

IN THE SUPREME COURT OF MISSOURI

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In re:	)	
ERIC G. ZAHND	)	
Missouri Bar No. 47196	)	Case No. SC96939
	)	
Respondent.	)	

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BRIEF OF  
MISSOURI VICTIM ASSISTANCE NETWORK  
IN SUPPORT OF RESPONDENT  
*AS AMICUS CURIAE*

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Missouri Victim Assistance Network, established in 1986, is a non-profit, voluntary network of individuals who come together to work toward creating a community responsive to crime victims. Missouri Victim Assistance Network has been instrumental in promoting change in the criminal justice system and continues to be at the forefront of the victims' rights movement.

This case raises a matter of interest to the Missouri Victim Assistance Network as it has the potential to greatly affect a Prosecutor's ability to zealously advocate on behalf of crime victims statewide.

## ARGUMENT

**A PROSECUTOR HAS A DUTY TO ZEALOUSLY ADVOCATE ON BEHALF OF THEIR CLIENT. THEIR CLIENT IS THE STATE OF MISSOURI. THEY DO, HOWEVER, ALSO HAVE A CONSTITUTIONAL RESPONSIBILITY TO THE CRIME VICTIM IN THEIR CASES. THE OFFICE OF CHIEF DISCIPLINARY COUNSEL'S INTERPRETATION OF THE ETHICAL RULES VIOLATED BY RESPONDENT IS INCORRECT AND IF ENFORCED WOULD HAVE A CHILLING EFFECT ON PROSECUTORS STATEWIDE, AND UPON THEIR ABILITY TO ADVOCATE WITH ZEAL ON BEHALF OF THEIR CLIENT AND ON BEHALF OF CRIME VICTIMS IN GENERAL.**

Supreme Court Rule 4,<sup>1</sup> containing the Rules of Professional Conduct, recognizes in its Preamble that “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” A Prosecutor has a unique duty to advocate on behalf of the State, which is comprised of the general public as well as past, present, and future victims of crimes. In the case before The Court, the young victim sustained years of sexual abuse.

Prosecutors statewide are responsible for protecting victims of crime utilizing all available measures within the bounds of the law. This responsibility includes not only prosecuting criminals but lending support to victims throughout such criminal prosecution. During the prosecution of crimes, the public has a right to be informed as to the public record being compiled in such criminal prosecutions.

The Office of Disciplinary Counsel (hereinafter referred to as “OCDC”) argues that Respondent violated Rule 4-4.4. Rule 4-4.4 recognizes that “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...” The OCDC’s interpretation in this matter was that Respondent’s intent behind the release of the identities of the letter writers was solely to embarrass a third party. This interpretation was not only inaccurate, but it precluded the availability of the safe harbor provisions available to Respondent. The safe harbor provision, more specifically Rule 4-3.6 (b), provides that “Notwithstanding Rule 4-3.6(a),

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<sup>1</sup> Hereinafter, all references to “Rule\_\_\_” shall be a reference to the Rules of Professional Conduct contained within the Supreme Court Rule, more particularly Rule 2 and/or Rule 4.

a lawyer may state: the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record.” Respondent’s intent was to provide transparency to the process by identifying ex parte letter writers’ communications to the sentencing Judge, who they hoped would act leniently to the criminal defendant.

Respondent articulated his reasons for identifying the letter writers. Those purposes include, “providing transparency in a high profile case, letting the public know that prominent members of the community will not get special treatment, or access to the judge, and to provide an incentive for other victims of sex crimes to come forward.” Respondent, acting zealously on behalf of the victim, and within the bounds of the law, provided the victim and the general public with transparency of the process.

The OCDC’s arbitrary and subjective interpretation of Respondent’s prosecutorial intent for releasing the identification of the letter writers is simply inaccurate for the reasons stated above. OCDC’s decision to discipline Respondent will have a chilling effect on prosecutors statewide. Unless this Court rules in favor of Respondent, Missouri prosecutors who release information) which rightfully should be and in this case was part of the public record) are at serious risk of disciplinary actions by the OCDC. The OCDC’s narrow interpretation of Respondent’s intent does not take into consideration the other legitimate basis the Respondent had for obtaining and releasing the information. This ruling would have the impact of leaving prosecutors statewide with the reasonable belief that their actual intent can, and potentially would be called into question and sanctioned by OCDC. The OCDC has created a clear obstacle to a prosecutor’s duty to

zealously advocate on behalf of crime victims. Prosecutors must be free to obtain and release information which pertains to the sentencing process of criminal defendants. In the case at hand, the letters of interest were specifically written with the intent and ultimately did become part of the public record regarding the sentencing of the defendant.

Victims of crime, particularly young victims of sexual abuse, place their faith in the Prosecutor's ability to act as advocate on their behalf. A Prosecutor plays a crucial role in a victim's support system. Often times, a prosecutor is the sole member of a victim's support system. If a victim lacks faith in the prosecutor's ability to provide support, she/he may be hesitant or unwilling to come forward with the necessary information regarding the abuse. Disclosure of abuse is a very difficult step to take for a victim of any age. Adding additional obstacles and considerations and limiting the prosecutor's ability to publicly advocate for and offer support to the victim is not in the general public's best interest.

It is prejudicial to the administration of justice when prosecutors are put in the position of being subject to disciplinary complaints and second-guessing their subjective intent when they aggressively engage in such advocacy on victims' behalf. This advocacy was against influential community members who chose to inject themselves in a public process then complain when their position was publicly contested, as in this case.

Amicus also believes it is important for The Court to consider that the letter writers were engaging in ex parte communications for the purpose of requesting leniency for the criminal defendant. Respondent sought, for the reasons stated, to make such communications public. Rule 2-2.9 pertains to such ex parte communications and

provides that “A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except...when circumstances require it...for scheduling, administrative, or emergency purposes, which does not address substantive matters.”

These ex parte letters addressed substantive matters and were not recognized by any exceptions to Rule 2-2.9. Accordingly, Respondent’s decision to communicate publicly the identity of the authors of such letters is well within Respondent’s authority.



## CONCLUSION

The OCDC's discipline of Respondent based upon its subjective belief regarding Respondent's intent in releasing the identities of the letter writers is without foundation. It ignores Respondent's stated intent. It denies the Respondent protection of the safe harbor provisions and will have a chilling effect on Prosecutors statewide to zealously advocate on behalf of crime victims. It will approve protecting ex parte communications with Trial Courts assigned the task of sentencing sexual abuse defendants. It will impact victims' and the general public's faith in the Prosecutor's ability to fully support and protect them. Amicus urges this court to reject the findings of the OCDC.

Respectfully submitted,

*/s/ Tara Cluck*

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### Certificate of Compliance

I, Tara Cluck, hereby certify to the following: The attached brief complies with limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. This brief contains 1,208 words, which does not exceed the 7,750 words allowed for an amicus curiae brief.

On this 27<sup>th</sup> day of March, 2018, electronic copies of Missouri Victim Assistance Network in Support of Respondent as Amicus Curiae were placed for delivery through the Missouri e-filing system to Nancy Ripperger, Office of Chief Disciplinary Counsel, Edwin Smith, Attorney for Respondent, Ronald Holliger, National Association of Criminal Defense Lawyers, Stephen Sokoloff, Missouri Association of Prosecuting Attorneys.

*/s/ Tara Cluck*

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Tara Cluck