Tr. 576)**. In December 2012, the Prosecutor's Office filed a criminal complaint against Mr. Paden charging him with two counts of first degree felony statutory sodomy. **App. 302-11**. Prior to being charged with the crimes, Mr. Paden had admitted to law enforcement that he had sexually assaulted one of his daughters. **App. 91 (Tr. 351)**.

Mr. Paden's father, Jimmy Paden, hired John O'Connor, a long-time Kansas City criminal defense attorney and prior prosecutor, to defend Mr. Paden. **App. 56 (Tr. 210)**. Assistant Prosecutor Myles Perry initially handled the prosecution of the case. When Mr. Perry was called into active military duty in 2014, Assistant Prosecutor Chris Seufert took over the prosecution. **App. 147 (Tr. 566)**. In early 2015, Mr. Perry returned from active duty and Mr. Perry and Mr. Seufert continued as co-counsels in the case. **App. 171 (Tr. 660)**. On August 17, 2015, Mr. Paden pled guilty to two counts of first degree felony statutory sodomy. **App. 302-11**.

Between the time Mr. Paden was charged with the crimes and the time he pled guilty, Mr. Paden bonded out of jail. While out on bond, Mr. Paden lied to various members of the public about his guilt. **App. 205-90**. As part of the guilty plea, Mr. Paden admitted that he had lied to people in the community. **App. 150 (Tr. 578)**.

The victim was emotionally unstable after Mr. Paden pled guilty. **App. 106 (Tr. 400)**. The victim felt ostracized by the community. **App. 150 (Tr. 577)**.

Mr. Paden's sentencing originally was scheduled for October 2, 2015, but then moved to October 9, 2015. **App. 302-11**.

MEMBERS OF THE DEARBORN COMMUNITY FILE CHARACTER REFERENCE LETTERS WITH THE COURT PRIOR TO MR. PADEN'S SENTENCING

Prior to sentencing, Mr. Paden's father asked Mr. O'Connor if it would be helpful if members of the community wrote character reference letters for Mr. Paden to be used at the sentencing hearing. **App. 56 (Tr. 212)**. Mr. O'Connor agreed that such letters

could be helpful.[1] **App. 56 (Tr. 212)**. Mr. O'Connor instructed Mr. Paden's father to have the letter writers file their letters directly with the Court. **App. 56 (Tr. 213)**. This is Mr. O'Connor's normal practice for handling character reference letters. **App. 56 (Tr. 213); 176 (Tr. 682)**.

The Court received sixteen reference letters from Mr. Paden's family, friends, and coworkers. **App. 302-11**. A few of the letters questioned the guilt of Mr. Paden and/or the character of the victim. **R. 673, 675**, and **676**. Most of the letters did not. **App. 191-193, 199-201; R. 674, 677, 679, 680, 681**, and **682-84**. Mr. Paden's counsel never intended to call the letter writers to the stand to testify at the sentencing hearing. **App. 70 (Tr. 269)**.

Both the Prosecutor's Office and Mr. O'Connor received copies of the character reference letters. **App. 58 (Tr. 218)**. Once the letters were filed with the Court, the public could review the letters by going to the Circuit Clerk's Office and requesting a copy of them. **App. 86 (Tr. 332-33)**.

---

[1] In the Paden case, Mr. O'Connor knew the letters would have minimal value, at best, in obtaining a reduced sentence because of the seriousness of the crimes Mr. Paden had committed. **App. 57 (Tr. 215)**. Mr. O'Connor testified that character reference letters are most effective in cases where probation is a possible sentence. In these type of cases, Mr. O'Connor utilizes character reference letters as part of his sentencing strategy about 90 percent of the time. **App. 57 (Tr. 215)**.

It is not unusual for defense counsel to submit character reference letters at the sentencing of a criminal defendant. **App. 21 (Tr. 70)**. Abe Shafer IV, a retired Platte County Circuit Judge and Prosecutor, testified that he saw hundreds of character reference letters when he was on the bench. **App. 20 (Tr. 67)**. Typically, the Prosecutor's Office does not object to character reference letters. **App. 35 (Tr. 128); 134 (Tr. 513)**. Respondent testified that the one time that the Prosecutor's Office objected, the Court overruled the objection. **App. 134 (Tr. 513)**.

While it would be unusual for a prosecutor to do so, a prosecutor has the right to subpoena a character reference letter writer to testify at sentencing and cross-examine the letter writer on the stand. **App. 29 (Tr. 102); 146-47 (Tr. 562-63); 158 (Tr. 608)**.

JERRY HAGG'S REFERENCE LETTER

Jerry Hagg was one of the letter writers. **App. 191-93**. Jerry Hagg is the retired President/Chief Executive Officer of the Platte Valley Bank. **App. 6 (Tr. 13)**. He served in this position for 32 years until his retirement in 2011. **App. 14 (Tr. 43)**. Mr. Hagg's prior position with the Platte Valley Bank is well-known in the community. **App. 18 (Tr. 59)**.

Mr. Hagg was friends with Mr. Paden's father for over 40 years. He knew Mr. Paden, but was not a close friend. **App. 7 (Tr. 15)**. After Mr. Paden pled guilty, Mr. Paden's father asked Mr. Hagg to write a reference letter for Mr. Paden. **App. 7 (Tr. 17)**.

Mr. Hagg was aware that Mr. Paden had pled guilty but did not follow the case closely. **App. 8 (Tr. 18); 17 (Tr. 54)**. He did not know the specific details of Mr. Paden's crime except for the fact that Mr. Paden had molested one of his daughters.

App. 7 (Tr. 15). Mr. Hagg did not contest Mr. Paden's guilt. **App. 17 (Tr. 54)**. He assumed Mr. Paden was guilty because he knew Mr. Paden had pled guilty. **App. 17 (Tr. 54)**.

Mr. Hagg and his wife prepared a letter which Mr. Paden's father sent to the Court. The letter stated:

> We have known Darren Paden all his life and watched him grow up. He has been involved in community activities with his church, school, and our volunteer fire department. He assumed leadership roles in the fire department and helped it grow to a very respected service in our community.
>
> He, along with his family, has contributed greatly over the years to this community.
>
> Thank you for your time.

App. 191-93.

Everything Mr. Hagg included in the letter was truthful. **App. 7 (Tr. 17)**. Mr. Hagg did not ask for a reduced sentence for Mr. Paden in his letter. **App. 8 (Tr. 18)**. Mr. Hagg's letter did not list his prior position at the Platte Valley Bank and did not indicate in any way that Mr. Hagg was writing as a representative of the bank. **App. 191-93**.

Mr. Hagg did not know Mr. Paden's victim. **App. 7 (Tr. 15)**. Mr. Hagg never made any negative statements about the victim or harassed the victim in any way. **App. 12 (Tr. 37); 132 (Tr. 505)**. Mr. Hagg's letter was filed with the Court on September 25, 2015. **App. 302-11**.

DONNA AND KARLTON NASH'S REFERENCE LETTER

Donna and Karlton Nash wrote one of the character reference letters. **App. 199-201.** Ms. Nash is the former Platte County Collector. She served in this position for 33 years before her retirement in 2011. **App. 38 (Tr. 138); 54 (Tr. 204)**. Ms. Nash is married to Karlton Nash. Karlton Nash owns Nash Gas in Dearborn, Missouri. **App. 38 (Tr. 138)**. The Nashes are well-known members of the Dearborn community. **App. 46 (Tr. 172)**.

Mr. and Ms. Nash were long-time friends of Mr. Paden's parents. **App. 38 (Tr. 138-39)**. Mr. and Ms. Nash knew Mr. Paden and his sister. **App. 38 (Tr. 139)**. Mr. Paden's father asked the Nashes to write a reference letter on behalf of Mr. Paden. **App. 38 (Tr. 141)**. The Nashes were hesitant to do so but after Mr. Paden's father made multiple requests, they decided to write a letter on Mr. Paden's behalf. **App. 38 (Tr. 141)**.

At the time the Nashes wrote the letter, the Nashes knew that Mr. Paden had been charged with molesting his daughter but did not know the status of the case or that Mr. Paden had pled guilty. **App. 38 (Tr. 139); 49 (Tr. 184)**.

The Nashes' letter stated:

> We have known [Mr. Paden's parents] for over 50 years. They were our first good friends when we moved to Dearborn and that friendship has continued throughout these years. We have watched their children Darren and [Mr. Paden's sister] grow into well respected, caring adults.

Darren has been an active productive member of his church and the Dearborn community. Because of this, he has received and is still receiving unlimited love and support from all of us.

We are writing to tell you that we sincerely pray that Darren will not be condemned to a life behind bars. Please give him an opportunity to prove that he can be a positive valuable member of his community.

Thank you, Judge Van Amburg, for your kind consideration.

App. 199-201.

The Nashes did not know the victim. **App. 41 (Tr. 153)**. They had never harassed the victim in anyway and never believed the victim was lying. **App. 41 (Tr. 152)**. Ms. Nash felt sorry for the victim. **App. 44 (Tr. 165)**.

The Nashes mailed their letter to the Court. **App. 39 (Tr. 143)**. The letter was filed in the court file on October 6, 2015. **App. 302-11**.

RESPONDENT DIRECTS THE ASSISTANT PROSECUTORS TO:

(A) SUBPOENA THE LETTER WRITERS,

(B) MEET WITH THE LETTER WRITERS, AND

(C) CONVINCE THE LETTER WRITERS TO

WITHDRAW THEIR LETTERS

Shortly after the Prosecutor's Office began receiving the character reference letters, Respondent, Mr. Perry, Mr. Seufert and Mr. Mark Gibson, the First Assistant Prosecutor, met to discuss the letters. **App. 108 (Tr. 407)**. Respondent was concerned because some of the letter writers were prominent members of the Dearborn community

and some of the letter writers questioned the guilt of Mr. Paden and/or questioned the character of the victim. **App. 108 (Tr. 408)**. Mr. Gibson suggested subpoenaing the letter writers and cross-examining them on the stand. **App. 108 (Tr. 410)**. Respondent agreed to such. **App. 108 (Tr. 410)**. Respondent, however, also directed Mr. Seufert to meet with the letter writers prior to the sentencing. **App. 109 (Tr. 411); 110 (Tr. 415-16)**. Mr. Seufert was to use the subpoenas to bring the letter writers into the office and meet with them. **App. 173 (Tr. 667)**. Mr. Seufert then was to confront the letter writers with the facts of the case and was to confront them with questions that could be posed to them on cross-examination. **App. 109 (Tr. 411); 110 (Tr. 415-16); 153 (Tr. 589)**. Respondent believed that after meeting with Mr. Seufert, the letter writers would ask the Court to disregard their letters when sentencing Mr. Paden.[2] **App. 109 (Tr. 411); 110 (Tr. 415-16)**.

The Prosecutor's Office did not file any formal objection to the letters or file any motion to strike the letters from the record. **App. 302-11**.

MR. HAGG AND JUDGE SHAFER'S MEETING WITH MR. SEUFERT

On October 1, 2015, the Prosecutor's Office served Mr. Hagg with a subpoena. **App. 8 (Tr. 18)**. The subpoena directed Mr. Hagg to call Mr. Seufert and to appear at the

[2] At the disciplinary hearing, most of the witnesses reference "withdrawing" the character reference letters. This is a misnomer in that once the letters were filed with the Court they could not be removed from the Court File. However, the letter writers could have asked the Court to disregard the letters.

Platte County Courthouse - Division II, Platte City on October 9, 2015, at 9:00 to testify on behalf of the State. **App. 194-98**. The sentencing was not scheduled to start until 11:00 a.m. that morning. **App. 302-11**.

Mr. Hagg called the Prosecutor's Office and was told by whoever answered the phone that Mr. Seufert wanted to talk to him about the letter he wrote. **App. 8 (Tr. 19)**. Shortly after Mr. Hagg called the Prosecutor's Office, Mr. O'Connor called Mr. Hagg. **App. 8 (Tr. 19)**. Mr. Paden's father had advised Mr. O'Connor that Mr. Hagg had been subpoenaed to appear at the sentencing. **App. 59 (Tr. 224)**. Mr. O'Connor thought this was very unusual, as he had never seen a character reference letter writer subpoenaed by a prosecutor before. **App. 59 (Tr. 223-24)**.

After talking with Mr. O'Connor, Mr. Hagg called Judge Shafer.[3] **App. 8 (Tr. 20)**. Judge Shafer and Mr. Hagg have known each other for years. **App. 20 (Tr. 66)**. Judge Shafer agreed to go with Mr. Hagg when he met with Mr. Seufert. Instead of meeting with Mr. Seufert on October 9, 2015, before the sentencing as the subpoena directed, Judge Shafer decided to try to meet with Mr. Seufert on October 8, 2015. **App. 21 (Tr. 72)**.

Mr. Hagg and Judge Shafer went to the Prosecutor's Office late in the work day on October 8, 2015. **App. 21 (Tr. 72)**. When they arrived, Mr. Seufert was unavailable, and

[3] As discussed above, Judge Shafer is a retired Platte County Circuit Judge and Prosecutor.

Mr. Perry invited Judge Shafer into his office while they waited for Mr. Seufert to become available. **App. 21 (Tr. 73); 173-74 (Tr. 670-71)**.

While speaking with Mr. Perry, Judge Shafer confirmed with Mr. Perry that the Prosecutor's Office's purpose in meeting with Mr. Hagg was to see if Mr. Hagg would withdraw his letter. Mr. Perry indicated that if Mr. Hagg withdrew his letter, Mr. Hagg would be released from the subpoena and would not have to testify at sentencing. **App. 21 (Tr. 72-73)**. Judge Shafer then returned to the waiting room and sat with Mr. Hagg. **App. 174 (Tr. 671)**.

A few minutes later, Mr. Hagg and Judge Shafer met with Mr. Seufert and Tanya Faherty, a paralegal at the Prosecutor's Office and the Victim Advocate for the Paden prosecution. **App. 22 (Tr. 74-75)**. After exchanging pleasantries, Mr. Seufert asked Mr. Hagg if he wanted to view Mr. Paden's confession. **App. 9 (Tr. 22)**. Mr. Hagg declined to do so. **App. 9 (Tr. 23)**. Mr. Seufert asked Mr. Hagg why he wrote the letter. **App. 9 (Tr. 23)**. Mr. Hagg replied that he had done so because Mr. Paden's father had asked him to do so. **App. 9 (Tr. 23)**. Mr. Seufert asked why Mr. Hagg had not written a letter for the victim. **App. 9 (Tr. 23)**. Mr. Hagg explained that he did not know the victim and the victim did not ask him to write a letter in her support. **App. 9 (Tr. 23)**. Mr. Seufert then accused Mr. Hagg of supporting child molestation, which Mr. Hagg denied. **App. 9 (Tr. 23)**. Mr. Hagg also told Mr. Seufert that he was offended that Mr. Seufert would accuse him of such. **App. 9 (Tr. 24)**. Mr. Seufert partially stood up and pointed a finger at Mr. Hagg and stated he was offended by Mr. Hagg's response and advised that if he did not withdraw his letter, Mr. Seufert would place Mr. Hagg on the stand during the

sentencing, ask him some very difficult questions and force Mr. Hagg to watch the confession video while he was on the stand. **App. 9 (Tr. 24); 22 (Tr. 76-77)**. Mr. Seufert was loud and confrontational in the meeting, as if he was cross-examining Mr. Hagg. **App. 23 (Tr. 80)**.

During the meeting, Judge Shafer asked how many people had written reference letters and how many letter writers had withdrawn their letters. **App. 9 (Tr. 25); 22 (Tr. 76)**. Mr. Seufert advised that sixteen people had sent reference letters, and none had withdrawn their letters. **App. 9-10 (Tr. 25-26)**. During the conversation, Mr. Hagg advised Mr. Seufert that he did not want to withdraw his letter. **App. 22 (Tr. 76)**.

As Mr. Hagg and Judge Shafer stood up to leave, Mr. Seufert advised that the office had prepared a press release and that unless Mr. Hagg withdrew his letter, his name would appear in the press release as a supporter of child molestation. **App. 10 (Tr. 26); 23 (Tr. 78)**. Prior to meeting with Mr. Hagg and Judge Shafer, Mr. Seufert spoke with Respondent and received authorization from Respondent to tell Mr. Hagg about the press release and to inform Mr. Hagg that his name would be included in the press release as a supporter of child molestation. **App. 154 (Tr. 594)**.

RESPONDENT'S TELEPHONE CALL TO MS. NASH

The Prosecutor's Office attempted to subpoena Mr. and Ms. Nash to the sentencing hearing but was unable to do so because the Nashes were out of town. **App. 110 (Tr. 418)**. Respondent knew Ms. Nash because they both belonged to the same political party and both had held elected positions in Platte County. **App. 39 (Tr. 143); 50 (Tr. 189)**.

During the evening of October 8, 2015, Respondent called Ms. Nash on her cell phone. **App. 111 (Tr. 419)**. Ms. Nash was in Washington D.C. attending a Daughters of the American Revolution National Meeting. **App. 39 (Tr. 143)**. After Ms. Nash answered her phone, she asked Respondent if she could call him back as she was at a dinner. **App. 39 (Tr. 144)**. Respondent indicated that he needed to speak with her immediately, so Ms. Nash left the dinner and went outside on the porch of the restaurant to talk. **App. 39 (Tr. 144)**. Initially, Respondent did not tell her why he was calling. **App. 39 (Tr. 144)**. Respondent sounded very agitated throughout the call. **App. 39 (Tr. 144)**.

Respondent advised Ms. Nash that he was very disappointed in her and her husband for writing a letter for a child molester. **App. 39 (Tr. 144)**. Ms. Nash indicated that they had written the letter because Mr. Paden's father had asked them to do so. **App. 39 (Tr. 145)**.

Respondent asked Ms. Nash if she knew that Mr. Paden had confessed and pled guilty. **App. 39 (Tr. 145)**. Ms. Nash indicated that she did not know that he had done so. **App. 39 (Tr. 145)**. Ms. Nash expressed sympathy for the victim when speaking with Respondent. **App. 132 (Tr. 505)**.

Respondent advised Ms. Nash that she should withdraw her letter and if she did not he would issue a press release which listed her name and the name of her husband in it. Respondent also indicated that the Nashes' reputation would be at stake because they had supported a child molester. **App. 39 (Tr. 145); 41 (Tr. 151)**. Ms. Nash advised Respondent that she would talk to her husband and they would get back to him if they

decided to withdraw their letter. **App. 41 (Tr. 151)**. Ms. Nash felt bullied and intimidated by Respondent. **App. 41 (Tr. 151)**. Ms. Nash cried after the phone call, as she did not want their names tarnished. **App. 41 (Tr. 152)**. After Ms. Nash returned to her hotel room, she called her husband. **App. 41 (Tr. 153)**. They decided that they would not withdraw their letter. **App. 41 (Tr. 153)**. They then hired an attorney to represent them in the event they were subpoenaed to testify at the sentencing. **App. 41 (Tr. 153)**.

THE PROSECUTOR'S OFFICE FACEBOOK POSTING

On October 8, 2015, Mr. Seufert made the following posting on the Prosecutor's official Facebook page:

> Darren Paden will be sentenced on October 9 on 2 counts of statutory sodomy in the first degree. Over 15 people have submitted letters to the Court in support of this child molester, including a former bank president . . . The sentencing hearing begins at 11 am in division 2 at the Platte County Courthouse, if you would like to attend the hearing to show support for the victim.

App. 291-95. Mr. Seufert obtained authorization from Respondent to make the posting. **App. 117 (Tr. 446)**.

THE SENTENCING HEARING

The October 9, 2015, sentencing hearing was cancelled. **App. 60 (Tr. 226-28)**; **302-11**. Initially, the Court rescheduled the sentencing for November 13, 2015, but Respondent and Mr. Gibson met with Mr. O'Connor and asked if he would agree to an earlier sentencing date because the victim was experiencing emotional problems. **App.**

60-61 (Tr. 226-30); 302-11. Mr. O'Connor agreed to do so because he believed it was in Mr. Paden's best interest to enter the state penitentiary system over remaining in the county jail while awaiting sentencing. **App. 60 (Tr. 229); 302-11**. During the meeting, the Prosecutor's Office indicated it would release the letter writers from the subpoena. **App. 60 (Tr. 229); 302-11**.

The sentencing was rescheduled for October 30, 2015. **App. 302-11**. The Prosecutor's Office released the letter writers from the subpoenas on October 28, 2015. **App. 202**. On October 29, 2015, Judge Shafer called Respondent to inquire if any of the letter writers' names would be mentioned at the sentencing. **App. 26 (Tr. 86)**. Respondent advised Judge Shafer that Mr. Perry[4] did not plan upon mentioning any of the letter writers by name unless Mr. O'Connor brought the issue up. **App. 26 (Tr. 86)**.

The sentencing occurred on October 30, 2015. **App. 302-11**. The possible range of sentencing for Mr. Paden was twenty to sixty years. **App. 210**. Mr. Paden was 52 years old at the time of sentencing and suffered from several serious health issues. **App. 277**. As a result, even if the Court imposed the minimum twenty-year sentence, it was unlikely that Mr. Paden would live long enough to be eligible for probation. **App. 277**.

Mr. O'Connor did not mention the letter writers or ask the Court to consider the letters when imposing sentence. **App. 61 (Tr. 230); 205-90**. At the sentencing, Mr. O'Connor put on an expert witness, a clinical psychologist, who Mr. Seufert vigorously

[4] Mr. Perry was handling the closing argument for the Prosecutor's Office at the sentencing. **App. 205-90**.

cross-examined. **App. 222-48**. Mr. O'Connor also put on eight live character witnesses. They included Mr. Paden's ex-wife, daughter (not the victim), son, coworker, niece, sister, father and mother. The character witnesses either testified to good things that Mr. Paden had done in his life or asked the Court for mercy when sentencing Mr. Paden. The prosecution did not cross-examine any of the witnesses. **App. 253-60**.

During the sentencing, the victim and her mother provided testimony regarding how Mr. Paden's crimes had negatively impacted their lives. **App. 261-75**. In his closing, Mr. Perry made references to the letter writers as a group but did not name the individual letter writers. **App. 279-86**. Mr. Perry focused on the letter writers who had questioned Mr. Paden's guilt and/or the victim's character and upon members of the community who had allegedly harassed the victim. **App. 279-86**. Mr. Perry also acknowledged that it was possible to both support the victim and the defendant in the case and commended Mr. Paden's father for doing so. **App. 277**.

The Court sentenced Mr. Paden to 25 years on Count I and 25 years on Count II with the sentences to run consecutively, for a 50-year sentence. **App. 286-287**.

RESPONDENT'S PRESS RELEASE

On October 30, 2015, Respondent prepared and distributed a press release regarding the Paden sentencing. **App. 119 (Tr. 451-52)**. Respondent titled the press release: "Dearborn man sentenced to 50 years in prison – Prosecutor disappointed that many supported confessed child predator over victim." **App. 296-98**.

The Press Release provided:

A Dearborn man who sexually abused a girl over the period of a decade, beginning when she was five or six years old, has been sentenced to 50 years in prison. Darren L. Paden, 52, received the sentence on October 30 after pleading guilty to two counts of first degree statutory sodomy in August.

But Platte County Prosecuting Attorney Eric Zahnd said something was different - and deeply troubling - about the case: the number of community members who continued to disbelieve the young girl, even though the defendant admitted his guilt within the first couple of hours of his police interview and then pleaded guilty.

"There are certainly a few good people in this community who have offered support to this young victim," Zahnd said. "It is shocking, however, that many continue to support a defendant whose guilt was never in doubt. If it takes a village to raise a child, what is a child to do when the village turns its back and supports a confessed child molester?"

At the sentencing hearing, the girl read a lengthy statement to the court that described not only the abuse she suffered . . ., but also how she felt rejected by her own community after disclosing the sexual abuse she suffered.

Among her comments:

> "I couldn't face the world, and I couldn't face this town that made me feel like I was unwanted by everyone. . . I

> was genuinely terrified to go into our new cafe in town because I was scared someone was going to yell at me or refuse to serve me. I was scared they would tamper with my food. I feel so unwelcomed in a town that I have grown up in. I feel like an outsider that just strolled in and everybody is giving their own analysis on; and making up gossip that people believe instead of just coming up and talking to me. Try dealing with that on top of being called a liar every day...

To say you support someone who has done this sort of thing makes me wonder how some would react if a son/daughter told you they were a victim of these behaviors. Would you sign a petition then? Would you write letters of support still? I have little faith some would cease support of these acts, even if it was their own flesh and blood."

The girl also said she transferred out of her public school because she "felt as if a teacher would snap on me any second in front of my peers." Ultimately, a school board member from the victim's school testified in support of Defendant. Two retired teachers and three other school employees also wrote letters in support of Paden.

Paden told the psychologist hired by his criminal defense attorney that he sexually abused the girl two or three times a month over a period from 2001 to 2012. Paden told the girl it was "their little secret" and that she should not tell her mother or anyone else.

Paden told his psychologist that he fantasized about incest and had sexual interest in children "both in dreams and fantasies." The psychologist diagnosed Paden as a pedophile.

When Paden was interviewed by detectives with the Platte County Sheriff's Department in December 2012, he admitted his guilt within two hours of the beginning of questioning. Paden also wrote letters apologizing to the victim and his family for what he had done. Despite the confession and apology letters, Paden refused to plead guilty to his crimes for more than two years.

Instead, Paden admitted to a Missouri Probation and Parole Officer that he told people the girl was lying about the allegations. At his guilty plea, however, Paden confirmed the girl "was, in fact, truthful."

Nevertheless, many members of the Dearborn community wrote letters on Paden's behalf following his guilty plea. Prosecutors met with most of them to make sure they understood that Paden had fully confessed to his crimes, yet many of these community leaders continued to member [sic] stand behind Paden.

Those writing letters or testifying on behalf of Paden included:

. . .

Donna Nash, Former Platte County Collector

Karlton Nash, Nash Gas

Jerry Hagg, Former President, Platte Valley Bank

. . .

> Zahnd said, "It is said that we can be judged by how we treat the least of those among us. It breaks my heart to see pillars of this community – a former county official, a bank president, . . . appear to choose the side of a child molester over the child he repeatedly abused."
>
> Judge James Van Amburg sentenced Paden to 25 years each on two counts of first degree statutory sodomy involving a victim under age 12. By law, those sentences must be run consecutively, resulting in a 50-year prison sentence.

App. 296-98. Respondent made the decision to include Mr. Hagg's and the Nashes' names in the press release. **App. 120 (Tr. 456)**. Respondent distributed the press release to various news agencies. **App. 121 (Tr. 461)**. Some of the news agencies included Mr. Hagg's and the Nashes' names in their reports or articles about the case. **App. 121 (Tr. 461)**.

Respondent did not list the names of all the character witnesses who testified on behalf of Mr. Paden in his press release. Excluded from the list were Mr. Paden's parents, his two children, and his niece. Respondent also did not include the names of three of the letter writers in his press release. **App. 296-98**. Respondent omitted the names of three of the letter writers because Mr. Seufert reported to Respondent that these letter writers had expressed sympathy for the victim. **App. 165 (Tr. 635)**.

RESPONDENT'S NOVEMBER 2, 2015, LETTER TO THE LETTER WRITERS

On November 2, 2015, Respondent sent a letter to the individuals who had written character reference letters for Mr. Paden. **App. 299-301**. In the letter, Respondent acknowledged that some of the letter writers had been upset with his office. He stated, in part:

> We certainly did not intend to offend anyone. However, I was shocked and brokenhearted to see so many pillars of the Dearborn community write letters in support of a confessed child predator and clinically-diagnosed pedophile, while the victim reported feeling unwelcome in her own community.
>
> The victim in this case has suffered greatly. Suffering as a result of a defendant's actions always occurs, but I do not expect a victim to suffer because her own community casts her aside. Sadly, however, that is exactly how the victim in this case feels.

App. 299-301.

Respondent then set forth many of the things that the victim said in her victim impact statement. Respondent stated the victim's statement deeply saddened him and that "if it takes a village to raise a child, what is a child to do when the village turns its back and supports a confessed child molester?" **App. 299-301**.

HARM CAUSED TO MR. HAGG AND THE NASHES BY RESPONDENT'S PRESS RELEASE

After Respondent issued his press release, Mr. Hagg received phone calls from various news agencies. **App. 12 (Tr. 34)**. Mr. Hagg was a Board member of a local electric co-op. At the co-op's annual meeting, two members of the co-op brought up to the other members that Mr. Hagg supported child molestation and that he should be removed from the Board. Mr. Hagg was not removed from the Board, but he did not run again because of the accusation made against him. **App. 12 (Tr. 36); 19 (Tr. 64)**.

Ms. Nash was very upset that Respondent's press release inferred that she supported child molestation. **App. 43 (Tr. 160-61)**. The Nashes were contacted by various news agencies. They also received various phone messages where people called them bad names. They found this very stressful. **App. 43-44 (Tr. 160-163)**. The Nashes had to call their children and grandchildren and tell them not to speak with the press about the issue. **App. 43 (Tr. 160)**. The Nashes quit going to political events because they believed people shied away from them because of the things Respondent had written in the press release. People made unkind comments about them on Facebook. Ms. Nash also had people come up to her and ask why she had written the letter. **App. 44 (Tr. 163)**.

THE DISCIPLINARY HEARING

On July 31, 2017, Informant filed an Information alleging that Respondent violated various Rules of Professional Conduct. **R. 1-10**. The Information only addressed Respondent's conduct regarding Mr. Hagg and the Nashes. **R 1-10.** On August 16, 2017,

Respondent filed his Answer. **R. 26-50**. On August 24, 2017, the Chair of the Advisory Committee appointed a Disciplinary Hearing Panel ("Panel") to conduct a hearing on the matter. **R. 51-53.**

On November 6 and 7, 2017, the Panel held a hearing. At the beginning of the hearing, the Panel took under advisement Respondent's Motion For Judgment on the Pleadings. **App. 5 (Tr. 7)**. The Panel also permitted amicus briefs, over the objection of Informant, from the Missouri Press Association, the Missouri Association of Prosecuting Attorneys, and Synergy Services.[5] **R. 70-71; 75-83.**

Nancy Ripperger represented Informant. Edwin Smith and R. Todd Ehlert represented Respondent. Informant offered eleven exhibits into evidence and nine were admitted. Informant put on testimony from five witnesses. Respondent offered 13 exhibits, all of which were admitted into evidence, and put on testimony from five witnesses. In addition, Respondent testified on his own behalf.

During the Disciplinary Hearing, Respondent strenuously denied that he did anything wrong or that he violated any of the Rules of Professional Conduct. **App. 90 (Tr. 348-49)**. He testified that he treated the letter writers as any moral person would and the way he would have wanted to be treated. **App. 90 (Tr. 349); 131 (Tr. 502)**. He

[5] Synergy Services provides hotlines services, shelter for domestic abuse victims, emergency shelter for children, long-term housing for homeless youth, and school-based prevention education focused on preventing bullying and dating violence. **R. 744.**

asserted that he, and the attorneys in his office, are "supremely ethical." **App. 131 (Tr. 501)**.

Respondent contended that he was concerned about Mr. Hagg's and the Nashes' letters because they were prominent members of the community and the Court might let Mr. Paden "off with a slap on the wrist" because of the letters. **App. 93 (Tr. 358)**. Tanya Flaherty, a paralegal for the Prosecutor's Office and the former victim advocate testified that she had spoken with Respondent, Mr. Perry, and Mr. Seufert about the letter writers on numerous occasions. She further stated that Respondent and the Assistant Prosecutors had no concern that Judge Van Amburg would give Mr. Paden a reduced sentence because of the character reference letters. **App. 169 (Tr. 651)**. Rather, Respondent and the Assistant Prosecutors merely thought it odd and unusual that prominent members of the community would support Mr. Paden. **App. 169 (Tr. 652)**.

Respondent also asserted that he dealt with Mr. Hagg and the Nashes the way he did because of the sentence the Court had imposed in the Swanepoel prosecution in 2013. **App. 108 (Tr. 409)**. Mr. Swanepoel was a 19-year-old South African man who pled guilty to four counts of felony statutory rape in the first degree. **App. 172 (Tr. 664)**. The range of punishment for the crimes was 30 years to life. **App. 172 (Tr. 664)**. The Court imposed a 9-year sentence on each of the four counts, suspended the execution of the sentence after 100 days shock time and placed the defendant on probation. **App. 180 (Tr. 697)**. At the end of the 100-day shock time, Mr. Swanepoel was deported. After his deportation, the Court issued a warrant for Mr. Swanepoel's arrest for failing to

comply with his probation terms[6] and set a $100,000 cash only bond. If Mr. Swanepoel attempts to reenter the country and he is arrested, he will have to serve out his prison sentence. **App. 181 (Tr. 699-700)**.

Many people had written character reference letters on behalf of Mr. Swanepoel and many people testified as character witnesses on behalf of Mr. Swanepoel at the sentencing hearing. Respondent made a strategic decision not to contest any of the character evidence in the Swanepoel case. **App. 108 (Tr. 409)**. Respondent testified that he was more upset about the sentence imposed in the Swanepoel case than "he had ever been about a sentence in Platte County." **App. 135 (Tr. 515)**. Respondent further testified that his office had sought a decades-long sentence in the case. **App. 139 (Tr. 534)**. Respondent attributed the short prison sentence imposed in the Swanepoel case to the effect that the character reference letters had on the judge.[7] **App. 108-09 (Tr. 408-11)**.

Judge Owens Lee Hull, Jr. sentenced Mr. Swanepoel.[8] Judge Hull testified at the hearing as a rebuttal witness for Informant. He testified that the case was unusual in that the Prosecution had entered into an agreement with the defense that the Prosecution would make no recommendation as to sentence and the Prosecution would not oppose

---

[6] Because Mr. Swanepoel was deported, he was unable to comply with the probation terms.

[7] Mr. Swanepoel was sentenced by a different judge than Mr. Paden.

[8] Judge Hull is now retired.

any sentence the defense recommended. Defense counsel had asked for a suspended execution of sentence. **App. 180 (Tr. 696-97)**. Judge Hull further testified that the character reference letters had no effect on the sentence he imposed. **App. 180 (Tr. 697-98)**.[9] He did, however, acknowledge that he gave some weight to the 28 live witnesses the defense put on at the sentencing. **App. 181 (Tr. 702)**.

Respondent asserted that the purpose of his conduct in listing Mr. Hagg's and the Nashes' names and employment or former employment in his press release was to: (a) show that there was transparency in the courts, (b) educate the public that it is important to support sexual assault victims, and (c) communicate to the public that criminal defendants cannot get special treatment if prominent people in the community write letters of support. **App. 118-120 (Tr. 448-57)**. Respondent went on to note that he provided the names and occupations of Mr. Hagg and the Nashes so that the press would be able to identify the prominent people who wrote letters of support more easily. **App. 121 (Tr. 461)**.

During the hearing, Respondent and Respondent's Counsel repeatedly attacked the disciplinary process and Informant's Counsel. Respondent advised the Panel that Informant's Counsel conducted no investigation into the complaint made against him. Rather, he asserted Informant's Counsel relied solely on the investigation Sara Rittman

[9] Judge Hull did testify that he never explained the rationale for his sentence to Respondent. **App. 181 (Tr. 702)**.

conducted.[10] Respondent went on to testify that he was shocked that Informant had completely abdicated the prosecutorial function to Ms. Rittman. **App. 122 (Tr. 466)**. Later, during cross-examination, Respondent admitted Informant's Counsel had investigated the matter independently of what Ms. Rittman had done when she came to his office and took his sworn statement and the statements of several of his employees. **App. 131 (Tr. 502)**.

Respondent's Counsel asserted that all charges brought against Respondent were "false" and "frivolous" and inferred that Respondent would deal with Informant or Informant's Counsel "at some point in time" for bringing the "frivolous charges" **App. 190 (Tr. 735)**. Respondent's counsel went on to state that he would guarantee that when this Court "gets ahold of the legal interpretation that the OCDC has given these rules, this is going to be taken care of in short order." **App. 190 (Tr. 735)**. Respondent's Counsel also advised the Panel that Respondent had lost the chance to be the US Attorney for the Western District of Missouri because the charges had been "hanging over Respondent for a year and a half." **App. 190 (Tr. 735)**.

At the end of Informant's case and at the end of the hearing, Respondent moved for a Directed Verdict, which the Panel took under advisement. **App. 85 (Tr. 327); 86 (Tr. 331); 185 (Tr. 715)**.

---

[10] Mr. O'Connor, who reported Respondent's conduct to Informant, hired Ms. Rittman to interview the letter writers and advise him whether he had an ethical obligation to report Respondent's conduct. **App. 62 (Tr. 235-236)**.

When Respondent's Counsel sent proposed findings to the Panel, his cover letter stated:

> One of my partners has been in regular contact with Senator Roy Blunt and his staff. After the conclusion of the hearing, we were told that Mr. Zahnd remains under active consideration by the While House for appointment as United States Attorney. However, this case must be resolved very promptly for that opportunity to remain a possibility. It would be a true miscarriage of justice for Mr. Zahnd to be passed over for a post for which he is imminently qualified, merely because these entirely unsupported allegations continue to hang over his head.

R. 749.

THE PANEL'S DECISION

On December 8, 2017, the Advisory Committee served the Panel's Decision on the parties. The Panel found that Respondent violated Rule 4-4.4(a) (using means that have no substantial purpose other than to embarrass, delay or burden a third person), Rule 4-5.1(c)(1) (supervising lawyer responsible for another lawyer's violation of the rules), and Rule 4-8.4(d) (conduct prejudicial to the administration of justice). The Panel found that Respondent did not violate Rule 4-3.4(f) (requesting a person other than a client refrain from giving relevant information to another party) and Rule 4-

3.8(f)[11](extrajudicial statements by a prosecutor that have substantial likelihood of heightening public condemnation of the accused). The Panel recommended that this Court issue a public reprimand to Respondent.

On January 5, 2018, Respondent rejected the Panel's Decision.

[11] Informant had asked the Panel to dismiss the Rule 4-3.8(f) charges when Informant filed its Proposed Findings of Fact, Conclusion of Law and Recommended Discipline**. R. 757.**

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-4.4(a) IN THAT RESPONDENT HAD NO SUBSTANTIAL PURPOSE OTHER THAN TO EMBARRASS OR BURDEN A THIRD PARTY WHEN HE INCLUDED THE NAMES AND PLACES (OR FORMER PLACES) OF EMPLOYMENT OF MR. HAGG AND THE NASHES IN HIS PRESS RELEASE AND STATED MR. HAGG AND THE NASHES CHOSE A CHILD MOLESTER OVER THE VICTIM.

In re Comfort, 159 P.3d 1101 (Kan. 2007)

In re Campbell, 199 P.3d 776 (Kan. 2009)

North Carolina State Bar v. Sutton, 791 S.E.2d 881 (N.C. 2016)

In re White, 707 S.E.2d 411 (S.C. 2011)

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-8.4(d) IN THAT IT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE FOR RESPONDENT TO:

A. THREATEN CHARACTER REFERENCE LETTER WRITERS BY ADVISING THEM THAT IF THEY DO NOT WITHDRAW THEIR LETTERS RESPONDENT WILL DAMAGE THEIR REPUTATIONS;

B. USE THE POWER OF THE SUBPOENA AS A MEANS TO BRING A CHARACTER REFERENCE LETTER WRITER INTO THE OFFICE TO THREATEN THE LETTER WRITER; AND

C. INTENTIONALLY EMBARRASSING AND HARASSING THE CHARACTER REFERENCE LETTER WRITERS IN HIS PRESS RELEASE WHEN THEY FAILED TO SUBMIT TO HIS DEMANDS.

In re Smith, 848 P.2d 612 (Or. 1993)

In re Chavez, 390 P.3d 965 (N.M. 2017)

In re Burns, 657 N.E.2d 738 (Ind. 1995)

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-3.4(f) IN THAT THE THREATS RESPONDENT MADE TO MR. HAGG AND THE NASHES CONSTITUTED AN ATTEMPT UPON THE PART OF RESPONDENT TO HAVE THIRD PARTIES REFRAIN FROM GIVING RELEVANT INFORMATION TO THE DEFENSE.

Oklahoma State Bar Association v. Cox, 48 P.3d 780 (Okla. 2002)

In re Walsh, 182 P.3d 1218 (Kan. 2008)

IV.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, CASE LAW FROM OTHER JURISDICTIONS, AND AGGRAVATING FACTORS SUGGEST THAT SUSPENSION IS THE APPROPRIATE DISCIPLINE.

In re Campbell, 199 P.3d 776 (Kan. 2009)

In re Warrick, 44 P.3d 1141 (Idaho 2002)

Oklahoma State Bar v. Cox, 48 P.3d 780 (Okla. 2002)

In re Doe, 801 F. Supp. 478 (D.N.M. 1992)

ARGUMENT[12]

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-4.4(a) IN THAT RESPONDENT HAD NO SUBSTANTIAL PURPOSE OTHER THAN TO EMBARRASS OR BURDEN A THIRD PARTY WHEN HE INCLUDED THE NAMES AND PLACES (OR FORMER PLACES) OF EMPLOYMENT OF MR. HAGG AND THE NASHES IN HIS PRESS RELEASE AND STATED MR. HAGG AND THE NASHES CHOSE A CHILD MOLESTER OVER THE VICTIM.

In matters of attorney discipline, the Panel's decision is only advisory. *In re Shelhorse,* 147 S.W.3d 79, 80 (Mo. banc 2004). This Court reviews the evidence de novo and reaches its own conclusions of law. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.* An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his or her license. *In re Shelhorse*, 147 S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

[12] Because Informant previously requested that the Panel dismiss the Rule 4-3.8(f) charges, Informant is not briefing the issue of whether Respondent violated Rule 4-3.8(f).

Rule 4-4.4(a) of the Missouri Rules of Professional Conduct states, in pertinent part: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Determining whether there has been a violation of this rule requires a court to examine the attorney's motive for his or her conduct. Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 Am. J. Trial Advoc. 27, 36. (Summer 2010). A court should apply an objective standard when evaluating the reasonableness of the attorney's actions and consider the specific facts and circumstances of the case instead of applying a subjective standard based solely on either the attorney's perspective or the third party's perspective. *In re Comfort*¸ 159 P.3d 1011, 1020 (Kan. 2007). An attorney cannot escape liability for violation of this Rule by merely stating that his or her actions were done for some other substantial purpose than embarrassing, delaying or burdening a third party. *Id.*

Even when there are both legitimate and illegitimate purposes for an attorney's conduct, courts routinely have found violations of Rule 4.4(a). For example, in *In re White*, 707 S.E.2d 411 (S.C. 2011), the South Carolina Supreme Court suspended an attorney's license who violated Rule 4.4(a) by sending his client's landlord and the town manager a letter that questioned whether the town manager had a soul, stated that the manager had no brain, and called the leadership of the town "pagan" and "insane." The Court held that the fact that the attorney's conduct could have served other legitimate purposes does not prevent that conduct from violating Rule 4.4(a). *Id*. at 414-15. *See also Kentucky Bar Ass'n v. Reeves*, 62 S.W.3d 360 (Ky. 2002) (Attorney suspended for

violating Rule 4.4(a) notwithstanding the fact that a demand letter had a dual purpose, one legitimate and one illegitimate); *In re Royer*, 78 P.3d 449 (Kan. 2003) (Attorney suspended for violating Rule 4.4(a) notwithstanding that transfer of ownership in property had both a legitimate and an illegitimate purpose); *Florida Bar v. Charnock*, 661 So.2d 1207 (Fla. 1995) (Attorney suspended for violating Rule 4.4(a) notwithstanding that actions to delay foreclosure proceedings had both a legitimate and an illegitimate purpose).

When there are arguably both legitimate and illegitimate reasons for the attorney's conduct, the courts look at the means the attorney used to meet his or her stated goal and evaluate whether the means had any substantial purpose other than to embarrass or burden the third party. For instance, *In re Campbell*, 199 P.3d 776 (Kan. 2009), the Kansas Supreme Court found that a prosecutor violated Rule 4.4(a) even though the prosecutor articulated a legitimate goal for his actions – to decrease underage drinking. The underlying case involved minors who had attended a party where alcohol was consumed. One minor, (C.H.), consumed six beers, was photographed having sexual intercourse with another student (M.V.). The prosecutor did not pursue prosecution of M.V. because he believed the sexual conduct to be consensual. However, Respondent, after deciding not to pursue criminal charges and after altering the photographs to obscure faces and certain body parts, allowed parents of minors who attended the party to view the photographs, including photographs of the partially clothed C.H. and photographs of the sexual intercourse between C.H. and M.V. While Respondent's desire to decrease underage drinking was legitimate, the means that Respondent

attempted to achieve his goal - allowing parents of the children who attended the party to view the photographs of the teenagers having sex - was designed to embarrass the teenagers and the parents. Thus, the Kansas Supreme Court found that the prosecutor violated Rule 4.4(a).

Similarly, in *In re Comfort*¸ 159 P.3d at 1020, an attorney published to various members of the community an indignant letter that he had written to another attorney to force the other attorney to withdraw two open records requests. The Court found that the attorney did have a legitimate objective of wanting to inform the other attorney that his client, as a private entity, was not subject to the open records act and he had a legitimate objective in notifying the other attorney that he believed the other attorney had a conflict of interest in the matter. The Court noted that while these concerns were valid, the means he used to achieve his goals, i.e., sending the letter to members of the public instead of only to the attorney, was designed to embarrass the attorney. Accordingly, the Court found that the attorney violated Rule 4.4(a).

In the instant case, it is undisputed that Respondent was representing a client, namely the citizens of Platte County, Missouri, when he issued his October 30, 2015, press release. When one looks at the facts of this case from an objective standard, it is also clear that Respondent was retaliating against Mr. Hagg and the Nashes both for writing the letters and then refusing to withdraw their letters. It is also clear that his intent in referencing them in his press release was to embarrass and humiliate them. Respondent specifically told Ms. Nash that if she did not withdraw her letter he would issue a press release with her and her husband's name in it and their reputation would be

at stake because they supported a child molester. **App. 39 (Tr. 145); 41 (Tr. 151)**. With Mr. Hagg, Respondent directed Chris Seufert to advise Mr. Hagg that if he did not withdraw his letter, his name would be included in the press release as a supporter of child molestation. **App. 10 (Tr. 26); 23 (Tr. 78)**.

The language Respondent used in his press release also shows his intent to embarrass Mr. Hagg and the Nashes. Respondent did not merely state that Mr. Hagg and the Nashes had submitted letters to the Court detailing Mr. Paden's contributions to the community. Rather, Respondent used highly inflammatory language ("appearing to choose the side of a child molester over the child he repeatedly abused") to describe Mr. Hagg and the Nashes. Respondent knew or should have known that his choice of words in describing Mr. Hagg and the Nashes would subject them to public ridicule.

At the hearing, Respondent argued that his statements regarding Mr. Hagg and the Nashes were permissible under Rule 4-4.4(a) because they served the substantial legitimate purpose of: (a) showing that there is transparency in the courts; (b) educating the public as to the wrongfulness of attacking the victims of sexual assault; and (c) communicating to the public that criminal defendants cannot get special treatment if prominent people in the community write letters of support.[13] **App. 118-20 (Tr. 448-57)**.

---

[13] Ironically, in a letter to the Disciplinary Hearing Panel in this case, Respondent referenced Senator Roy Blunt and stated "it would be a true miscarriage of justice for Mr. Zahnd to be passed over" for the US Attorney position because of the "entirely unsupported allegations" hanging over his head. **R. 749.**

Significantly, Respondent testified that he provided the names and occupations of Mr. Hagg and the Nashes so that the press would be able to identify the prominent people who wrote letters of support more easily. **App. 121 (Tr. 461)**.

Respondent's arguments are without merit. When one evaluates the means Respondent used to achieve his stated goal, it is clear that the means were designed to embarrass and humiliate Mr. Hagg and the Nashes. Respondent could have shown the public that there was transparency in the Courts without listing Mr. Hagg's and the Nashes' names in his press release and without using highly inflammatory language to describe Mr. Hagg and the Nashes' actions. In fact, the Prosecutor's Office's October 8, 2015, Facebook posting mentioned that 15 individuals had written letters of support but did not mention the letters writers by name. **App. 291-95**. The Facebook posting also did not use the highly inflammatory language contained in the press release. In addition, if Respondent's actual goal was to provide the public with an accurate accounting of what occurred in the Paden sentencing, he would have included all the names of the witnesses who testified on behalf of Mr. Paden and all the names of the individuals who had written letters in support of Mr. Paden. Respondent did not do this. He picked and chose who he included.[14]

[14] Mr. Seufert testified that Respondent omitted the names of three of the letter writers from the press release because he had advised Respondent that these three letter writers had expressed sympathy for the victim when he spoke to them. **App. 165 (Tr. 635)**.

If Respondent's purpose in issuing the press release was to educate the public that it is wrong to harass sexual assault victims, it was disingenuous to include Mr. Hagg's and the Nashes' names in the press release. There is no mention of the victim in either the Hagg or Nash reference letters. **App. 194-98, 199-201**. Respondent did not have any evidence that Mr. Hagg or the Nashes had done anything that could be construed as hateful or harassing to the victim. **App. 12 (Tr. 37); 41 (Tr. 152); 132 (Tr. 505)**. In fact, Mr. Hagg and Ms. Nash both testified that they did not even know the victim and during the hearing Respondent acknowledged that Ms Nash expressed sympathy towards the victim when he spoke with her. **App. 7 (Tr. 15); 41 (Tr. 153); 44 (Tr. 165); 132 (Tr. 505)**.

If Respondent was concerned that Mr. Hagg's and the Nashes' letters might either properly or improperly influence the Court because of their prominence in the community, he should have objected to the letters or filed a motion to strike the letters. He did not do this. He could have also called the letter writers to the stand and cross-examined them about Mr. Paden's actions. Then defense counsel would have had the opportunity to object and the Court should have stopped the questioning if the Prosecution's actions became threatening or harassing toward the letter writers. Instead of addressing the letters through proper court channels, Respondent decided to address the letters by threatening the letter writers and then embarrassing them in his press release when they failed to submit to his demands.

Respondent argued during the hearing that his public attack on the letter writers, including Mr. and Ms. Nash and Mr. Hagg, was justified because – in his view - their

letters should not have been considered by the sentencing court. He asserted that the defense had no right to present the letters to the Court because they were inadmissible hearsay. **App. 106 (Tr. 399); 189 (Tr. 731)**. Respondent's argument fails for several reasons.

First, there is no exception to Rule 4-4.4(a) that allows for the bullying or harassing of third parties if inadmissible evidence is submitted to the Court. Second, Respondent is wrong in his assertion that the character reference letters were improperly before the Court. As noted by this Court in *State v. Taylor*, 466 S.W.3d 521, 534 (Mo. banc 2015), "there is a long-standing right that a criminal defendant personally be given the opportunity to speak and to present mitigating evidence prior to sentencing." This right includes the right to present evidence regarding the defendant's character. *State v. Berry*, 168 S.W.3d 527 (Mo. App. W.D. 2005); *See also* Penalty Phase Issues, 28 Mo. Prac., Mo. Criminal Practice Handbook, § 38:8, Robert Dierker ("Any evidence relevant to the defendant's character or statutory mitigating circumstance is ordinarily admissible."); Furthermore, at sentencing before a judge, contrary to Respondent's assertion, hearsay is permitted routinely. *Martin v. State*, 291 S.W.3d 846, 849, 850 (Mo. App. W.D. 2009). Finally, and most importantly, as discussed above, if Respondent believed the letters were improperly submitted to the Court, he should have moved the Court to either ignore the letters or return the letters. Instead, Respondent used his extrajudicial bully pulpit to intimidate, harass, and embarrass two families.

Respondent also asserted to the Panel in his Motion for Judgment on the Pleadings that his actions were permissible because his statements were expressly permitted under

the safe harbor provision of Rule 4-3.6. Rule 4-3.6 addresses trial publicity and prohibits an attorney from making extrajudicial statements that the lawyer knows or reasonably should know will be disseminated by means of public communication which will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Rule 4-3.6 has a "safe harbor" exception which permits an attorney to discuss information contained in the public record.

As the Panel noted, Respondent's argument is unpersuasive. First, there is nothing in Rule 4-3.6 that suggests it takes precedence over Rule 4-4.4(a), nor is there anything in Rule 4-4.4(a) that indicates that it is subject to Rule 4-3.6. Moreover, Respondent's statements would not fall within the safe harbor "public information" exception to Rule 4-3.6. The "public information" exception only permits an attorney to quote from or reference the contents of the public record. *Attorney Grievance Commission v. Gansler*, 835 A.2d 548, 569 (Md. 2003); *In re Brizzi*, 962 N.E. 2d 1240, 1247 (Ind. 2012). An attorney is not allowed to discuss his own opinions about what is in the public record.

Respondent's comments went far beyond quoting the record or referencing the contents of the letters. Instead, Respondent interjected his own opinion into the press release when he portrayed Mr. Hagg and the Nashes as choosing the "side of a child molester over the child he repeatedly abused." This is very different than providing an accurate, unbiased reference to the letters and letting the public draw their own conclusions regarding the content of the letters and the people who wrote the letters.

Respondent has also asserted that Rule 4-4.4(a) cannot be used to restrict his First Amendment Right to self-expression. **R. 142**. Respondent has argued that his First

Amendment right allows him to discuss publicly and truthfully matters of public concern and to make a fair comment on the acts of community leaders. Respondent even contends that he was statutorily compelled to say what he did in his press release about the letter writers because Section 37.070, RSMo, mandates that each state department carry out its mission with full transparency to the public. **R. 143-144**.

Respondent's arguments are misplaced. First, Rule 4-4.4 regulates conduct not speech. *In re Comfort*, 159 P.3d at 1025; *See also In re Madison*, 282 S.W.3d 350, 363 (2009) (concurring opinion) (harassing judge by sending insulting and offensive letters was conduct not speech). Second, an attorney's speech, even a prosecutor's speech, can be limited.[15] *See In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991) "The First Amendment does not immunize an attorney from being disciplined for violating the Rules of

[15] Respondent infers that because he is a prosecutor his right to free speech is greater than an ordinary attorney. Informant asserts that the opposite may be true. In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the United States Supreme Court held that when an assistant prosecutor makes a statement pursuant to his official duties, the prosecutor is not speaking as a citizen for First Amendment purposes. As a result, the prosecutor's employer can discipline the prosecutor for his speech. Other courts have gone on to note that prosecutors, as ministers of justice, are charged with the duty to be even more cautious than regular attorneys with their speech so as not to prejudice justice. *See Attorney Grievance Commission v. Gansler*, 835 A.2d 548, 572-73 (Md. 2003).

Professional Conduct merely because the attorney employs 'speech' in committing the violations." *North Carolina State Bar v. Sutton*, 791 S.E.2d 881, 892 (N.C. 2016).

In *Gentile v. State Board of Nevada*, 501 U.S. 1050, 1051-52 (U.S. 1991), the United States Supreme Court held when analyzing whether an ethics rule violates a lawyer's First Amendment rights, that the court must engage "in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue. Where unbridled speech amounts to misconduct that threatens a significant state interest, the state may restrict a lawyer's right to freedom of speech. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

In *Sutton*, 791 S.E.2d at 889, the attorney in question was angry with a sheriff's investigator and uploaded a video to You Tube of an incident in which he confronted the investigator and accused the investigator of engaging in criminal conduct. The attorney also had a penchant for "us[ing] graphic sexual commentary to embarrass and/or demean others in professional contexts." A disciplinary panel found that the attorney had violated Rule 4-4.4(a).

The attorney challenged the finding, claiming the Rules of Professional Conduct, either facially or as applied to him, violated his right to free speech. The attorney did not specify which Rule he believed was unconstitutional and, as a result, the Court found that the argument had not been properly preserved. Nevertheless, the Court took the opportunity to reject the attorney's assertion and specifically discussed speech by an attorney. It stated:

> . . . .The Supreme Court has explained that "[s]tates have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.". . .
>
> Moreover, "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' ". . . . As such, the Supreme Court has recognized the substantial interest possessed by states both in "protect[ing] the integrity and fairness of a State's judicial system,". . . and in "protect[ing] the flagging reputations of . . . lawyers by preventing them from engaging in conduct that . . . is universally regarded as deplorable and beneath common decency . . . .

Id. at 892-93(citations omitted). *See also In re Comfort*, 159 P.3d at 1027. (To the extent the application of Rule 4-4.4(a) placed restrictions on the attorney's speech it did not violate the attorney's right to free speech).

As articulated by the North Carolina Supreme Court in *Sutton*, this Court has a substantial interest in protecting the integrity and fairness of the State's judicial system and preventing an attorney from engaging in "deplorable conduct" such as embarrassing or harassing a third party. Rule 4-4.4(a) does not unduly restrict Respondent's speech in that it does not prohibit him from issuing a press release regarding a sentencing but merely prohibits him from issuing a press release which has a substantial purpose of

embarrassing a third party. Respondent could have kept the public adequately informed about the case without specifically identifying the letter writers and without using highly inflammatory language to describe them.

It is relevant to note that unlike other attorneys, prosecutors enjoy a particularly close relationship with the press. This is a relationship which the press carefully cultivates because it is advantageous to the press as the prosecutor may provide a favored media outlet with the "scope" on criminal cases of public interest. This leads to prosecutors knowing that they can control the information they wish to disseminate and shape the way the media and the public views the disclosures. Bennett Gersham, *The Prosecutor's Duty of Silence*, 79 Alb. L. Rev. 1183, 1216 (2016).

As the United States Supreme Court noted in *Berger v. United States*, 295 U.S. 78, 88 (1935), while a prosecutor's role to serve justice allows a prosecutor to strike hard blows it does not allow him to strike foul blows. The power of the prosecutor, combined with the influence of the media, makes for a dangerous combination if the prosecutor strikes a "foul blow." Bennett Gersham, *The Prosecutor's Duty of Silence*, 79 Alb. L. Rev. at 1215. In this case, Respondent intentionally "struck a foul blow" against Mr. Hagg and the Nashes via his press release and this Court should find that he violated Rule 4-4.4(a).

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-8.4(d) IN THAT IT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE FOR RESPONDENT TO:

A. THREATEN CHARACTER REFERENCE LETTER WRITERS BY ADVISING THEM THAT IF THEY DO NOT WITHDRAW THEIR LETTERS RESPONDENT WILL DAMAGE THEIR REPUTATIONS;

Rule 4-8.4(d) provides that is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

> A lawyer must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client.

In re Goude, 374 S.E.2d 496, 511 (S.C. 1988).

As the federal courts have acknowledged when determining whether a criminal defendant's Sixth Amendment right to present a defense has been violated, "threats against witnesses are intolerable." *United States v. Goodwin*, 625 F.2d 693, 703 (5th Circuit 1980). Accordingly, courts have found a violation of Rule 4-8.4(d) when an

attorney threatened a witness or third party.[16] In *In re Smith*, 848 P. 2d 612 (Or. 1993), a workers' compensation attorney wrote a letter to the independent medical examiner and "suggested" that the doctor should concur with the client's doctor's diagnosis. In the letter, the lawyer stated that a contrary diagnosis would result in a lawsuit against the doctor. The Oregon Supreme Court found a violation of Rule 8.4(d) and stated that "improperly threatening a witness in a legal proceeding is substantially harmful to the administration of justice," even if the witness does not submit to the threat. *Id.* at 615. *See also In re Ayala*, 693 P.2d 580 (N.M. 1985) (An attorney's attempt to buy the silence of a witness in a disciplinary case was prejudicial to the administration of justice); *Oklahoma Bar Association v. Bednar*¸ 299 P.3d 488 (Okla. 2013) (An attorney who emailed witnesses and threatened to sue them for fraud if they testified engaged in conduct prejudicial to the administration of justice).

In the instant case, Respondent threatened Ms. Nash by telling her that if she and her husband did not withdraw their letter he would issue a press release which listed their names in it and "their reputations would be at stake because they supported a child molester." **App. 39 (Tr. 145); 41 (Tr. 151)**.

---

[16] While Informant did not find case law from this Court which specifically holds that threatening a witness or third party is conduct prejudicial to the administration of justice, this Court has held that threatening opposing counsel violates Rule 4-8.4(d). *See In re Eisenstein*, 485 S.W.3d 759, 763 (Mo. banc 2016).

Respondent threatened Mr. Hagg when he directed Mr. Seufert to meet with Mr. Hagg to persuade Mr. Hagg to withdraw his letter and he authorized Mr. Seufert to advise Mr. Hagg that if he did not withdraw his letter, Respondent would include Mr. Hagg's name in the press release "as someone who supports a child molester." **App. 154 (Tr. 594)**.

The fact that Respondent did not personally speak with Mr. Hagg does not allow him to escape liability for violation of Rule 4-8.4(d). Respondent is vicariously liable for Mr. Seufert's conduct via Rule 4-5.1(c). Rule 4-5.1(c) provides that "a lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer . . . has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." In this case, Respondent ordered and/or ratified Mr. Seufert's conduct.

As discussed under Point I of the Argument, Mr. Paden had a right to present mitigating character evidence at sentencing, including hearsay evidence in the form of character reference letters. Thus, it is immaterial that Mr. O'Connor did not plan to call Mr. Hagg or Ms. Nash to the stand. Any threat made by Respondent to keep relevant character evidence or information from the Court was conduct prejudicial to the administration of justice.

B. USE THE POWER OF THE SUBPOENA AS A MEANS TO BRING A CHARACTER REFERENCE LETTER WRITER INTO THE OFFICE TO THREATEN THE LETTER WRITER; AND

During the hearing, Assistant Prosecutor Perry testified that the plan was to "subpoena" the character reference letter writers into the office so that Mr. Seufert could "speak", with them and "convince" them to withdraw their letters. **App. 173 (Tr. 669)**. Mr. Perry's statement is supported by the actual subpoena which directs Mr. Hagg to call Mr. Seufert and directs Mr. Hagg to arrive at the Courthouse two hours before the scheduled sentencing hearing. **App. 194-98**. While Respondent had the right to subpoena Mr. Hagg to attend the hearing and to cross-examine him, it was improper for Respondent to use the subpoena as a means to coerce Mr. Hagg into meeting with Mr. Seufert before the sentencing so that Mr. Seufert could threaten Mr. Hagg.

As the New Mexico Supreme Court noted in *In re Chavez,* 390 P.3d 965, 969-70 (N.M. 2017):

> The duty of fairness extends to all parties to judicial actions and. . . it extends to the recipients of subpoenas.
>
> * * * *
>
> A subpoena that issues improperly, but has the guise of authority and carries the threat of punishment, falsely suggests that the recipient is legally required to answer and has therefore lost the right not to respond. This is misleading and

> unfair, and represents an abuse of the government's substantial power and responsibility.

Such conduct is prejudicial to the administration of justice.

C. INTENTIONALLY EMBARRASSING AND HARASSING THE CHARACTER REFERENCE LETTER WRITERS IN HIS PRESS RELEASE WHEN THEY FAILED TO SUBMIT TO HIS DEMANDS.

Courts have found violations of Rule 8.4(d), in addition to finding violations of Rule 4-4.4(a), when lawyers engage in litigation or out-of-court tactics with no concern for the victims, the witnesses or the public. In *In re Burns*, 657 N.E.2d 738, 739 (Ind. 1995), the Indiana Supreme Court noted that if an attorney's threatening behavior during a legal proceeding has no other substantial purpose than to embarrass, delay or burden a person, the conduct is also prejudicial to the administration of justice. In the *Campbell* case discussed under Point I of the Argument, the Kansas Supreme Court held that a prosecutor also violated 8.4(d) when he publicly embarrassed families of uncharged minors who had photographed each other drinking alcohol and having sex. In that case, the court explained the 8.4(d) violation in this way: "Respondent prejudiced justice when he failed to recognize that justice required sensitivity to the privacy rights of the members of the public." 199 P.3d 776, 778 (Kan. 2009).

Accordingly, Respondent violated Rule 4-8.4(d) when he included Mr. Hagg's and the Nashes' names and places or former places of employment in his press release and advised the public that they supported a child molester over a victim. There was no need

for Respondent to reference the letter writers in his press release and, even if such need existed, Respondent could have referred to the letter writers without mentioning their names as Mr. Perry did in his closing arguments at the sentencing. Respondent knew that by including Mr. Hagg's and the Nashes' names in his press release as individuals "who chose the child molester over the victim," Mr. Hagg and the Nashes would be harassed by the public and suffer humiliation, but he did it anyway. Respondent failed to recognize that justice required sensitivity to the rights of the letter writers.

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-3.4(f) IN THAT THE THREATS RESPONDENT MADE TO MR. HAGG AND THE NASHES CONSTITUTED AN ATTEMPT UPON THE PART OF RESPONDENT TO HAVE THIRD PARTIES REFRAIN FROM GIVING RELEVANT INFORMATION TO THE DEFENSE.

Rule 4-3.4(f) provides that a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party. The ABA Criminal Justice Standards for the Prosecution Function ("ABA Criminal Justice Standards") better describes the requirements of Rule 4-3.4(f) when the attorney is a prosecutor. Standard 3-3.4(h) of the ABA Criminal Justice Standards provides that a prosecutor should not discourage or obstruct communication between witnesses and the defense counsel. It further states that the prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. It notes that while the prosecutor may fairly and accurately advise a witness as to the likely consequences of their providing information to the defense, the prosecutor can only do so in a manner that does not discourage communication. *Id.*

Rule 4-3.4(f) rests on the principle that "the fair and efficient functioning of the adversary system requires that litigants have unfettered opportunities to seek information relevant to their claims and the decision on whether to cooperate with one side should be

voluntarily made by the witness. Jon Bauer, *Buying Witness Silence: Evidence - Suppressing Settlements and Lawyer's Ethics*, 87 Or. L. Rev. 481, 509 (2009). *See also* Comment 1 to Rule 4-3.4(f) (The purpose of Rule 4-3.4 is to ensure fair competition in the adversary system.) A violation of this rule is "a grievous assault upon the truth-seeking function of the judicial process." *Oklahoma State Bar v. Cox*, 48 P.3d 780, 786 (Okla. 2002),

At the hearing, Respondent's Counsel asserted that Rule 4-3.4(f) was inapplicable because Respondent never directly told Mr. Hagg or Ms. Nash that they should not speak with Mr. O'Connor. The Panel agreed with this assessment. However, both Respondent and the Panel read Rule 4-3.4(f) much too narrowly. Courts have found violations of Rule 4-3.4(f) in many different situations including efforts to dissuade a fact or expert witness from testifying on behalf of an adversary. Jon Bauer, *Buying Witness Silence: Evidence -Suppressing Settlements and Lawyer's Ethics,* 87 Or. L. Rev at 526.

In *Oklahoma State Bar Association v. Cox,* 48 P.3d 780 (Okla. 2002), the Oklahoma Supreme Court found a violation of Rule 4-3.4(f) when the attorney threatened opposing counsel's expert witness by stating that if the expert testified at trial, he would "dig up dirt" on the expert witness and would present evidence which would affect the expert's credibility. The attorney then served the witness with a subpoena duces tecum whereby he demanded copies of documents related to the expert's alleged involvement in illegal wiretapping. *See also In re Walsh*, 182 P.3d 1218 (Kan. 2008) (An attorney violated Rule 4-3.4(f) when he negotiated a settlement with a client when he included a

condition that the client voluntarily refrain from giving testimony at his disciplinary hearing).

While Mr. O'Connor did not intend to call Mr. Hagg or the Nashes to the stand, as discussed in Point I of this Argument, their letters were relevant, admissible character evidence. Like the attorney in *Cox*, Respondent's actions were designed to discourage Mr. Hagg and Ms. Nash from providing the relevant information to the Court. The evidence presented at the hearing clearly shows that when Respondent spoke with Ms. Nash he threatened her by advising that if she did not withdraw her letter he would issue a press release which listed the Nashes as supporters of a child molester and their reputations would be at stake. **App. 39 (Tr. 145); 41 (Tr. 151)**. Similarly, Respondent directed Mr. Seufert to meet with Mr. Hagg to persuade Mr. Hagg to withdraw his letter and he authorized Mr. Seufert to threaten Mr. Hagg by telling Mr. Hagg that if he did not withdraw his letter Respondent would include Mr. Hagg's name in the press release as someone who supports a child molester. **App. 10 (Tr. 26); 23 (Tr. 78); 154 (Tr. 594)**. Respondent violated Rule 4-3.4(f) when he threatened Ms. Nash and he vicariously violated Rule 4-3.4(f) via Rule 4-5.1(c) when he directed Mr. Seufert to threaten Mr. Hagg.

IV.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, CASE LAW FROM OTHER JURISDICTIONS, AND AGGRAVATING FACTORS SUGGEST THAT SUSPENSION IS THE APPROPRIATE DISCIPLINE.

When determining an appropriate sanction for violations of the Rules of Professional Conduct, this Court should assess the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003).

Since this Court's decision in *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994), this Court has consistently turned to the ABA Standards for Imposing Lawyers Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose. The ABA Standards direct Courts to consider four factors in assessing punishment: (a) the ethical duty violated by the lawyer; (b) the lawyer's mental state; (c) the actual or potential injury resulting from the misconduct; and (d) the existence of aggravating and mitigating circumstances. ABA Standards, Theoretical Framework.

With respect to the first factor, Respondent violated his duty as a prosecutor to seek justice. A prosecutor's interest in a criminal prosecution is not to win a case, but to ensure that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935). As a result, courts recognize that the ethical rules impose high ethical standards on prosecutors.

> Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any *right* of the Government, but from *power* entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power.

In re Doe, 801 F. Supp. 478.480 (D.N.M. 1992).

After identifying the duty or duties violated, and, in turn, the relevant ABA Standard(s), a court must next determine which presumptive sanction per the ABA Standards applies to the case before it. This determination requires a careful consideration of the facts because the severity of the presumptive sanction varies depending upon the lawyer's mental state—whether the lawyer acted intentionally, knowingly, or negligently—and the seriousness of the actual or potential injury caused by the lawyer's misconduct. ABA Standards, Theoretical Framework.

To aid in this determination, the ABA Standards define "intent," "knowledge," "negligence," "injury," and "potential injury." A lawyer's mental state should affect the sanction imposed by this Court because intentional or knowing conduct threatens more

harm than does negligent conduct, thus it is sanctioned more severely. *In re White-Steiner*¸198 P.3d 1195, 1197 (Ariz. 2009).[17]

ABA Standards 5.2 and 6.3 are most applicable to the Rules Respondent violated. ABA Standard 5.2 is "appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice." *In re Abrams*, 257 P.3d 167, 170 (Ariz. 2011). Under this standard, suspension is appropriate "when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules and causes injury or potential injury to a party or to the integrity of the legal process." ABA Standard 5.22.

Standard 6.3 addresses improper communications with individuals in the legal system. Standard 6.32 provides that "suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding."

---

[17] The ABA Standards defines "intent" as the "conscious objective or purpose to accomplish a particular result." ABA Standards, Black Letter Rules. Negligence is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.* Knowledge is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Id.*

Respondent knew, or should have known, that threatening character reference letter writers to withdraw their letters and then intentionally embarrassing and humiliating them in a press release when they refused to submit to his demands was improper and deviated from proper procedures. It caused potential injury to the legal system in that as discussed under Point I of the Argument, criminal defendants have a right to put on mitigating evidence at sentencing and Respondent's actions may cause other potential character witnesses or letter writers to refuse to provide character evidence to the Courts in the future. It also damaged Mr. Hagg and the Nashes' reputation in the community.

There are numerous aggravating factors in this case. Respondent adamantly refuses to acknowledge any level of misconduct. ABA Standard 9.22(g). Because a prosecutor is an attorney representing the community that elects him, rather than private interests, his role is very different from that of other attorneys.

> Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; they must serve truth and justice first. Their job is not just to win, but to win fairly and within the rules.... When a prosecutor steps over the boundaries of proper conduct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again.

United States v. Lopez-Avila, 678 F.3d 955, 964-965 (9th Cir. 2012). Unfortunately, in this case Respondent has shirked his duty as a prosecutor and refused to own up to his wrongdoing.

Instead, he has continued his heavy-handed and personalizing tactics during this disciplinary case, with repeated attacks on Informant's Counsel. Respondent's inference during closing that he would deal with Informant and/or Informant's Counsel "at some point in time" for bringing "frivolous charges" is a serious aggravating factor. Threatening disciplinary counsel is never appropriate. Respondent's behavior in this disciplinary case exemplifies his refusal to reflect on his earlier behavior; it is also another display of his approach to the practice of law. The public and the courts should expect more of the same if his practice can continue unabated.

Second, Respondent has substantial experience in the law. ABA Standards 9.22 (i). Respondent has practiced since 1996. He has been the Platte County Prosecutor since 2003. By this point in his career, Respondent ought to have developed legal, ethical and less personal ways of dealing with a defendant's character witnesses.

Some Courts have also noted that because a prosecutor's ethical duties exceed those of other lawyers, substantial experience as a prosecutor is a further aggravating factor. *In re Zawada*, 92 P.3d 862, 868 (Ariz. 2004). As the elected Prosecutor for Platte County, Respondent had the responsibility to seek justice and act ethically on behalf of all the citizens of that community. In the underlying Paden prosecution, that responsibility extended beyond the victim and accused to include those citizens who chose to write letters to the Court during the sentencing phase of the criminal case detailing positive aspects of the defendant's life or character. Respondent ignored his duty to seek justice in this case. Respondent steadfastly pursued a course of conduct

intended to unfairly and unjustifiably attack the character and integrity of the letter writers.

Third, and most troubling are the false statements Respondent made to the Panel. ABA Standard 9.22(f). During the hearing, Respondent testified he had authorized his Assistant Prosecutors to subpoena the character reference letter writers and confront the letter writers before the sentencing because of the sentence imposed in the Swanepoel case. Respondent went on to testify that the Swanepoel case was a statutory rape case whereby the Court had imposed only a 100-day sentence even though his office had requested a "decades-long sentence." Respondent attributed the short prison sentence to the fact that many people had written character reference letters on behalf of Mr. Swanepoel and the Prosecutor's Office did nothing to contest the letters.

According to the sentencing judge in the Swanepoel case, Respondent's claimed plea for a multiple decade sentence never happened. Contrary to his testimony in the instant matter, Respondent's office stipulated that they would make no recommendation for a sentence. Respondent's office further agreed that they would not oppose any sentencing arguments presented by Mr. Swanepoel or his attorney.

Respondent also testified that he took the action he did regarding Mr. Hagg and the Nashes because he was concerned that their prominence in the community would sway the Court into imposing a very short sentence for Mr. Paden. Ms. Flaherty contradicted his testimony when she stated that she had spoken with Respondent and the other Assistant Prosecutors involved in the case multiple times about the issue, and they were not concerned that Mr. Hagg's and the Nashes' letters would influence the Court.

Respondent's less-than-honest testimony casts additional doubt on his attempts to justify his choices to use extra-legal means to attack the defendant's character witness. As a result, his sworn – but inaccurate - justifications serve as an aggravating factor in determining a sanction.

The only mitigating factor applicable is Respondent's absence of a prior disciplinary record. ABA Standard 9.32(a).

When determining what level of discipline to impose, case law is also instructive. A search of cases whereby prosecutors engaged in witness intimidation or publicly humiliated a third party also suggests that suspension is the appropriate discipline. For example, in the *Campbell* case discussed under Point III of the Argument, the Kansas Supreme Court suspended the county attorney's license for six months after he invited parents to watch a video of their teenagers engaging in underage drinking and sexual conduct. *Campbell*, 199 P. 3d 776 (Kan. 2009). Similarly, in *In re Warrick*, 44 P.3d 1141 (Idaho 2002), the Idaho Supreme Court suspended a prosecutor who described an inmate as a "scumbag" and a "waste of sperm" on an Inmate Control Board in the county jail.[18]

Violations of Rules 3.4, 4.4 and 8.4(d) by private counsel have also resulted in suspension. As discussed under Point III of the Argument, the Oklahoma Supreme Court suspended an attorney after the attorney used intimidation to prevent the opposing

[18] The prosecutor also failed to correct false testimony by a witness.

counsel's expert witness from testifying. *Cox*, 48 P.3d 780 (Okla. 2002) (The attorney advised the expert witness he would "dig up dirt" on the expert if he testified).

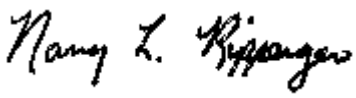
Because ABA Standards suggest that suspension is appropriate, there are several troubling aggravating factors and case law also suggests suspension is appropriate, Informant recommends that this Court suspend Respondent's license with no leave to apply for reinstatement for at least six months.

CONCLUSION

For the reasons set forth above, this Court should find that Respondent violated Rules 4-3.4(f), 4-4.4(a) and 4-8.4(d), suspend Respondent's law license with no leave to apply for reinstatement for at least six months, and impose the $1,000 fee and costs provided for by Rule 5.19(h) against Respondent.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

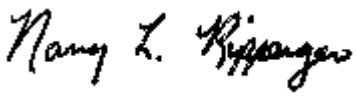


By: _____
Nancy L. Ripperger #40627
Staff Counsel
3327 American Avenue
Jefferson City, MO 65109
(573) 635-7400
(573) 635-2240 fax
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2018, a copy of Informant's Brief is being served upon Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.



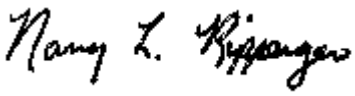
_____

Nancy L. Ripperger

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) and;
3. Contains 15,601 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



_____

Nancy L. Ripperger