IN THE SUPREME COURT
STATE OF MISSOURI

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

RESPONDENT'S CORRECTED BRIEF

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INTRODUCTION

The Informant, Office of Chief Disciplinary Counsel (the "OCDC"), seeks discipline for Platte County Prosecuting Attorney Eric G. Zahnd because he recounted truthful, public information about a legal proceeding after it was concluded. That truthful information included describing letters in the public record which were sent to the trial court *ex parte*. The letters sought leniency for a convicted child sex abuser. Having made the decision to disseminate true, public information about a concluded legal proceeding,[1] Mr. Zahnd decided that the fairest approach to the letter writers was to tell them both the complete facts of the case before they were confronted on the witness stand, under oath and in a public forum, with that information and the likelihood of publicity. When the defense solicited the letters, the defense did not advise the letter writers that their letters,

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[1] **Rule 4** itself recognizes the vital importance of public's right to information about legal proceedings:

> [T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.
>
> **Rule 4-3.6, cmt [1]**

as well as their identities, would be a matter of public record. The OCDC contends Mr. Zahnd should be disciplined for telling the truth and giving the letter writers the information the defense should have given them.

This case presents two important questions. First, when can the Rules prohibit a lawyer from speaking the truth about what happened in open court after the legal proceedings are complete? The **First Amendment** and the Rules themselves provide a simple and unequivocal answer: never. Second, when is a prosecutor required by the Rules to conceal the true facts of a case and the likelihood of publicity from members of the public (who are, in part, his client) who wish to influence the court, effectively sandbagging them regarding the natural consequences of their actions? Chief Judge Fischer seemed to provide the answer to this very question when he recently opined from the bench, "It seems like one thing we ought to emphasize is that lawyers ought to tell the truth, which includes good news and bad news, to their clients." **Statement of Chief Justice Fischer, In re: Valentino, SC96700, as reported in *Lawyer's long deceit lands him in hot water*, Missouri Lawyer's Weekly, http://molawyersmedia.com/2018/01/10/lawyers-long-deceit-lands-him-in-hot-water/ (Jan. 10, 2018) (Last accessed Mar. 23, 2018)**.

Here, unfortunately, the defense did not disclose the truth to the letter writers about their letters in support of a convicted child sex offender and their identities being matters of public record, but Mr. Zahnd did. In furtherance of his statutory duties, he also told the public the truth about a concluded criminal case, for which the OCDC is now

asking that he be disciplined. In this case, all Mr. Zahnd did was tell the truth, first to the letter writers and then to the general public.

When fairly read without the need of a highly nuanced interpretation, there is nothing in the Rules of Professional Conduct that would have put Mr. Zahnd on notice that his telling the truth was not permitted and was subject to sanction. After all, "the truth never damages a cause that is just." **Mohandas Karamchand Gandhi, II Non-violence in peace and war (1949), p. 162.** The fact is, under the laws of this State and the Rules of Professional conduct, letter writers seeking to influence *ex parte* a Court's handling of a case with an out of court statement offered for the truth of the matters asserted therein, are not accorded confidentiality, which is the bedrock of the charges brought by the OCDC. The OCDC argues for a tortured reading of the Rules and urges this Court to bestow a special right of anonymity on letter writers who seek to influence our courts *ex parte* with hearsay. Simply put, under any reasonable interpretation of the Rules and facts of this case, the OCDC has not and cannot meet its burden of proving that Mr. Zahnd committed any misconduct, and the Information against Mr. Zahnd should be dismissed.

STATEMENT OF FACTS

The Statement of Facts proffered by the OCDC makes material omissions. A complete recitation of the material facts follows:

Respondent Eric G. Zahnd is and, at all relevant times hereto, was the duly elected Platte County Prosecuting Attorney. Tr. 345:12-14.

The Underlying Criminal Case

The allegations in the Information against Mr. Zahnd stem from a child sex abuse case in Platte County Circuit Court, *State of Missouri v. Darren Paden*, Case No 12AE-CR03149-01. Information ¶ 10. In that case, Mr. Paden confessed to sodomizing his victim over a period of 10 years, starting when the victim was five years old. Tr. 267:1-4; 352:18-25.

Before his confession, Mr. Paden was a well-known and respected member of his small community of Dearborn, Missouri. Tr. 140:13-19; 266:17-21; 682:4-9. Due to the seriousness of the crime and Mr. Paden's social standing, the *Paden* case was the subject of considerable media attention without any involvement of Mr. Zahnd. Tr. 46:5-12; 75:19-25; 176:12-20; 353:19-354:5.

After briefly denying his guilt to law enforcement, Mr. Paden quickly confessed to sexually abusing his victim. He then wrote a letter of apology to his wife and his children, including the victim. There was overwhelming proof of Mr. Paden's guilt. Tr. 267:5-9; 350:25-351:10.

Nevertheless, while out of custody on bond for nearly three years pending the disposition of his case, Mr. Paden lied to his family and friends, claiming he was not guilty and falsely claiming that the victim had fabricated her claims of sexual abuse. Tr. 268:8-11; 351:25-352:2; 355:3-10; 682:25-683:15.

Based upon Mr. Paden's lies and community standing, the victim was ostracized and declared a liar by many in the community where she had lived her entire life. The community's adoption of Mr. Paden's lies made the victim's life almost unbearable. Due

to Mr. Paden's lies and community members' actions based on those lies, the victim engaged in self-harm and contemplated suicide. Tr. 355:11-19; 683:21-686:12.

In the Fall of 2014, the State made a plea offer that, in exchange for Mr. Paden's guilty plea, it would recommend 30 years imprisonment and that the defense could argue for any sentence allowed by law. That offer was rejected. Tr. 257:8-258:1.

On August 17, 2015, Mr. Paden pleaded guilty to two counts of statutory sodomy in the first degree of a victim under the age of twelve, pursuant to a plea agreement that the State would recommend a total of 60 years' incarceration and with the understanding that the minimum sentence would be a total of 20 years' incarceration. Tr. 215:25-216:1; 230:8-10; 266:9-16; 272:19-22; 350:14-17.

The Court set Mr. Paden's case for sentencing for October 9, 2015. Information ¶ 12; Tr. 226:11-12; 277:7-8; 361:4-6. " In preparation for the sentencing, Mr. Paden's counsel [Complainant Mr. John P. O'Connor], advised Mr. Paden that he should request family, friends, and coworkers to provide the Court with reference letters which detailed positive aspects of his life or character." Information ¶15.

At the request of Mr. Paden's father and/or Mr. O'Connor, various members of the Dearborn community wrote letters in support of leniency for Mr. Paden following his guilty plea. In all, sixteen letters of support from Mr. Paden's family, friends and coworkers were sent directly to the Court without prior notice to the State, depriving it of the right to object to anything contained in the letters before the Court had read them. Mr. O'Connor chose to have the letters sent directly to the Court because "it has more

meaning to a judge if someone is going to do that." Tr. 45:23-25; 49:10-13; 142:22-143:3; 178:20-25; 213:18-214:3.

Despite Mr. Paden's confession, guilty plea, and overwhelming evidence of guilt, some of the letters of support expressly questioned Mr. Paden's guilt, and at least one of the letters questioned the victim's veracity. Informant's Resp. to RFA No. 5; Tr. 297:11-17; 332:3-15; 356:14-22; 357:21-25.

Those writing letters on behalf of Mr. Paden included Donna Nash, former Platte County Collector; Mrs. Nash's husband, Karlton Nash of Nash Gas; and Jerry Hagg, former President, Platte Valley Bank. Information ¶¶ 17-19; Tr. 16:15-17:10; 41:4-7; 124:20-24; 138:8-10; 140:1-141:10; 175:1-5.

Mrs. Nash's former position as the elected Platte County Collector was information in the public record. Mrs. Nash testified that she was identified as Platte County Collector to every taxpayer in Platte County when she was in office in tax statements sent out to Platte County citizens. Mrs. Nash also testified that the Platte County Board of Elections maintains public records of each of her elections to the office of Platte County Collector. Tr. 172:12-20; 173:19-174:23.

Mr. Hagg's former role as President of Platte Valley Bank was information in the public record. Mr. Hagg testified that his former role as President of Platte Valley Bank was widely known and available from several publicly available sources. He also testified that he is listed as the "President" of Platte Valley Bank on various publicly available filings maintained by the Missouri Secretary of State. Tr. 41:4-44:6.

The purpose of Mr. Hagg's letter (the "Hagg Letter") was to seek leniency for Mr. Paden. Tr. 53:13-17. When Mr. Hagg wrote his letter, Mr. Paden and his counsel, Mr. O'Connor, had failed to disclose to him the true facts of Mr. Paden's crimes. Accordingly, Mr. Hagg did not have full knowledge of the conduct to which Mr. Paden had pled guilty before he wrote his letter. Tr. 53:18-54:2. After learning the true facts of Mr. Paden's crimes, Mr. Hagg now understands that Mr. Paden, whom his letter supported, is a child molester. Tr. 55:15-18. Even though he wrote a letter seeking leniency for Mr. Paden, Mr. Hagg testified that he believes "that child sex abusers like Mr. Paden" should not receive leniency in their sentencing. Tr. 63:10-14.

In requesting that Mr. Hagg write a letter in support of Mr. Paden, neither Mr. Paden's father nor Mr. O'Connor ever told Mr. Hagg about the natural consequences of writing such a letter—that he could be subpoenaed as a witness to testify in open court concerning his support for Mr. Paden, a confessed child molester, and that his letter would not be confidential, but would be a matter of public record that could be viewed by members of the public, including the media. Because of the undisputed failure of Mr. Paden's father and Mr. O'Connor to advise Mr. Hagg about the natural consequences of his letter, Mr. Hagg was mistakenly led to believe that only the Court would ever know about his letter. Mr. Hagg testified that when he wrote his letter, he believed the letter would be out of the public eye and strictly for the judge. He further testified that he did not want anyone to know about his letter and it "bother[ed]" him when he learned that the letter was public. Tr. 49:14-51:12.

Had Mr. Paden's father or Mr. O'Connor advised Mr. Hagg before he wrote his letter that he could be called as a witness and that his letter would be public, he most likely would not have written it. Hence, but for the unexplained failure of Mr. Paden's father and Mr. O'Connor to advise Mr. Hagg of the natural consequences of his writing a letter of leniency for Mr. Paden, Mr. Hagg would not have been placed in the position in which he found himself – writing a letter of leniency for a confessed child molester, which was totally contrary to his beliefs. Tr. 49:14-50:25; 53:13-17; 63:10-14.

When Mr. Zahnd's assistant prosecutor told Mr. Hagg the truth about the natural consequences of his writing the letter of leniency for Mr. Paden it was the first time anyone had done so. Tr. 26:15-25.

Mr. Hagg believes "that child sex abusers like Mr. Paden" should not receive leniency in their sentencing. Tr. 63:11-14. Yet he wrote a letter seeking leniency for Mr. Paden, Tr. 53:13-17. This contradiction would have been fertile grounds for cross examination by the State. Mr. Zahnd correctly believed that the Hagg Letters could be effectively rebutted by calling Mr. Hagg as a witness at the sentencing hearing. Tr. 410:11-20.

When the Nashes wrote their letter (the "Nash Letter"), Mr. Paden and Mr. O'Connor had failed to disclose the true facts of Mr. Paden's crimes to the Nashes. Accordingly, the Nashes did not have a full knowledge of the conduct to which Mr. Paden had pled guilty. Tr. 142:6-8; 144:21-145:2; 153:2-7; 168:13-20; 185:1-7; 188:10-15.

The purpose of the Nash Letter was to seek leniency for Mr. Paden. Tr. 177:20-23. Mrs. Nash only learned from Mr. Zahnd that Mr. Paden had pleaded guilty. Once Mrs. Nash learned the true facts of Mr. Paden's crimes, she understood that Mr. Paden, whom her letter supported, is a child molester. Had Mrs. Nash known that Mr. Paden had pleaded guilty when she wrote her letter, the letter may have been different. Tr. 185:1-7; 11-16; 203:14-204:4.

In requesting that the Nashes write a letter in support of Mr. Paden, neither Mr. Paden's father nor Mr. O'Connor ever told her about the natural consequences of writing such a letter—that she could be subpoenaed as a witness to testify in open court concerning her support for Mr. Paden, a confessed child molester, and that her letter would not be confidential, but would be a matter of public record that could be viewed by members of the public, which would include the media. Because of Mr. Paden's father's and Mr. O'Connor's undisputed failure to advise the Nashes about the natural consequences of their letter, the Nashes were mistakenly led to believe that only the Court and the Prosecutor would ever know about her letter. Mrs. Nash testified that she thought the letter would be kept confidential by the judge and would not be part of the public record of the case. Tr. 179:10-18; 180:22-25; 181:4-12; 186:4-7.

Mrs. Nash was hesitant to write a letter as requested and admitted that had she been advised by Mr. O'Connor prior to writing the letter that she could be called as a witness and that the letter would not be confidential, she may have not written it the same way. Hence, but for the unexplained failure of Mr. Paden's father and Mr. O'Connor to advise Mrs. Nash of the natural consequences of her writing a letter of leniency for Mr.

Paden, Mrs. Nash would not have been placed in the position in which she found herself—writing a letter of leniency for a confessed child molester. Tr. 176:23-177:5; 203:14-204:4.

When Mr. Zahnd told Mrs. Nash the truth about the natural consequences of her writing the letter in support of Mr. Paden that was the first time anyone had done so. Tr. 179:10-18; 180:22-25; 181:4-12; 188:5-18.

The Nashes believed that Mr. Paden was a "caring adult" to whom they gave "love and support" even after he pleaded guilty. Tr. 140:13-24. Mrs. Nash also came to understand that Mr. Paden was a child molester. Tr. 185:11-16. The Nashes characterization of a child molester as a "caring adult" would have been fertile grounds for cross examination by the State. Mr. Zahnd correctly believed that the Nash Letter could be effectively rebutted by calling Mrs. Nash as a witness at the sentencing hearing. Tr. 410:11-20.

The Court received 14 others letters on behalf of Mr. Paden. It was evident from the content of some of the letters that important facts had not been disclosed to the letter writers and the letters were written without knowledge of the true facts of the case and the nature and extent of Mr. Paden's criminal conduct to which he confessed. Despite Mr. Paden's guilty plea where he admitted, under oath, to sexually abusing the victim multiple times over many years and admitted that the victim had told the truth about that abuse, letters received by the Court still questioned whether the victim was being truthful.

Informant's Resp. to RFA No. 5; Tr. 297:11-17; 332:3-15; 356:14-22; 357:21-25. For example, one letter stated:

> I believe only [the victim], Darren and God himself know the truth in the situation. No one has encouraged me to discredit [the victim's] claims. However, from the onset, I did not believe the charges to be true because I have also known [the victim] for many years. Ex. 104.

Despite the fact that Mr. Paden confessed to his crimes within two hours of his interview (a portion of which was a voice stress test, which Mr. Paden failed), another letter to the trial court stated:

> Only God, Darren and [the victim] know what truly happened. I feel Darren may have admitted to things he did not do after hours of interrogation and all the pressure to admit guilt. Ex. 103.

Yet another letter stated:

> I realize there are only three who know the full truth of a case—the victim, the defendant, and God. I know Darren was raised in a Christian home and taught Christian values and I find it hard to believe that he would forsake them. I have never had an occasion to doubt his integrity. Ex. 101.

Mr. Zahnd and the assistant prosecutors assigned to the *Paden* case were concerned that the letters had been written in reliance on Mr. Paden's lies and were conveying inaccurate information to the Court. Mr. Zahnd believed he had a responsibility to correct the letter writers' misapprehension of the facts so that the Court

would base its decision on accurate information based on a full and complete understanding of the facts. Tr. 374:13-22; 407:12-410:10.

Mr. Zahnd met with his first assistant, Mark Gibson, and the two assistant prosecutors handling the *Paden* case to discuss what should be done about the letters. Together, the four had more than 60 years of prosecutorial experience. Tr. 345:11-19; 404:12-20; 562:1:4; 585:22-590:13; 654:4-7; 659:16-660:7; 662:17-23.

The unanimous judgment of the four prosecutors was that effective advocacy required the letters to be confronted. Tr. 407:24-412:7; 589:11-590:13; 666:24-667:24. Mr. Gibson suggested that the letter writers be placed under subpoena and examined in court as to the true facts of the case. Tr. 410:5-8; 591:2-23; 655:14-16; 662:24-663:2.

Given that he had reason to believe that the letter writers had been lied to, Mr. Zahnd was concerned with the fairness of surprising the letter writers with the true facts of the case for the first time in open court. Thus, he instructed the assistant prosecutors to offer to meet with the letter writers and to inform them of the overwhelming evidence of Mr. Paden's guilt to determine if the true facts would alter their opinion of Mr. Paden. If their opinions were changed due to the new information and that fact was communicated to the Court, it would be unnecessary to call them as witnesses at the sentencing. Tr. 411:1-412:7; 414:24-415:6.

Mrs. Nash testified that she preferred Mr. Zahnd's approach to dealing with the letter writers as opposed to be sandbagged. Specifically, Mrs. Nash testified that she preferred receiving a phone call from Mr. Zahnd as opposed to being first called as a

witness and being surprised with the true facts of the case for the first time in open court. Tr. 171:2-9.

Mr. Zahnd also instructed the assistant prosecutors to inform the letter writers of the likelihood of publicity related to their participation in the case, as a request for cameras in the courtroom had been made by the press and there was significant media interest in the case. Tr. 542:1-23; 548:18-21.

Prosecutors met with most of the letter writers to make sure that they understood that Mr. Paden had fully confessed to his crimes; yet many of them, including community leaders, continued to support him. Tr. 594:18-19.

The evening before the Paden sentencing hearing, assistant prosecuting attorney Chris Seufert met with Mr. Hagg and his counsel, Mr. Abe Shafer. A legal assistant with the prosecutor's office, Tanya Faherty, was also present for that meeting. Tr. 21:13-17; 74:23-75:2; 594:13-15; 639:20-23.

Before the meeting, Mr. Shafer met with assistant prosecuting attorney Myles Perry while he waited for Mr. Seufert. At the end of that meeting, Mr. Shafer said words to the effect of: "Well, just to be clear, I assume that if Mr. Hagg were to withdraw his letter entirely, that he wouldn't need to appear to testify?" Mr. Perry replied "That's generally about the size of it, Judge." Mr. Perry informed Mr. Seufert of this exchange before Mr. Seufert met with Mr. Shafer and Mr. Hagg. Tr. 72:19-73:2; 593:8-21; 671:4-672:4.

At the meeting with Mr. Hagg, Mr. Seufert attempted to show Mr. Hagg the transcript of Mr. Paden's guilty plea, a video recording of Mr. Paden's confession, and

other evidence of Mr. Paden's guilt. Mr. Hagg refused to consider any of that evidence. Tr. 22:25-23:1; 54:10-19; 58:13-16; 80:14-16; 108:15-109:5; 623:20-24.

Mr. Shafer asked something to the effect of, "What are you asking for?" Believing that Mr. Shafer was referring to his discussion with Mr. Perry, Mr. Seufert expressed a sentiment similar to Mr. Perry's, saying words to the effect of, "If he withdraws his letter, it will not be necessary for him to appear in court." Tr. 597:8-19.

Mr. Hagg unequivocally stated that he would not withdraw his letter, and gave Mr. Seufert no reason to believe that he would change his mind. Tr. 58:17-22; 109:7-10; 597:20-24.

At the end of the meeting and only after Mr. Hagg unequivocally stated he would not withdraw his letter, Mr. Seufert informed Mr. Hagg that a news release had been prepared and that those who wrote letters of support for Mr. Paden would be named in the news release. Tr. 26:13-23; 78:18-25; 598:20-599:7; 626:6-17; 644:21-645:9.

In his meeting with Mr. Hagg, Mr. Seufert attempted to inform Mr. Hagg of: (1) the true facts of the *Paden* case to determine if the new information would change his opinion of Mr. Paden; and (2) the likelihood of publicity.

That same evening, Mr. Zahnd had a telephone conversation with Mrs. Nash. Tr. 143:9-16; 417:10-419:1.

Upon reaching Mrs. Nash, Mr. Zahnd asked Mrs. Nash about the letter she and her husband wrote to the Court. She responded that she and her husband had been long-time friends of Mr. Paden's father, that he kept asking her to write a letter on his son's behalf, and that they eventually felt compelled to do so. Mr. Zahnd asked Mrs. Nash if she was

aware of the facts of the *Paden* case. She said that she was not. Mr. Zahnd shared with her various facts that were a matter of record in the case to ensure that she understood the true nature and extent of Mr. Paden's conduct and that would potentially be presented to her in cross- examination. Mr. Zahnd also explained that the victim felt that members of the community had turned on her. He told Mrs. Nash that the victim planned to talk at the sentencing hearing about her suicidal feelings that she attributed partly to the fact that people did not believe her. Mr. Zahnd told Mrs. Nash that he had never prosecuted a case where so many community leaders appeared to have sided with a man who had admitted this sort of child sexual abuse. Tr. 144:16-145:2; 176:23-177:5; 419:2-422:18.

Mr. Zahnd then asked Mrs. Nash whether anything he had told her about the facts of the case changed her opinion and whether she still wanted the Court to consider her letter. Ms. Nash expressed to Mr. Zahnd great ambivalence about what to do and said that she would need to talk with her husband about it. She said words to the effect of, "You know Karlton and I would never do anything to hurt you." Mr. Zahnd responded that nothing she did or decided not to do would hurt him – that this was not a personal matter for him. Tr. 145:15-25; 422:19-423:3.

Having known Mrs. Nash, a fellow elected official, for many years, Mr. Zahnd knew that she was extraordinarily sensitive to any adverse media publicity and would appreciate a heads-up concerning any possible publicity. Mr. Zahnd also knew that the *Paden* case was being closely followed by the media. Glenn Rice, a reporter with the Kansas City Star, had already asked for and received the letters written in support of Mr. Paden. From comments Mr. Rice had made, Mr. Zahnd sensed that his story regarding

the case would not be read as being sympathetic to those who had written letters of support on behalf of Mr. Paden. Tr. 179:23-180:1; 423:4-425:24.

Because of their long friendship and his knowledge of Mrs. Nash's sensitivity to adverse publicity, Mr. Zahnd shared with her that the media was monitoring this case very closely. He told her that her letter was a matter of public record. Mr. Zahnd asked Mrs. Nash whether Glenn Rice had called her, as Mr. Rice had indicated he intended to do so. So she would have all the facts, Mr. Zahnd further advised Mrs. Nash that he was considering a news release that would include the names of those who had written letters in support of Mr. Paden. Mr. Zahnd told Mrs. Nash that he thought the media coverage would not be favorable to the witnesses. Mr. Zahnd testified that was not a threat, but was simply a statement of fact of the natural consequences of her actions. It was made out of concern for a friend whom he had known for years, knew to be sensitive to public criticism, and may not have appreciated the degree of media attention that would be focused on the letter writers, including her husband and her. Tr. 423:4-425:24.

The call ended with Mrs. Nash promising to talk with her husband and call Mr. Zahnd back if they decided to do anything about their letter. Tr. 145:15-25; 421:8-11.

Mrs. Nash testified that she have preferred to learn the information that Mr. Zahnd conveyed in a private conversation rather than while being questioned in open court. Tr. 171:2-9.

In his call with Mrs. Nash, Mr. Zahnd merely informed Mrs. Nash of: (1) the true facts of the *Paden* case to determine if the new information would change their opinion of Mr. Paden; and (2) the likelihood of publicity.

On October 8, 2015, Mr. Zahnd permitted Mr. Seufert to post on the Platte County Prosecuting Attorney's 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 11:00 am in division 2 at the Platte County courthouse, if you would like to attend the hearing to show support for the victim.

Tr. 192:22-193:9; 446:22-447:11; Ex. 8.

Before authorizing the Facebook post, Mr. Zahnd, relying on the Safe Harbor provisions of **Rule 4-3.6(b)**, ensured that it contained only true information already in the public record. Tr. 446:22-447:11. It is undisputed that the Facebook post contained only true information. Tr. 194:15-17; 287:21-288:11; 448:1-3. It is also undisputed that the Facebook post contained only information in the public record. Tr. 194:18-195:3; 447:22-25.

Rule 4-4.4(a): Means with no other purpose than to embarrass or burden a third party.

Mr. Paden's sentencing hearing, originally set for October 9, was continued. On October 30, 2015, Mr. Paden was sentenced to a total of 50 years' incarceration, substantially more than the 30 year maximum of the plea agreement that Mr. Paden had rejected. Tr. 257:17-20; 258:5-8. Before the sentencing hearing, Mr. Zahnd and Mr. Gibson met with Mr. O'Connor. Because the victim in the case was suffering greatly – and Mr. Zahnd feared for her emotional and physical well-being – the State agreed that it

would not call any of the letter-writers as witnesses at the hearing in exchange for Mr. O'Connor's agreement to move the hearing up from its re-scheduled date of November 13, 2015. The State further agreed, in exchange for the expedited hearing for the sake of the victim's health and well-being, that it would not object to the Court considering the 16 letters the Court had already received from the letter-writers. Tr. 441:11-443:23

At the sentencing hearing, the victim made it clear that she believed that letter writers like the Nashes and Mr. Hagg had chosen the side of her abuser over her. At sentencing, she said:

> To some of the citizens in my town and any onlookers, 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 to their own flesh and blood.

Ex. 7 (Sentencing Tr.) 61:24-62:6.

Assistant Prosecuting Attorney Myles Perry argued for the State at sentencing. Among other things, Mr. Perry argued, without any objection from the defense, that the letter writers had supported Mr. Paden instead of the victim. Among his comments:

> The defendant unleashed this monster and it won't stop. He started it. He fed it lies. And the community that surrounded [VICTIM] and him, strengthened it through willful ignorance; perhaps because they would rather see a young child consumed by it than to face the truth themselves….

> Instead, this victim, [VICTIM] was forced to stand up to the very people who should be kneeling down to provide her comfort and support. Instead, they [the letter writers] drove a girl deserving of every kindness they could extend, right out of their own town.

Ex. 7 79:2-7; 80:6-10.

The entire sentencing, including everything that the victim and Mr. Perry said, was "information contained in the public record." **Rule 4-3.6(b)(2)**. The victim and assistant prosecutor Myles Perry asserted that the letter writers had supported Mr. Paden and ostracized the victim. Mr. Zahnd used slightly different words to express the same sentiment in a news release. Ex. 7, 9.

After the sentencing was complete, Mr. Zahnd issued a news release that stated in part:

> [M]any 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 … 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

> Mr. Zahnd said, "it is said that we can be judge 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 the child molester over the child he repeatedly abused." Ex. 9

Mr. Zahnd read **Rule 4-3.6(b)(2)** as allowing him to repeat and paraphrase that information "without fear of discipline." ***Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033, 111 S. Ct. 2720, 2723, 115 L. Ed. 2d 888 (1991).** Prior to issuing the news release, Mr. Zahnd conferred with Mr. Perry to ensure that the substance of the news release would match the substance of the sentencing argument. In drafting the news release, Mr. Zahnd relied on the Safe Harbor provisions of **Rule 4-3.6(b)** believing that anything said in open court was information in the public record and could be re-stated. Tr. 458:10-460:8.

The news release contained only true information. Retired Judge Abe Shafer, counsel for Mr. Hagg, testified that "I don't see anything in Exhibit 9 [the news release] that I know to be inaccurate." Likewise, Mrs. Nash testified that she didn't "see anything" that was "factually untrue" in the news release. Tr. 122:6-123:4; 196:4-7; 288:2-5; 297:23-298:7. There was no evidence or testimony that the news release contained any untrue statements.

It is undisputed that the news release only contained information in the public record. There was no evidence or testimony that any part of the press release was not information in the public record. Tr. 61:25-62:5; 123:5-124:14; 455:23-456:3; Ex. 7.

There was substantial testimony that all of the information in the news release was information in the public record:

a. The Hagg Letter and the Nash Letter were received by the Platte County Circuit Judge presiding in the Paden case and placed in the Court's file. Thus, they became public records. Tr. 332:16-333:11; Informant's Resp. to RFA Nos. 10, 11.

b. The fact that Mr. Hagg had served as a President of the Platte Valley Bank was commonly known in the Dearborn community and was information in the public domain that existed prior to, or separate from, the investigation and prosecution of the *Paden* case. It was also contained in public documents filed by Platte Valley Bank with the Missouri Secretary of State. Tr. 41:10-44:6.

c. The fact that Mrs. Nash had served as Platte County Collector was commonly known in the Dearborn community was information in the public domain that existed prior to, or separate from, the investigation and prosecution of the subject criminal matter. It was also contained in public documents of the Platte County Election Board and the Collector's Office. Tr. 172:17-174:25.

Knowing that nearly every media outlet would want to confirm the identities and prominence of the letter writers, Mr. Zahnd included that information in his news release. Mr. Zahnd did not care whether or not media outlets ended up printing the names of the letter writers. Some media outlets did, some printed a portion of the names, and some of the media outlets printed none of the names. Tr. 456:23-457:4; 461:2-7

The OCDC included in its Information the same information that it criticizes Mr. Zahnd for repeating: (1) the identity of Mr. Hagg and the Nashes; (2) their former places of employment; and (3) they wrote letters of support for Darren Paden, a person convicted of statutory sodomy in the first degree. There is no legal requirement that Mr. Hagg and the Nashes be specifically identified in the Information instituting the current disciplinary proceeding. Indeed, the identities of certain crime victims are routinely redacted from public documents (including in the disciplinary proceeding where the identity of the victim in the *Paden* case is subject to a protective order). Under the OCDC's own broad construction, **Rule 4-4.4(a)** would prohibit any inclusion of such public information in a public document like the Information because it embarrasses or burdens Mr. Hagg and the Nashes and the OCDC failed to use pseudonyms, seek a protective order, or take other steps to protect Mr. Hagg and the Nashes from supposed embarrassment or burden.

Rule 4-8.4: Conduct prejudicial to the administration of justice.[2]

The State traded away its right to call Mr. Hagg and the Nashes as witnesses at the sentencing hearing in exchange for an expedited hearing, given the victim's fragile emotional state. However, Mr. O'Connor did not and never intended to call Mr. Hagg or the Nashes as witnesses at sentencing. Tr. 223:16-17; 270:18-22; 278:14-20. Neither Mr. Hagg nor the Nashes were designated as witnesses by defense in the *Paden* case. Tr. 337:22-338:6; Informant's Resp. to RFA Nos. 24, 26. Mr. O'Connor never took any steps to serve Mr. Hagg or the Nashes with compulsory process, such as a subpoena. Tr.

[2] Many of the facts set forth above are also relevant to the **Rule 4-8.4** claim.

60:24-61:1; 117:9-12. The defense made absolutely no attempt to call Mr. Hagg or the Nashes as witnesses at the sentencing hearing. Tr. 60:19-23; 117:13-21; Ex. 7. To the contrary, the defense went out of his way to keep Mr. Hagg and the Nashes off the stand, agreeing to move up the sentencing if the State would forego its right to call Mr. Hagg, the Nashes and the other letter writers at the hearing. Information ¶ 31.

Throughout the *Paden* case, Mr. Hagg and the Nashes were willing to cooperate with the defense and were never effectively "driven from the witness stand" by any action of Mr. Zahnd. The reason why they never took the stand was because the defense chose not to call them. Tr. 98:6-14; 236:3-5; 239:5-12.

If Mr. Hagg had testified at the sentencing hearing, he would have testified that, in his opinion, child sex abusers like Mr. Paden should not receive leniency in their sentencing. Tr. 63:11-14. Once Mrs. Nash understood that Mr. Paden had pleaded guilty, she admitted her letter may have been different than the one she sent to the Court. If Mrs. Nash had testified, her testimony may have been different from her letter. Tr. 203:14-204:4. There was no other evidence establishing how Mr. Hagg or the Nashes would have testified at sentencing. There is no evidentiary basis to find that the testimony of Mr. Hagg or the Nashes would have been favorable to Mr. Paden, but there is evidence that it may have been unfavorable. Tr. 223:16-17; 270:18-22; 278:14-20.

Rule 4-3.4(f): Request to refrain from voluntarily giving relevant information to another party

Mrs. Nash and Mr. Zahnd testified that Mr. Zahnd never requested that Mrs. Nash refrain from voluntarily giving any information to the defense in the *Paden* case. Tr. 198:24-199:15; 486:19-24.

Mrs. Nash testified that the only information that Ms. Nash had regarding Darren Paden was included in the Nash Letter. Tr. 181:13-18. At the time of Mr. Zahnd's conversation with Mrs. Nash, the defense in the *Paden* case had already been given a copy of the Nash Letter. Thus, all the information that Ms. Nash had regarding Mr. Paden had already been given to the defense. Mrs. Nash had no further information related to Mr. Paden that she could refrain from giving to the defense. Tr. 218:9-25. "Neither Respondent nor his assistants specifically stated to Mrs. Nash that she should not provide her letter regarding Mr. Paden to Mr. Paden's counsel." Informant's Resp. to RFA No. 46; Tr. 341:13-21.

Mrs. Nash and Mr. Zahnd testified that Mr. Zahnd never mentioned Mr. Paden's defense counsel in their conversation. Tr. 199:13-15; 427:3-6.

Likewise, Mr. Hagg, Mr. Shafer, Mr. Seufert and Ms. Faherty testified that Mr. Seufert never requested that Mr. Hagg refrain from voluntarily giving any information to the defense in the *Paden* case. Tr. 59:20-60:17; 111:7-112:13; 599:21-600:13; 646:14-25.

Mr. Hagg did not identify any information, other than information in the Hagg Letter that he possessed regarding Mr. Paden. At the time of Mr. Seufert's meeting with

Mr. Hagg, the defense in the *Paden* case had already been given a copy of the Hagg Letter. Thus, all the information that Mr. Hagg had regarding Mr. Paden had already been given to the defense. No evidence was presented that Mr. Hagg had further information related to Mr. Paden that he could refrain from giving to the defense. Tr. 218:9-25. "Neither Respondent nor his assistants specifically stated to Mr. Hagg that he should not provide the letter he had written regarding Mr. Paden to Mr. Paden's counsel." Informant's Resp. to RFA No. 39; Tr. 340:8-16.

Both Mrs. Nash and Mr. Hagg admitted that ethical and justifiable actions of attorneys can be "intimidating." Mrs. Nash testified that merely appearing as witnesses in this proceeding was "intimidating." Likewise, Mr. Hagg testified that he is "always nervous" when appearing as a witness in court or at a disciplinary hearing and that appearing as a witness can be "intimidating." Tr. 39:1-11; 166:25-167:5.

Regardless of any subjective feelings the Nashes or Mr. Hagg may have had, there was no evidence that the charged actions of Mr. Zahnd or the actions of any assistant prosecuting attorney lacked any legitimate purpose and were intended to intimidate the Nashes or Mr. Hagg. On the contrary, the actions of Mr. Zahnd and his assistants were intended to advise the Nashes and Mr. Hagg of the true facts of the *Paden* case, the fact that their letters on behalf of Mr. Paden were public records, the truth regarding media interest in the case, and Mr. Zahnd's intention to issue a news release in the case. Because Mr. Paden and his counsel, Mr. O'Connor, failed to advise the Nashes and Mr. Hagg of the public nature of their letters and the media interest in the case culminating in Mr. Zahnd's news release, the responsibility to first tell the Nashes and Mr. Hagg the full

truth about those things was forced upon Mr. Zahnd and his assistant prosecutors, even though the Nashes and Mr. Hagg might consider that bad news. Tr. 49:14-50:24; 179:10-18; 180:22-25; 181:4-12; 186:4-7; 411:1-412:7; 414:24-415:6; 542:1-23; 548:18-21. Rather than sandbag the Nashes and Mr. Hagg, Mr. Zahnd believed that he ought to tell them the entire truth, treating them as he himself would have wanted to be treated. Tr. 411:1-412:7.

Neither Mr. Zahnd nor any assistant prosecuting attorney suggested that Mrs. Nash or Mr. Hagg should not voluntarily give any information to the defense in the *Paden* case. Tr. 59:20-60:17; 111:7-112:13; 198:24-199:15; 486:19-24599:21-600:13; 646:14-25. There was no evidence that Mrs. Nash or Mr. Hagg believed from their interactions with Mr. Zahnd and/or his assistant prosecutors that she or he should not communicate freely with the defense in the *Paden* case. Tr. 60:2-8; 199:5-8.

Mrs. Nash voluntarily met with Sara Rittman, the paid consultant hired by Mr. Paden's counsel. Tr. 236:3-5; 239:5-12.

Mr. Hagg, through his counsel, communicated extensively with the defense in the *Paden* case, such that his counsel, Mr. Shafer, testified that it would take a "long time" to relate all of the times that he had communicated with Mr. Paden's counsel, Mr. O'Connor, about the *Paden* case. Tr. 98:6-14.

The extensive communication between Mr. Paden's defense team and Mrs. Nash and Mr. Hagg indicates that neither Mrs. Nash nor Mr. Hagg believed that Mr. Zahnd implied that they should not communicate freely with the defense in the *Paden* case.

Finally, the OCDC states that Mr. O'Connor believed the letters sent to the Court would have minimal value. Informant's Brief p. 9, fn 1. This overstates Mr. O'Connor's testimony. Mr. Paden's counsel admitted that the letters in support of Mr. Paden, individually and collectively, were "inconsequential," had "no bearing, zero" would "never … carry the day," and "were never going to be meaningful" to the Judge's sentencing decision. Based on his opinion of the letters' complete lack of probative value, Mr. Paden's counsel made no reference to the letters at sentencing. As such, there was no evidence that the letters tended to make the existence of a material fact more or less probable. Tr. 272:5-6, 15-17; 273:16; 275:20-22; Ex. 7.

STANDARD OF REVIEW

This Court reviews the evidence *de novo*, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. ***In re Belz*, 258 S.W.3d 38, 41 (Mo. 2008)**. The panel's findings of fact, conclusions of law, and the recommendation are advisory, and this Court may reject any or all of the panel's recommendations. ***In re Coleman*, 295 S.W.3d 857, 863 (Mo. 2009)**.

This is a **First Amendment** case. All of Mr. Zahnd's relevant actions involve speech: his issuance of a news release and his or his assistants' speech to the letter writers regarding the true facts of the case and the media's interest in the case. Professional misconduct is usually established by a preponderance of the evidence. ***In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003)**. The OCDC has failed to meet its burden even under a preponderance of the evidence standard. However, because the OCDC

interprets the Rules to govern Mr. Zahnd's speech on matters of public interest, it must meet an even higher burden: it must show that its restrictions are narrowly tailored to serve a compelling state interest and must justify its regulation of speech by clear and convincing evidence.

A. Content-based restraints on speech must be narrowly tailored to serve a compelling state interest.

Because this is a **First Amendment** case, it is subject to strict scrutiny. Judge Scott M. Matheson, Jr., now of the United States Court of Appeals for the Tenth Circuit, has explained that regulations of attorney speech are constitutionally suspect and must be narrowly tailored to serve a compelling state interest:

> Regulation of lawyer speech about a pending case[3] is inescapably content-based because the speech's message may produce harm that the government seeks to prevent. Such content regulation aimed at communicative impact conflicts with orthodox first amendment doctrine that government has no power to restrict expression because of its message,

[3] Virtually all of the cases and commentary on this subject deal with extrajudicial attorney speech about *pending* cases. These cases and commentary assume that it is beyond debate that once a case is complete, the government cannot, consistent with the First Amendment, prohibit truthful attorney speech regarding the completed case. In the case before this Court, all of Mr. Zahnd's extrajudicial speech of which the OCDC complains occurred *after* Mr. Paden had pled guilty and had been sentenced.

its ideas, its subject matter, or its content. Accordingly, the Supreme Court normally applies the most exacting scrutiny to restrictions aimed at the communicative impact of expression. Such regulation violates the first amendment unless it is necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."

Scott M. Matheson, Jr., The Prosecutor, the Press, and Free Speech, 58 Fordham L. Rev. 865, 897-98 (1990) (internal citations omitted).

In a disciplinary proceeding limiting a prosecutor's speech concerning a criminal case, the government bears a heavy burden:

> In determining the validity of restrictions upon free speech, the constitutional analysis calls for the application of two demanding tests. The first is whether a substantial governmental interest is furthered by the restriction upon speech. ***Procunier v. Martinez*, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974)**. The second requires that the restriction be no greater than is necessary or essential to protect the governmental interest involved. ***Id.*** The application of these tests involves a balancing of the gravity and likelihood of the harm that would result from unfettered speech against the degree to which free speech would be inhibited if the restriction is applied. ***Nebraska Press Association v. Stuart*, 427 U.S. 539, 562, 96 S. Ct. 2791, 2804, 49 L. Ed. 2d 683, 699 (1976)**, citing ***United States v. Dennis*, 183 F.2d 201, 212 (2d Cir.1950) (Hand, J.), aff'd, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951)**.

***Matter of Rachmiel*, 90 N.J. 646, 449 A.2d 505 (1982)** (finding former prosecutor did not violate of New Jersey's ethical rules).

The government may not attempt to restrict speech unless it clearly falls into one of two realms of attorney conduct:

> Generally there are two areas where a state has a significant interest in prescribing standards of attorney conduct. An attorney may be disciplined for conduct which shows his inability to represent clients competently and honestly. An attorney may also be disciplined for conduct which interferes with the processes of the administration of justice, such as bribery of jurors, subornation of perjury, misrepresentations to a court or any other conduct which undermines the legitimacy of the judicial processes. A state may not regulate an attorney's exercise of his right to free speech under the guise of prohibiting professional misconduct unless his conduct clearly falls into one of these two categories of significant state interest.

***Polk v. State Bar of Texas*, 374 F. Supp. 784, 787–88 (N.D. Tex. 1974)**.

The OCDC correctly states that "[w]here unbridled speech amounts to misconduct *that threatens a significant state interest*, the state may restrict a lawyer's right to freedom of speech." Informant's Brief p. 49 (citing ***NAACP v. Button*, 371 U.S. 415, 439, 83 S. Ct. 328, 341, 9 L. Ed. 2d 405 (1963)**) (emphasis added). However, the OCDC inexplicably omits the Missouri Supreme Court's clarifying statement construing ***Button*** in ***Matter of Westfall*, 808 S.W.2d 829, 835–36 (Mo. 1991)**: "Restrictions on free speech, however, will survive judicial scrutiny only if the limitation furthers an important

or substantial governmental interest and is no greater than necessary or essential to the protection of the particular governmental interest involved." As ***Button*** holds, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." ***Button*****, 371 U.S. at 439.**

The OCDC never identifies any compelling or significant state interest in silencing the repetition of truthful, public information regarding legal proceedings after they conclude. To restrict Mr. Zahnd's freedom of speech, the OCDC must show the Rules are narrowly tailored to serve a compelling state interest and are no broader than necessary to serve that interest. The OCDC cannot and does not even attempt to do so.

B. <u>The government must justify its regulation of speech by clear and convincing evidence.</u>

In order to limit speech, the government must meet a burden of clear and convincing evidence.[4] "The Supreme Court has made it clear that the free speech provision which is guaranteed by the government cannot be withheld by the government

[4] Unlike most states where professional misconduct must be proven by clear and convincing evidence, in Missouri, a mere preponderance of the evidence will usually justify discipline. ***See In re Farris*****, 472 S.W.3d 549, 557 (Mo. banc 2015)**. However, "[w]here the protections of the Constitution conflict with the efficiency of a system to ensure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform." ***Polk v. State Bar of Texas*****, 374 F. Supp. 784, 788 (N.D. Tex. 1974).**

absent *convincing proof* that the government's interests outweigh the individual speaker's constitutional rights." **Rachel Luna, *The Ethics of Kiss-and-Tell Prosecution: Prosecutors and Post-Trial Publications*, 26 Am. J. Crim. L. 165, 176 (1998)** (citing ***FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984)** (emphasis added). "When applying strict scrutiny, the Court assumes government action is unconstitutional unless the government can show with *clear and convincing evidence* that its action is the least speech-restrictive means of advancing a compelling government interest. Thus, the burden of proof to support the government action falls to the government, not the targeted speaker." **Susan Dente Ross, *An Apologia to Radical Dissent and A Supreme Court Test to Protect It*, 7 Comm. L. & Pol'y 401, 427 (2002)** (emphasis added); *see also* ***Matheson* 58 Fordham L. Rev. at 922** ("[W]hen the case is tried to the bench, requiring that threat to trial fairness be proved by clear and convincing evidence comports with the shift in free speech and fair trial balance that occurs when a case is tried to a judge rather than a jury."); **Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 Emory L.J. 859 (1998)** ("Therefore, both rules of professional conduct regulating attorney speech and gag orders on lawyers should be allowed only if strict scrutiny is met.").

The OCDC attempts to turn the **First Amendment**'s protections on their head, requiring Mr. Zahnd to justify his speech with a substantial purpose (other than informing the public of the truth). To the contrary, the **First Amendment** places the burden on the OCDC to justify the restriction of speech by proving by clear and convincing evidence both that: (1) a substantial governmental interest is furthered by each restriction upon

speech and (2) the restriction be no greater than is necessary or essential to protect the governmental interest involved. Again, the OCDC has not even attempted to meet this burden.

I. Response to Informant's Point Relied on I: Mr. Zahnd cannot be punished under Rule 4-4.4(a) because: (A) truth is an absolute defense; (B) his speech is protected under the First Amendment; (C) the OCDC has not proven his news release had no substantial purpose other than to embarrass or burden; (D) he was within the safe harbor of Rule 4-3.6; and (E) he was not put on notice as to what the Rules require.

The OCDC's claim under **Rule 4-4.4** is based solely on the news release. Information ¶ 41. The OCDC asserts that Mr. Zahnd violated **Rule 4-4.4(a)** because his news release had no substantial purpose other than to embarrass and burden Mr. Hagg and Mr. Nash. However, the OCDC's claim fails for multiple reasons. First, the truth of Mr. Zahnd's statements is an absolute defense. Second, even if this Court finds that Mr. Zahnd's statements were not true, his speech is otherwise protected by the **First Amendment**. Third, even if his speech is not absolutely protected by the **First Amendment**, the OCDC has not shown that his news release had no substantial purpose other than to embarrass or burden Mr. Hagg or the Nashes. Fourth, all of Mr. Zahnd's comments in the news release fell within the safe harbor of **Rule 4-3.6**. Fifth, even if this Court wishes to clarify the Rules now to find that Mr. Zahnd's actions somehow violated the Rules, he was not given fair notice of what the Rules require.

A. Truth is an Absolute Defense

Under the **First Amendment**, a lawyer cannot be disciplined for recounting truthful, public information regarding a judicial proceeding that has concluded. No lawyer in any American jurisdiction has ever been disciplined for reciting truthful, public information about a court case after the case has concluded.[5]

Since the OCDC's interpretation of the Rules is utterly novel and without precedent, this Court should look to the related context of cases dealing with attorney criticism of judges. Indeed, the courts and the public are equally subject to criticism outside the courtroom. ***See Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 463 (1907)** ("When a case is finished, courts are subject to the same criticism as other people….") (cited with approval in ***Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070 (1991)**).

When an attorney criticizes a judge, truth is an absolute defense. As the United States Supreme Court has held, "truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned." ***Garrison v. Louisiana*,**

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[5] Mr. Zahnd has exhaustively attempted to find *any* case where discipline was sought (much less imposed) for stating true, public information about a case once that case is over. He has found none. The OCDC cites to 25 disciplinary cases from a total of 13 jurisdictions. None of these cases impose discipline on a lawyer for recounting truthful, public information regarding a judicial proceeding after it has concluded. *See* Chart of Cases pp. 94 to 106 of this brief.

379 U.S. 64, 73-74 (1964); ***see also Standing Committee on Discipline of the United States Dist. Court for the Central Dist. of California v. Yagman*****, 55 F.3d 1430, 1438 (9th Cir. 1995)** ("To begin with, attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense."). Expressive activity on matters relating to the functioning of the government, in general, and the conduct of criminal trials, in particular, is "plainly at the center of the protective umbrella of the First Amendment." **See State ex rel. Okla. Bar. Ass'n v. Porter, 766 P.2d 958, 966-967 (Okla. 1988)**.

Further, it is not just Mr. Zahnd's right to speak that is implicated, it is also the public's right to hear. "The counterpoint of the right to speak is the right of the listener to receive a free flow of information… [I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." ***Id.* at 967.** (citations omitted). Silencing attorney speech about judicial proceedings "directly inhibit[s] the public's right to receive this information from those who under ordinary circumstances are most calculated to be intimately familiar with this aspect of the government process." ***Id.*** Because the right of the public to receive information about the workings of its government functionaries "occupies a critical citadel of the First Amendment rights," it is difficult to "conceive[] of an interest sufficiently imperative to justify such a restriction of core First Amendment rights, at least where the statements made are not shown to be incorrect statements of fact." ***Id.***

Simply stated, just as the **First Amendment** protects an attorney's right to level truthful criticism at a judge, so too does it protect an attorney's right to recount truthful, public information about a judicial proceeding after it concludes.

It is uncontested that Mr. Zahnd's statements in the news release are truthful.[6] Counsel for Mr. Hagg testified, "I don't see anything in Exhibit 9 [the news release] that I know to be inaccurate." Likewise, Mrs. Nash testified that she didn't "see anything" that was "factually untrue" in the news release. Tr. 122:6-123:4; 196:4-7; 288:2-5; 297:23-298:7. There was no evidence or testimony that the news release contained any untrue statements. Indeed, the Disciplinary Hearing Panel concluded that Mr. Zahnd should be disciplined "*because* the statements are true." DHP Decision p. 21(emphasis in original). In the face of contrary United States Supreme Court precedent, the Panel wrongly concluded that "the truthfulness of a statement, therefore, cannot be an absolute defense to an alleged violation of Rule 4-4.4(a)." *Id.*

The OCDC and Amici NACDL and MACDL harshly criticize Mr. Zahnd's statement that those writing letters for the purpose of seeking leniency for the Defendant "appear[ed] to choose the side of a child molester over the child he repeatedly abused."

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[6] To the extent that Zahnd's statements were not factual in nature, but opinion, they cannot be disciplined. For example, "statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they imply a false assertion of fact." ***Yagman*, 55 F.3d at 1438**.

Nonetheless, Amici characterize the letters as "letters of support." Brief of Amici Curiae NACDL and MACDL pp. 11, 32. In an adversarial proceeding to support one side is necessarily not support the other. By definition, the defendant was a child molester and the letter writers chose to seek leniency for him with letters of support. To argue that the letter writers did not choose the child molester's side is illogical. Certainly, from the undisputed facts and the victim's perspective, it is reasonable to infer that the letter writers were not writing in support of the victim, which they were free to do if they had so chosen. However, rather than writing a letter in support of the victim and urging the Court to impose the severe punishment requested by the victim, the letter writers chose the child molester. It is simply a true fact that Mr. Hagg and the Nashes chose the side of the child molester and not the child he repeatedly abused.

Mr. Hagg extolled the virtues of the Defendant in the hope that the Defendant would receive less punishment than the victim believed was justified. It cannot seriously be argued that he did not taken the side of the Defendant with regard to sentencing.

Mrs. Nash called the Defendant a "caring adult[]" and beseeched the sentencing court to give him a chance to "prove that he can be a valuable member of his community." She also told the Court that Mr. Paden had her "unlimited …support." Being a caring adult and sodomizing a child for the better part of a decade are mutually exclusive. Seeking the return of a child molester to the community where he sexually abused his victim and giving the child molester your "unlimited … support" is obviously taking the side of the child molester.

That Mr. Hagg and the Nashes had taken the side of Mr. Paden and not the victim was clear to Assistant Prosecuting Attorney Perry, who argued at sentencing, without objection, "they [the letter writers] drove a girl deserving of every kindness they could extend, right out of their own town." Ex. 7 80:6-10. It was also clear to victim who in her statement to the Court at sentencing specifically called out the Defendant's supporters for adding to her suffering. Ex. 7 61:24-62:6. And it was clear to Kansas City Star reporter Glenn Rice, who wrote a story describing the two sides at the sentencing: the Defendant and his supporters on one hand and the victim on the other. **"Favored son's decade-long sexual abuse of girl divides small Missouri town," Kansas City Star, October 30, 2015** (accessed at http://www.kansascity.com/news/local/crime/article41940072.html#storylink=cpy). Everything in the news release was completely true, including that Mr. Hagg and the Nashes "appear[ed] to choose the side of a child molester over the child he repeatedly abused." According to the United States Supreme Court, truth may not subject a lawyer to sanctions. Accordingly, Mr. Zahnd had an absolute right to tell the public the truth after the proceeding concluded and cannot be disciplined for it.

B. The First Amendment further protects Mr. Zahnd's speech on matters of public concern

Even if this Court were to find that Mr. Zahnd's speech is not absolutely protected simply because of its truth, Mr. Zahnd's news release is the very kind of speech that the **First Amendment** protects most strenuously. Indeed, "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss

publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." ***Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L.Ed. 1093 (1940)** (holding **First Amendment** protects labor picketing).

1. Attorneys are protected by the First Amendment

The OCDC asks this Court to interpret **Rule 4-4.4(a)** to prohibit a certain class of citizens (attorneys) from speaking on certain subjects (on behalf of a child victim in the face of prominent community members who sought leniency for her abuser). The "concern with limiting what subjects may be spoken to by which speakers is absolutely inimical to the principles of the First Amendment. In the realm of protected speech, the government is constitutionally disqualified from dictating the subject about which persons may speak and the speakers who may address a public issue." ***State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 967(Okla. 1988)** (holding utilization of disciplinary rules to sanction speech criticizing judge was significant impairment of **First Amendment** rights of attorney to criticize court and the public's right to hear criticism of judicial branch).

2. Silencing Mr. Zahnd from sharing his viewpoint with the public violates the First Amendment

As a prosecuting attorney, [7] Mr. Zahnd has a viewpoint on the subject of the importance of supporting victims of child sexual abuse, especially when the victim

[7] Mr. Zahnd's status as prosecutor does not put him beyond the protection of the **First Amendment**. "[P]rosecutor speech is entitled to first amendment protection

reports being ostracized by her community. In fact, the State of Missouri imposes on him a duty to support victims of child sexual abuse. *See, e.g.,* **MO. CONST. Art. I, §32**. He firmly believes our courts should be transparent, and the public has the right to know the identities of people who seek to influence a court regarding the sentencing of a man convicted of sodomizing his daughter repeatedly for the better part of a decade. The government—represented here by the OCDC—deems his viewpoint "inflammatory."[8] It

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because the prosecutor retains a constitutional right to self-expression and because the speech informs the public about matters of public concern…" **Scott M. Matheson, Jr., The Prosecutor, the Press, and Free Speech, 58 Fordham L. Rev. 865, 930 (1990)**. Moreover, "[t]he prosecutor does not relinquish free speech rights by virtue of being a prosecutor." **Id. at 933** (*citing* ***In re Hinds*, 449 A.2d 483, 489 (1982)**); see also **Monroe H. Freedman & Janet Starwood, Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan. L. Rev. 607, 617 (1977)** ("As an individual, the prosecuting attorney, too, has rights of freedom of speech protected by the first amendment.").

[8] The OCDC argues that Zahnd's speech should be prohibited because it "subject[ed Mrs. Nash and Mr. Hagg] to public ridicule." In other words, the public broadly shared Zahnd's disappointment with the support that Mrs. Nash and Mr. Hagg gave to Mr. Paden. This is not a constitutionally sound reason to suppress speech:

> To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public

seeks to ban him from the marketplace of ideas because it does not like what he has to say. The government also recognizes that his comments are undeniably true and of public concern. Indeed, the Disciplinary Hearing Panel concluded that Mr. Zahnd must be silenced "*because* the statements are true." DHP Decision p. 21 (emphasis in original).

The government wishes to encourage the public speech of Mr. Paden's supporters while silencing those with contrary view from confronting that speech in public. This type of one-sided, content-based government censorship is precisely what the **First Amendment** was designed to prevent. Mr. Zahnd's speech about the conduct of judicial proceedings (i.e., the very functioning of his government) is within the hard-core center of the **First Amendment** and entitled to robust protection from this Court.

3. Gentile v. State Bar of Nevada controls this case.

The OCDC seeks discipline because Mr. Zahnd identified individuals who sought to influence the sentencing court by their name and occupation and described their participation in the case using, in the OCDC's opinion, "inflammatory" language. While

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> of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.

***Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056–57 (1991) (J. Kennedy concurring)**.

the OCDC has failed to provide the Court with any case imposing discipline in these circumstances, a United States Supreme Court case has held discipline is patently unconstitutional under very similar circumstances: ***Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).**

In ***Gentile***, attorney Dominic Gentile held a press conference on the day after an indictment was handed down against his client. At the press conference, Gentile identified a state witness by name (Steve Scholl), by occupation (Police Detective) and accused the witness of stealing drugs and travelers checks from a safety deposit box and of being a "crooked cop" – allegations that are surely far more "inflammatory" than anything of which Mr. Zahnd is accused. ***Id.* at 1058**. Gentile also intimated that Det. Scholl was a drug addict. ***See id.* at 1064**. The Nevada State Bar Association sought to discipline Gentile for these statements made during the pendency of a criminal case. ***Id.*** The Supreme Court held that Mr. Gentile's speech was protected by the **First Amendment**, with Justice Kennedy describing Gentile's speech as "innocuous."[9] ***Id*. at 1057**.

[9] To the extent that the subject matter of Gentile's speech is materially different from Zahnd's speech, Gentile's speech was more extreme. Gentile spoke while the case was pending; Zahnd only spoke after sentencing was concluded. Gentile accused Det. Scholl of serious crimes and corruption; Zahnd fairly characterized those seeking leniency for a child molester as taking his side, paraphrasing the State's sentencing argument. Still,

Justice Kennedy, in a concurring portion of his opinion, called the bar association's actions, "punishment of pure speech in the political forum." ***Id.* at 1034**. Kennedy also explained the public's interest in information about judicial proceedings:

> The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. **See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-839, 98 S.Ct. 1535, 1541-1542, 56 L.Ed.2d 1 (1978)**. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." ***Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980)**. Public vigilance serves us well, for "[t]he *knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power*.... Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." ***In re Oliver*, 333 U.S. 257, 270-271, 68 S.Ct. 499, 506-507, 92 L.Ed. 682 (1948)**.

***Id*. at 1035** (emphasis added).

Justice Kennedy characterizes Gentile's speech as "innocuous" yet the OCDC hyperbolically calls Zahnd's speech "inflammatory."

As in the case against Mr. Zahnd, Gentile spoke out, in part, because of the "serious toll" the investigation had taken on his client. Mr. Zahnd's client, the State of Missouri, has a strong interest in mitigating the stress endured by a child victim in a criminal case. ***See, e.g.*, § 491.710, RSMo** ("the prosecuting attorney … shall take appropriate action to insure a speedy trial in order to minimize the length of time the child must endure the stress of his or her involvement in the proceeding."). Mr. Zahnd issued the news release, in part, to ease the suffering of the child victim. The uncontradicted testimony of the victim's mother establishes that Mr. Zahnd was successful as to his intended purpose of supporting her daughter. Tr. 687:22-688:11.

Just as "an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of" involvement in a criminal case, ***Gentile*, 501 U.S. at 1043**, a prosecutor can take reasonable steps to defend the reputation of a child victim and reduce the adverse consequences of her victimization, especially after the conclusion of the judicial proceeding. When it comes to reducing these adverse consequences, "[a]n attorney's duties do not begin inside the courtroom door" and "he or she cannot ignore the practical implications of a legal proceeding." ***Id.***

In the case at bar, the victim was suffering terribly. Mr. Paden added insult to injury by first sexually abusing her and then lying about it. Because of those lies, she had been ostracized in her hometown. She was literally driven to the brink of suicide. As the lawyer for the State of Missouri charged with seeking redress for the grievous harm suffered by the victim, Mr. Zahnd could not ignore the practical implications of a community that turned against the victim. He spoke out truthfully about the participation

of Mr. Hagg and the Nashes in the criminal case so that public might understand what the victim had been through. Given the holding in ***Gentile***, Mr. Zahnd's statements were protected **First Amendment** speech.

Gentile's holding sets out the constitutional requirements for restricting speech through disciplinary rules. Justice Kennedy, writing for the majority in this part of his opinion, held that Nevada's version of prior **Model Rule of Professional Conduct 3.6** was void for vagueness because "its safe harbor provision … misled petitioner into thinking that he could give his press conference without fear of discipline." ***Id*. at 1048.**

The Court split on the standard to apply when determining the constitutionality of restrictions on extrajudicial attorney speech. Justice Kennedy and three justices would have applied normal **First Amendment** principles to extrajudicial speech. Chief Justice Rehnquist, with the deciding vote case by Justice O'Connor, applied a less demanding standard permitting restrictions "designed to protect the integrity and fairness of a State's judicial system and [imposing] only narrow and necessary limitations on lawyers' speech." ***Id*. at 1075.**

Justice Rehnquist argued in the dissenting portion of his opinion that Nevada's equivalent of **Rule 4-3.6** met that lower standard because it was narrowly tailored in that it "applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones attorneys' comments until after the trial." ***Id*. at 1076.** Justice O'Connor believed that the Rule was still unconstitutionally vague even applying this lower standard, and concurred with Justice Kennedy on that point.

The OCDC's interpretation of **Rule 4-4.4** includes none of the narrow tailoring that the minority thought saved the Rule in ***Gentile***. The OCDC would not require any prejudicial effect to impose discipline. The OCDC argues that **Rule 4-4.4** should be applied with particular bite to prosecutors stating, "[i]t is relevant to note that unlike other attorneys, prosecutors enjoy a particularly close relationship with the press." **Informant's Brief p. 51.** The OCDC would silence Mr. Zahnd's right to speak forever, not merely delay it until the after the trial.

Yet even the narrow tailoring of Nevada's equivalent of **Rule 4-3.6** did not save it from being unconstitutionally vague. Justice O'Connor joined Justice Kennedy's opinion to form a majority for the proposition that the Rule *failed to give fair notice* to those it was intended to deter and created the possibility of discriminatory enforcement, creating a trap for the wary and unwary alike. ***Id*. at 1050, 1082**.

If an attorney's pre-trial statements identifying a witness by name and occupation and perhaps falsely accusing that witness of a having committed multiple crimes that were not part of the public record are "innocuous" statements protected by the **First Amendment**, then Mr. Zahnd's truthful statements of public information made about matters fully established in court after the conclusion of the case are undoubtedly protected speech.

In short, given the dictates of the **First Amendment**—particularly as explained by the United States Supreme Court in ***Gentile***—it is clear that the OCDC has failed to identify any compelling state interest justifying permanently gagging a lawyer from recounting true, public information about court proceedings after they conclude. And the

language of **Rule 4-4.4** is not narrowly tailored to serve such an interest. Accordingly, **Rule 4-4.4,** to the extent that it is interpreted to regulate truthful speech, is unconstitutional.[10]

C. The news release served myriad substantial purposes other than to embarrass or burden the Supporters.

Even if the Court were to find that Mr. Zahnd's statements are not protected by the **First Amendment**, his statements are protected by the Rules themselves. Indeed, by the express language of **Rule 4-4.4**, the OCDC must prove that Mr. Zahnd's news release had "no substantial purpose" that was legitimate. The OCDC has failed to do so, and its claim under **Rule 4-4.4(a)** therefore fails.

Rule 4-4.4 prohibits using "means that have no substantial purpose other than to embarrass, delay, or burden a third person." ***Cf.*** **Fed. R. Civ. P. 11** (penalizing the presentation of documents for *any* "improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."). Accordingly, a lawyer is permitted to use means that incidentally embarrass or burden a third party if there is a

[10] Of course, **Rule 4-4.4** still applies to the non-expressive conduct it was written to cover. As demonstrated more fully below, see footnote 11, *infra*, **Rule 4-4.4** is not generally viewed as a significant limit on attorney speech. As the OCDC notes, "Rule 4-4.4 regulates conduct not speech." Informant's Brief p. 48. True enough. However, labeling Zahnd's pure, truthful speech as "conduct" does not obviate the protections of the **First Amendment**.

substantial purpose. For this reason, where a lawyer reported domestic violence to the commanding officer of her client's spouse with a purpose of averting additional domestic violence, the West Virginia Supreme Court issued a writ of prohibition to end the investigation by the Committee of Legal Ethics of the State Bar because averting the domestic abuse of her client was a substantial purpose such that no further investigation into her intent was warranted. ***State ex rel. Scales v. Comm. on Legal Ethics of W. Virginia State Bar*, 446 S.E.2d 729, 733 (1994)**. The existence of a single, legitimate substantial purpose obviated the need for any further inquiry.

The Supreme Court of Missouri long ago recognized that those who participate in the judicial system may, as part of that participation, have their character injured and be compelled to answer questions even when the answer is disgraceful**.** ***See Sandy Ford Ranch, Inc. v. Dill*, 449 S.W.2d 1, 6 (Mo. 1970)** ("It has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge.").

Former Dean Ellen Suni of the University of Missouri-Kansas City School of Law has noted, "[w]hile abusive treatment of witnesses can implicate **Rule 4.4**, the Rule focuses on the 'substantial purposes' of an action *rather than its effect*. Where the purpose is permitted, the Rule appears to tolerate a high level of negative effect." **Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of***

***Shifting Blame in Criminal Cases*, 68 Fordham L. Rev. 1643, 1666 (2000)** (citations omitted) (emphasis added). The news release had multiple substantial purposes, and the treatment of the Mr. Hagg and the Nashes in the news release was far from abusive. Whatever the subjective, negative effect they may have experienced from their public acts becoming widely known, it was substantially less than the "high level" that the Rule permits.

Mr. Zahnd had several substantial purposes for his news release, any one of which would put his speech outside the ambit of **Rule 4-4.4**. The OCDC mischaracterizes some of Mr. Zahnd's purposes and ignores others. Often, the OCDC plays Monday morning quarterback and argues that there was a different way of communicating the information to public. But a lawyer is not required to choose the least burdensome means (with the full benefit of hindsight), he is merely required to use a means that has some substantial purpose other than to embarrass, delay, or burden a third person. Mr. Zahnd's news release had many such purposes.

1. Assuring the public that influential members of the public are not given special access or consideration by the courts.

There is a widespread perception, highlighted by the recent disclosures regarding Harvey Weinstein, that the rich and powerful receive special treatment by the criminal justice system. *See, e.g.,* **Cooper, Ryan, *What enabled Harvey Weinstein*, The Week, 12 Oct. 2017,** theweek.com/articles/730215/what-enabled-harvey-weinstein ("One crucial step for preventing sexual predation is simply bringing rich and powerful people under the rule of law. It absolutely beggars belief to think that Weinstein would have

avoided prosecution if he had not been a wealthy movie mogul.") In order to maintain public confidence in the criminal justice system, prosecutors must be allowed to explain to the public that influential people do not get special access or consideration by the courts.

In this case, the Supporters sent letters to the judge *ex parte*, hoping to influence his sentencing decision. It was widely known, at least among the citizens of Dearborn, that several prominent people supported Mr. Paden. The Supporters were happy to include their names in the letters to judge because they knew it would give their letters more weight (had anonymity been important to the letter writers, they could have sent their letters anonymously). Once justice was achieved and Mr. Paden received a substantial prison sentence, it was important for the public to know that the attempts at influence by his powerful friends and family had not been successful. The news release, generally, and the information identifying the Supporters and the position they took at sentencing, specifically, served the important and substantial interest of maintaining confidence in the criminal justice system. It is disingenuous to use one's good name to attempt to influence a Court and then expect to hide that fact from the public.

The OCDC argues that in order to assure the public that prominent people who sent personal letters to the Court did not secure special treatment for Mr. Paden, Mr. Zahnd should have attempted various legal maneuvers to remove the letters from the Court's consideration or cross examined the letter writers on the stand. This latter strategy would have been more burdensome for the letter writers. Mrs. Nash specifically testified that she preferred a call from Mr. Zahnd to being confronted for the first time on

stand. Had Mr. Zahnd followed the OCDC's suggest path, it is entirely likely that the OCDC would be here complaining that Mr. Zahnd did not give the letter writers a heads-up before burdening them with an uncomfortable, stressful cross-examination.

Regardless, the existence of other ways to achieve a purpose does not make the means chosen by Mr. Zahnd unethical. The rule does not require the least burdensome means (which may be impossible to determine *a priori*). Moreover, conduct is not unethical simply because an alternative means for achieving the same legitimate purpose can be determined after the fact with the full benefit of hindsight. The rule simply requires that the means chosen has a substantial purpose. The news release did.

2. Evincing support for the victim of a heinous crime and thereby encouraging other witnesses or victims of similar crimes to come forward and report crime.

Public support for sex offenders puts society at risk and discourages victims from coming forward. It is a disturbing, but common, dynamic for the friends and supporters of a convicted sex offender to rally around him. That dynamic has played out in the Steubenville Rape Case, the Stanford Rape Case, and recently even closer to home in several sexual assault cases brought against Jacob Ewing, a citizen of Holton, Kansas. Dani Bostick, a survivor of child sexual abuse, has described the harm caused by those who publicly support sex offenders:

> Maintaining delusions about the perpetrator's character requires minimizing the seriousness of rape and blaming the victim. It even involves treating the perpetrator as if he were the victim, providing him compassion

> and support. Clinging to one's unrealistic perception about the perpetrator's character revictimizes the true victim. When people cling to their beliefs about a perpetrator, they put society at risk. They send the message that rape is not a big deal.
>
> Simply put, moral people don't commit rape. Believing otherwise hurts victims and emboldens perpetrators. One of the most dangerous aspects of rape culture is the inability and unwillingness of people to look beyond the perpetrator's personal branding and self-promotion.
>
> It's time to realize that our impressions of people should change when we are presented with more information. If you think someone is a person of stellar character, it is time to change your opinion after he is convicted of sexual assault.

Dani Bostick, *Brock Turner's Many Letters of Support Reveal a Disturbing Truth about Rape Culture,* The Huffington Post, TheHuffingtonPost.com, 11 June 2016 (Last accessed 16 Oct. 2017).

Any choice the prosecutors made about disseminating the fact of the support Mr. Paden enjoyed would have burdened third parties, whether that burden fell on the victim and her family or the Supporters. Abdicating their responsibility to provide information to the public about what transpired in court and contributing to a conspiracy of silence about sexual assault would have increased the already heavy burden on the victim—a burden that had pushed her to the brink of suicide. She deserved for the public to know that she had been vindicated in court despite the lies of the defendant and the efforts of

the Supporters to get a lesser sentence for Mr. Paden. Evincing support for her in the face of those members of the community who supported Mr. Paden was a substantial purpose of including the names and places of employment of the Supporters.

It is also important for other victims and witnesses of sexual abuse to see that the criminal justice system will protect them even when powerful people are arrayed against them. When justice is done in spite of a child sex offender's support from prominent people, victims and witnesses of similar crimes are more likely to come forward. Supporting the victims of these heinous crimes and encouraging disclosure by other victims and witnesses are very substantial purposes.

The OCDC mischaracterizes this purpose as "educating the public as to the wrongfulness of attacking the victims of sexual assault." That purpose, while laudable, was not Mr. Zahnd's. Mr. Zahnd was focused on Mr. Paden's victim and other actual and potential victims. His purpose was to let those victims know he would support them even when powerful people took the other side. To accomplish that purpose, in Mr. Zahnd's opinion it was necessary to identify the powerful people who took the other side.

3. Efficiently communicating to multiple press agencies matters in the public record that were of public interest.

The news release allowed Mr. Zahnd to efficiently communicate information to multiple press agencies without consuming considerable staff time.

The sentencing of Mr. Paden and the role the Supporters played in it was destined to be a major news story. The case had already received significant press attention with multiple newspaper articles written about the case. Media outlets had requested

permission to have cameras in the courtroom. A reporter from the Kansas City Star had requested and received copies of the letters of support. Finally, it is typically a matter of intense public interest when prominent people support those guilty of sex crimes. *See, e.g.*, **Emily Giambalvo, *Tahoma School District not pleased about letter in support of sex offender coach wrote on district letterhead*, The Seattle Times, The Seattle Times Company, 13 July 2017**, www.seattletimes.com/sports/high-school/tahoma-school-district-not-pleased-about-letter-in-support-of-sex-offender-on-district-letterhead/; **Matt Hamilton, *Stanford sex offender's friends and relatives wrote to persuade judge to keep him out of prison*, Los Angeles Times, Los Angeles Times, 7 June 2016,** www.latimes.com/local/lanow/la-me-ln-stanford-rape-brock-turner-letters-20160606-snap-htmlstory.html; **Jason Meisner, *More than 40 letters in support of Hastert made public before sentencing*, *Chicagotribune.com*, 27 Apr. 2016,** www.chicagotribune.com/news/local/breaking/ct-dennis-hastert-letters-met-20160422-story.html; **Barton Deiters, *Judge receives 115 letters of support for South Christian teacher who had sex with 15-Year-Old student*, MLive.com, 22 Nov. 2010,** www.mlive.com/news/grand-rapids/index.ssf/2010/11/judge_receives_115_letters_of.html.

For the reasons set forth above, Mr. Zahnd had a substantial purpose in supporting the victim in the face of prominent supporters of Mr. Paden. Mr. Zahnd wanted the public to know that, in Platte County, the State will not desert a victim because very prominent people seek leniency on behalf of a defendant. As discussed previously, Mr. Zahnd has a **First Amendment** right to express this belief publicly and through the use

of a news release. But if Mr. Zahnd wanted to note that "prominent" people had supported Mr. Paden, he would have been asked by any ethical and professional reporter to confirm the identity of the "prominent" people before the reporter would publish Mr. Zahnd's statement.

Because Mr. Zahnd knew that many reporters would ask for the names and prominence of the Supporters to confirm the statements made in open court and reiterated in the news release, Mr. Zahnd utilized the news release as an efficient way to answer their questions. Answering every press inquiry individually would have been impractical. Tr. 461:8-462:22. However, Mr. Zahnd was unconcerned with whether the media printed specific names or occupations of the Supporters. Some media outlets ended up printing the entire list of the letter writers; some named only a few of the letter writers; some named none of them. Knowing that nearly every media outlet would want to confirm the identities and prominence of the letter writers, Mr. Zahnd included that information in his news release. Mr. Zahnd was willing deliver the news release to members of the media and let individual media outlets decide whether to publish names of the letter writers, which some did and others did not. Again, with respect to the Supporters, the news release merely reiterated and provided confirmatory facts for the point Mr. Perry and the victim had already made in open court: community pillars had taken the side of a convicted child sex abuser against his victim.

The OCDC does not recognize or respond to this substantial purpose in any way.

4. Informing the public about how Mr. Zahnd was using public resources, and what choices he was making about enforcement priorities.

"[T]he public has a right to be kept informed about how a prosecutor is using scarce public resources, and what choices he or she is making about law-enforcement priorities." **R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle, Law & Contemp. Probs*., Autumn 2008, at 73 (2008)**. This notion is particularly true when prominent people disagree with the prosecutor's decisions.

A substantial purpose of the news release was to inform the public about a newsworthy case being handled by the Platte County Prosecuting Attorney's Office and to explain why Mr. Zahnd thought this defendant deserved a substantial prison sentence. The State of Missouri has a strong public policy in favor of transparency in government. *See, e.g.,* **RSMo § 37.070** ("It shall be the policy of each state department to carry out its mission with full transparency to the public."). Consistent with this strong public policy, Mr. Zahnd routinely publishes news releases and social media reports about the work of the Prosecuting Attorney's Office. The news release was issued consistent with Mr. Zahnd's duty of transparency and to educate and inform the community about matters of public interest. *See* ***Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Employees,* 43 S.W.3d 293, 301 (Mo. 2001),** as modified (Apr. 24, 2001) ("[O]pen records do not simply accommodate the public's amusement, curiosity, or convenience. Instead, it is simply beyond dispute that public records are freely accessible

to ensure confidence in the impartiality and fairness of the judicial system, and generally to discourage bias and corruption in public service. 'Without publicity, all other checks are insufficient....'") (citing **1 J. Bentham, Rationale of Judicial Evidence 524 (1827)**).

The OCDC characterizes this substantial purpose as "showing that there is transparency in the courts." Informant's Brief p. 43. But Mr. Zahnd did not wish merely to "show" transparency in some theoretical way. Mr. Zahnd's purpose was to *actually* be transparent and recount public information to the public. The OCDC argues that Mr. Zahnd should have been somewhat less transparent, concealing some information from the public. This is not transparency; it is opacity. Mr. Zahnd believed he could not achieve his purpose of being transparent with the public about how he was using their resources and his law enforcement priorities without fully and fairly recounting what had happened earlier in court, including that certain prominent members of the community had sought leniency on behalf of a convicted child sex abuser.

It was apparent from the fact that Mr. Hagg, the Nashes and the other letter writers sought leniency for Mr. Paden that they, at least implicitly, believed that Mr. Zahnd's law enforcement priorities were misplaced and that he was seeking a sentence that was too harsh. Surely an elected prosecutor is permitted to justify to the public his exercise of discretion when it is publicly questioned in court by leading citizens of his jurisdiction.

D. Mr. Zahnd's news release was permitted by the safe harbor of Rule 4-3.6.

Even if this Court finds Mr. Zahnd's statements are not protected because they are truthful, are not otherwise protected by the **First Amendment**, are not directly analogous

to the statements found permissible in ***Gentile***, and were not supported by some substantial purpose, his statements were nevertheless permissible because they contained exclusively public information within the safe harbors of Rule **4-3.6(b)**. **Rule 4-3.6(b)(2)** provides, "a lawyer may state…information contained in the public record." "Information contained in a public record" includes anything in the public domain, including public court documents, media reports, and comments made by police officers. **See *Attorney Grievance Comm'n of Maryland v. Gansler***, 835 A.2d 548 (Md. 2003). "If the matter the prosecutor discusses with the media is already in the 'public record,' it does not constitute an ethical violation for the prosecutor to repeat the matter to the press." **Cassidy, *Law & Contemp. Probs*., Autumn 2008 at 83 (2008)**. All of the information in the news release was in the public record and permitted by **Rule 4-3.6(b)(2)**.

The OCDC argues that **Rule 4-3.6**, which governs extrajudicial attorney speech, does not apply in this case seeking to discipline an attorney for extrajudicial speech. Instead, the OCDC relies on **Rule 4-4.4**, which by Informant's own admission governs conduct and not speech. In the OCDC's view, **Rule 4** expressly permits statements in the public record in one place and then implicitly prohibits those statements in another. This disharmonious construction violates all tenants of statutory construction.

Rule 4 must be construed as a single rule that is internally consistent. "[E]ach part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed." **§ 46:5 "Whole statute" interpretation, 2A Sutherland**

Statutory Construction § 46:5 (7th ed.) (citations omitted); ***see also Devine v. Robinson*, 131 F. Supp. 2d 963, 971 (N.D. Ill. 2001)** (holding this principle is "well-established" and applies to the ethical rules). Further:

> Where one statute deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. But if two statutes conflict, the general statute must yield to the specific statute involving the same subject, regardless of whether it was passed prior to the general statute, unless the legislature intended to make the general act controlling, the general act deals comprehensively with a subject, or expressly contradicts the specific act and that construction is absolutely necessary for all the words of the general statute to have any meaning at all. **§ 51:5.General and special acts, 2B Sutherland Statutory Construction § 51:5 (7th ed.).**

The construction of **Rule 4-4.4** urged by the Disciplinary Hearing Panel and the OCDC ignores these well-established principles of statutory construction. The OCDC argues that **Rule 4-4.4** is completely independent of **Rule 4-3.6** and makes no attempt to harmonize the two. This is an improper attempt to confine interpretation to the one section to be construed while ignoring the remainder of the **Rule 4**.

Properly read, however, **Rule 4-3.6** can be easily harmonized with **Rule 4-4.4**. **Rule 4-3.6** provides "a lawyer may state … information contained in a public record." Information already in the public record is unlikely to unfairly embarrass or burden a third party, just as it is unlikely to materially prejudice an adjudicative proceeding. **Rule**

4-4.4 would still apply to all of the other ways that a lawyer can embarrass, delay or burden a third party and it would apply to speech that does not fall into a safe harbor—for example, purely private matters not in the public record such as those at issue in ***U.S. v. Petrovic*, 701 F.3d 849 (8th Cir. 2012)** (cited by amici NACDL and MACDL).

If the Court finds that it is impossible to harmonize **Rule 4-3.6** with **Rule 4-4.4**, **Rule 4-3.6** must control on the subject of extrajudicial attorney speech because **Rule 4-3.6** specifically deals with that subject. **Rule 4-4.4** is not specifically concerned with nor generally understood to be a significant limit attorney speech.[11] As the OCDC states,

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[11] As an American Bar Association publication has noted, **Rule 4-3.6** "focuses only on a lawyer's extrajudicial communications about and during the pendency of an adjudicative proceeding. The rule generally does not limit post-proceeding communications**."** **Michael Downey, Ethical Rules for Litigating in the Court of Public Opinion, ABA (July 18, 2012)** (accessed at http://apps.americanbar.org/litigation/committees/ethics/email/summer2012/summer2012-0712-ethical-rules-litigating-court-public-opinion.html). The reason that Rule 4-3.6 is focused on communication during the pendency of an adjudicative proceeding is that the government has no substantial interest in limiting post-proceeding communication and may not do so constitutionally. **Rule 4-4.4** and its analogues in other jurisdictions are not generally understood to regulate attorney speech:

> The U.S. Constitution protects both the right of lawyers to speak in defense of their clients and the right of the public to learn about litigated matters.

"**Rule 4-4.4** regulates conduct not speech." Informant's Brief p. 48. When the subject is speech, **Rule 4-4.4**, a general provision dealing with conduct and not speech, must yield to **Rule 4-3.6**, a specific provision focused on speech. Accordingly, since Zahnd's speech is within the "public information" safe harbor of **Rule 4-3.6(b)(2)**, he cannot be disciplined for it.

The entire news release was within the **Rule 4-3.6(b)** safe harbor because it was "information contained in the public record." The OCDC complains that the news release violated **Rule 4-4.4(a)** in that it: (1) identified Mr. Hagg and the Nashes, (2) identified their current or former places of employment, and (3) commented that the letter

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> Yet, such protections and rights have limits. For lawyers, their rules of professional conduct provide four major limits.… [T]hese four limits are: (1) the limit that American Bar Association Model Rule 3.6 imposes on extrajudicial statements during civil and criminal investigations and litigation; (2) additional limits that Model Rule 3.8(f) imposes on prosecutors regarding extrajudicial comments; (3) restrictions that Model Rule 8.2 places on criticisms of the judges; and (4) the prohibitions that Model Rule 8.4 contains against misrepresentations and conduct prejudicial to the administration of justice.

Id. This ABA article did not consider or discuss **Rule 4-4.4** as a significant limit on lawyer speech.

writers chose the side of a child molester over his victim. Information, ¶ 41. Each of these complained-of statements fall squarely within a safe harbor of **Rule 4-3.6(b)(2).**

1. Identity of the letter writers.

The safe harbor provisions expressly permit a lawyer to state the identity of a person involved. **Rule 4-3.6(b)(1)**. Further, **Rule 4-3.6(b)(2)** expressly permits a lawyer to state information in the public record. The identity of Mr. Hagg and the Nashes as letter writers was information contained in a public record. And, the letters they signed and sent directly to the Court were placed in the Court's file, thereby making their identities public records.

2. Current or former places of employment.

The current and former places of employment also fall squarely within the safe harbor of **Rule 4-3.6(b)(2).** They were readily available on the Internet and in public records. The evidence showed that Mr. Hagg was identified as the President Emeritus of Platte Valley Bank in several publicly available sources. He was also listed as "President" of Platte Valley Bank on various publicly available filings maintained by the Missouri Secretary of State.

Mr. Nash was similarly identified as the owner of Nash Gas and Appliance, Inc. in filings maintained by the Missouri Secretary of State and other public sources.

Mrs. Nash was a former elected official in Platte County. She was identified as a former Platte County Collector in various Court filings, including, for example, in *K. Shafina v. Donna Nash, Platte County Collector*, Case No. 10AE-CV00998, in the Circuit Court of Platte County, Missouri. She was also identified as Platte County

Collector in the tens of thousands of tax statements sent out to Platte County citizens in her years as Platte County Collector. And, of course, as with any elected official, the Platte County Board of Elections maintains public records of each of her elections to the officer of Platte County Collector.

3. Appearance that Supporters chose the side of the child molester.

The fact that the Nashes and Mr. Hagg "appear[ed] to choose the side of a child molester" is also information within the public record. By submitting letters of support for Mr. Paden to the Court, the letters became a public record. It is a fair comment to say that in doing so, Mr. Hagg and the Nashes supported a child molester and chose his side as opposed to the side of the victim. It certainly appeared that way to the victim. At sentencing, she said:

> To some of the citizens in my town and any onlookers, 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 to their own flesh and blood.

Ex. 7 61:24-62:6. The entire sentencing, including everything that the victim said, was "information contained in the public record." At the sentencing hearing, the victim and Assistant Prosecuting Attorney Miles Perry argued that the Supporters had supported Mr. Paden and ostracized the victim. Mr. Zahnd used slightly different words to express the

same sentiment in the news release. **Rule 4-3.6(b)(2)** led Mr. Zahnd to believe that he could repeat and paraphrase that information "without fear of discipline." ***Gentile*, 501 U.S. at 1033.**

It also appeared to a reporter from the Kansas City Star that the leaders of the community who wrote reference letters chose the side of a child molester over the victim. That reporter wrote, without benefit of Mr. Zahnd's news release:

> On one side there has been Paden, backed by a contingent of supporters that has included family, church elders, the former bank president and other prominent residents.
>
> On the other side was the victim, now 18, who said this week that although she has received some strong words of support, she largely has been ostracized and even been declared a liar by some in the community where she also has lived her entire life. All she did was tell — and much of the community turned its back on her.

"Favored son's decade-long sexual abuse of girl divides small Missouri town," Kansas City Star, October 30, 2015 (accessed at http://www.kansascity.com/news/local/crime/article41940072.html#storylink=cpy).

Even if Mr. Zahnd's statements were not protected simply because they are truthful, because they fall otherwise within the protections of the **First Amendment**, or because they had substantial purposes other than to embarrass, or burden third parties, the OCDC's claim that Mr. Zahnd violated **Rule 4-4.4(a)** cannot stand. Its proposed

application of **Rule 4-4.4(a)** to statements of information contained in the public record directly conflicts with the safe harbor provision of **Rule 4-3.6(b)**. The OCDC is wrongly urging an interpretation that **Rule 4-4.4(a)** proscribes speech that is elsewhere expressly permitted.

E. Mr. Zahnd was not put on notice as to what the Rules require.

Finally, even if Mr. Zahnd's statements were not: (A) absolutely protected because they were true; (B) otherwise protected under the **First Amendment**; (C) permitted because they served a substantial purpose other than to embarrass or burden; or (D) somehow fell outside the safe harbor of **Rule 4-3.6**, it is clear that no attorney, including Mr. Zahnd, would be put on notice as what the Rules require regarding truthful statements involving public information about court proceedings once those proceedings have concluded.

1. Vagueness

A restriction of extrajudicial attorney speech is void if is so vague that it fails to provide fair notice to those to whom it is directed or is so imprecise that discriminatory enforcement is a real possibility. "[V]ague laws are particularly odious in the realm of freedom of expression." **Suzanne F. Day, *The Supreme Court's Attack on Attorney's Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 Case W. Res. L. Rev. 1347, 1376 (1993)**. Ratifying the OCDC's radically expansive interpretation of the Rules in this case requires the Rules to become so broad that they would fail the Constitutional prohibition against unreasonably vague laws. Indeed, the OCDC's

contention that "**Rule 4-4.4** regulates conduct not speech," Informant's Brief p. 48, is an implicit admission that **Rule 4-4.4** is too vague to have placed Mr. Zahnd on notice that his speech in the form of a news release would somehow violate the Rules.

a) Fair Notice

The law must give fair notice of what is permitted and what is proscribed. A law is void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." ***Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)**. Judge Matheson explains the applicability of the vagueness doctrine to extrajudicial speech by prosecutors as follows:

> The vagueness doctrine has special bite in the first amendment area because uncertain rules induce self-censorship of protected speech and precise rules give assurance that the lawmaker has focused on reconciling speech and governmental interests supporting regulation. As a result, the Supreme Court has required more specificity for rules potentially applicable to first amendment speech than to other areas. The rule should be voided unless it "conveys sufficiently definite warning as to the proscribed conduct."

Matheson, 58 Fordham L. Rev. at 899–900 (1990) (internal citations omitted).

The OCDC urges strained and internally inconsistent interpretations of **Rule 4**, with the Rule giving with one hand and taking with the other. If the Rules restrict speech in the ways that the OCDC believes, the Rules are so imprecise they inevitably fail to give fair notice.

If this Court wishes to use this case to clarify that the Rules prohibit the sort of speech at issue in Mr. Zahnd's case, it may do so going forward. But it cannot subject Mr. Zahnd to discipline for violating such a rule, as the existing Rules and their interpretation by this and every other court in the United States did not give fair notice to Mr. Zahnd that his acts fell in any way outside those Rules.

b) Discriminatory Enforcement

Since vague laws engender the possibility of selective and discriminatory enforcement, courts have sought to end their potential chilling effect on protected speech. **Day, 43 Case W. Res. L. Rev. at 1376**. "The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement." ***Gentile*, 501 U.S. at 1051**. In the case against Mr. Zahnd, the OCDC's attempts to impose discipline can only be described as selective and discriminatory. The OCDC has alleged professional misconduct by Mr. Zahnd based to some degree on Mr. Seufert's conduct, but have failed to seek discipline against Mr. Seufert. The OCDC would likewise hold Mr. Zahnd responsible for failing to supervise Mr. Seufert even though he was not Mr. Seufert's direct supervisor. At the same time, the OCDC seeks no discipline against Mr. Seufert's actual direct supervisor, Mark Gibson. Another attorney, Myles Perry, was intimately involved in the prosecution of Mr. Paden and the decision to confront Mr. Hagg and the Nashes, but has escaped the OCDC's fickle scrutiny.

2. Overbreadth

Restrictions on extrajudicial attorney speech are void if they are overbroad (i.e., not narrowly tailored to serve a compelling state interest). Judge Matheson explains:

> Traditionally courts have determined the constitutionality of a law as it is applied to facts on a case-by-case basis. The first amendment overbreadth doctrine, on the other hand, tests the constitutionality of a law in terms of its potential applications. To be invalid, a law must pose a significant likelihood of deterring protected speech. A law is void if it does not aim specifically at evils within the allowable area of government control but sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protected first amendment rights. The problem with such a law is that it hangs over people's heads like a Sword of Damocles. That judges will ultimately rescue those whose conduct in retrospect is held protected is not enough, for the value of a sword of Damocles is that it hangs--not that it drops, thereby deterring protected speech.

Matheson, 58 Fordham L. Rev. at 899 (internal citations omitted).

In the case at bar, the OCDC attempts to impose discipline for speech that occurred after the criminal case was over and done. There is no compelling state interest in silencing lawyers forever regarding the conduct of criminal cases. Even worse, the OCDC's veritable Sword of Damocles hangs over the heads of Missouri's prosecutors. Prosecutors are left to guess as to what extent they are permitted to repeat truthful, public information. Mr. Zahnd has been contacted by a Missouri prosecutor who wants to issue a news release describing letters written to the court in a child sex case, but is afraid to

speak due to the risk of ethical sanctions. This chilling effect is depriving the public of information that they have a constitutional right to receive.

In summary, there are multiple reasons this Court should dismiss the OCDC's claim under **Rule 4-4.4** regarding Mr. Zahnd's recounting of truthful, public information about the *Paden* case in his news release once the case was concluded. First, Mr. Zahnd's statements were true, and truth is an absolute defense to any proceeding under the Rules. Second, Mr. Zahnd's news release is at the center of political speech protected by the **First Amendment**, and the OCDC has not even attempted to justify its restrictions on that speech by clear and convincing evidence that the restriction furthers a substantial governmental interest and the restriction is narrowly tailored to serve that interest. Third, the OCDC has not proven Mr. Zahnd's news release has no substantial purpose other than to burden Mr. Hagg and the Nashes; to the contrary, the news release has multiple other substantial purposes. Fourth, the entirety of Mr. Zahnd's news release was public information the statement of which is protected by the safe harbors of **Rule 4-3.6(b)**. And finally, even if this Court wishes to now craft an interpretation of the Rules prohibiting conduct like Mr. Zanhd's, the text of the Rules and the existing interpretations of the Rules would not have given a reasonable lawyer fair notice that conduct like Mr. Zahnd's violated the Rules. The Court should dismiss the OCDC's claim under **Rule 4-4.4** for each of these reasons.

II. Response to Informant's Point Relied on II: Mr. Zahnd cannot be punished under Rule 4-8.4(d) because: (A) he merely informed the Supporters of the true facts of the case and the likelihood of publicity, (B) the letters were not properly before the Court, (C) the OCDC is constrained by its pleadings to claims based on an alleged interference with Paden's Sixth Amendment Rights, and (D) a violation of Rule 4-8.4(d) cannot stand on its own as it is too vague absent truly egregious conduct.

The OCDC's theory that Mr. Zahnd violated Rule 4-8.4(d) is based on a fundamental misunderstanding of the law. The OCDC presumes that people who attempt to influence a court are somehow entitled to anonymity and from having their opinions challenged, either by the prosecution or, later, in the court of public opinion. The law does not support this assumption.

A. Informing the Supporters of the true facts of the case and the likelihood of publicity was not a threat or intimidation tactic; it was telling the truth.

What the OCDC calls "intimidation tactics," Information ¶ 37, was in fact providing truthful information to the Supporters regarding the facts of the case against Mr. Paden and the likelihood of publicity. Telling the truth is not "intimidation tactics" or "retaliation." Retaliation does not include "presenting the potential defense witnesses with facts of the investigation and the crimes charged…" ***United States v. Girod, 646 F.3d 304, 312 (5th Cir. 2011); see also Franklin v. Thaler, EP-11-CV-413-KC, 2013 WL 3816397, at *21-22 (W.D. Tex. July 19, 2013)*** (no retaliation where prosecutors

provided potential defense witnesses with defendant's criminal history and recorded phone conversations). Respondent has researched the law and failed to find a single published case in American jurisprudence where a court has found retaliation by either: (1) informing a potential witness of the true facts of the case, or (2) the possibility of publicity.[12]

Remonstrating with a witness regarding the truth about a defendant's conduct is not an "intimidation tactic." ***See*** **Restatement (Third) of the Law Governing Lawyers § 120, cmt. h (2000**) ("Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the …witness … to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is a matter of judgment."); ***see also*** **Rule 4-3.3(a)(3)** (a lawyer may not

[12] Amici NACDL and MACDL rely on the definition of the crime of tampering with a witness and a comment to a criminal code that is no longer in effect to argue that Mr. Zahnd engaged in "coercion via a threat." Amici NACDL and MACDL's Brief p. 24. It is telling that Amici do not cite to any case where a person was charged with a crime (much less convicted) for informing a potential witness of the true facts of a case and the likelihood of publicity. Mr. Zahnd has researched the issue and has likewise been unable to find a single case charging a crime under these circumstances. The reason that no person in Missouri history has been charged with making a "threat" for informing a potential witness of the true facts of a case and the likelihood of publicity is because telling the truth is not a threat.

offer evidence that a lawyer "knows to be false" and must take reasonable remedial measures if a lawyer knows a witness called by the lawyer has offered false testimony). Accordingly, an attorney may confront an opinion witness with contrary information in an attempt to change the witness's opinion.

The OCDC urges a novel interpretation of the Rules and seeks discipline for attorney speech that has never before been subject to discipline in any American jurisdiction. The OCDC candidly admits in its brief that it is in unchartered territory, saying "[w]hile 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[13] violates Rule 4-8.4(d). ***See In re Eisenstein*, 485 S.W.3d 759, 763 (Mo. banc 2016)**." Informant's Brief p. 53, fn 16.

While no disciplinary authority in the United States has ever sanctioned a lawyer for informing a witness about the likelihood of publicity, the closest analogous situation is United States District Court Judge Thomas Durkin's warning in *United States v.*

[13] Of course, the threat in ***Eisenstein*** was very different than anything that Mr. Zahnd is alleged to have done. Eisenstein e-mailed opposing counsel, "Rumor has it that you are quite the gossip regarding our little spat in court. Be careful what you say. I'm not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start. Joel." ***In re Eisenstein***, 485 S.W.3d at 761. And Mr. Eisenstein's threat was one of several ethical violations by Mr. Eisenstein.

Hastert, No. 15-cr-00315 that letters of support would only be considered if they were part of the public record.

In that case, former U.S. House Speaker Dennis Hastert pleaded guilty to a federal financial crime in a hush-money case stemming from allegations of sexual misconduct. **Wisniewski, Mary, and Fiona Ortiz, *Ex-House Speaker Hastert pleads guilty in hush-money case*, Reuters, Thomson Reuters, 28 Oct. 2015**, www.reuters.com/article/us-usa-crime-hastert/ex-house-speaker-hastert-pleads-guilty-in-hush-money-case-idUSKCN0SM17Z20151028. Sixty people, including some prominent public figures, wrote letters of support to the Court. The letters were written before the federal government revealed the highly credible accusations of molestation against Hastert. **Draper, Kevin, *Why Is The University Of Chicago's Wrestling Coach Supporting Alleged Child Molester Dennis Hastert?*, Deadspin, Deadspin.com, 25 Apr. 2016**, deadspin.com/why-is-the-university-of-chicagos-wrestling-coach-suppo-1772892641. The defense provided those letters to the Court under seal. Judge Durkin informed the parties that he would not consider letters of support unless they were a matter of public record (stating in his order, "[u]sually letters attesting to a defendant's character are part of the public record.") **Associated Press, *Hastert judge won't consider support letters unless public*, Sandiegouniontribune.com, San Diego Union-Tribune, 22 Aug. 2016**, www.sandiegouniontribune.com/sdut-hastert-judge-wont-consider-support-letters-2016apr15-story.html. Judge Durkin and the letter writers knew that the support for Hastert would be of public interest and would almost certainly be widely reported. Once Hastert's supporters were informed—the OCDC might say "threatened"—that the letters

would be public, 19 letter writers withdrew their letters from consideration by the Court. **Tarm, Michael, *Ex-Congressmen send letters asking for leniency for Hastert*, The Seattle Times, The Seattle Times Company, 22 Apr. 2016**, www.seattletimes.com/nation-world/tom-delay-sends-support-letter-for-hastert-sentencing/.

As in the case against Mr. Zahnd, in the Hastert case:

- Prominent people wished to influence a judge to exercise leniency by submitting letters out of the public eye on behalf of a criminal defendant who had pleaded guilty;
- Those supporters did not have all of the information when they wrote their letters;
- After the letters were filed with the Court, the supporters were informed for the first time that the letters would be a matter of public record;
- Once being advised of all of the facts of the case against the defendant and the likelihood that the letters would become public, the supporters were given the opportunity to make an informed decision regarding whether they wanted the Court to consider their letters.

Although the actions of Mr. Zahnd and Judge Durkin are very similar and the Hastert case was highly publicized, no commentator, disciplinary authority, or court has suggested that Judge Durkin's actions in warning the letter writers that their letters would be a matter of public record were unethical in any way. The OCDC stands alone in its construction of the Rules of Professional Conduct as proscribing Mr. Zahnd's conduct in

advising the Supporters that their letters would subject them to public scrutiny and that Mr. Zahnd intended to submit a news release that would include the names of the Dearborn community leaders who took Paden's side over the child victim's.

The purpose of the meeting with Mr. Hagg and the phone call with Mrs. Nash was not to threaten the Supporters. It was to make sure that they were aware of the true facts of the case (they were not) and to inform them of the natural consequences of publicly supporting a child molester (publicity of their support for a child sex abuser, which the community would likely view negatively).

The letters at issue in this case—improperly sent directly to the Court at Mr. Paden's counsel's urging without first giving Mr. Zahnd and his assistants a chance to intervene—were based on the Defendant's false protestations of innocence to his friends and family (despite his full confession and sworn guilty plea). It was the unanimous professional judgment of the four senior prosecutors involved in the case, who collectively had more than 60 years of prosecutorial experience, that effective advocacy required that the Supporters be confronted with the truth. After all, "[c]ritical to any opinion as to the appropriate sanction is a full knowledge of the conduct alleged and charged." ***Eisenstein*, 485 S.W.3d at 767** (J. Wilson, dissenting), quoting ***In re Frick***, 694 S.W.2d 473, 480 (Mo. banc 1985).

Once the prosecutors decided to confront the Supporters, the prosecutors had a second choice:

- Sandbag the Supporters and surprise them with a potentially upsetting and public cross examination regarding the information the defendant had actively

misrepresented to them, to be followed by the near certainty that their participation in the case would be subject to intense public scrutiny; or

- Disclose the true facts and the likelihood of publicity ahead of time and allow the Supporters to make a fully informed choice about their support for Mr. Paden—a choice the Defendant's lies had deprived them of.

For Mr. Zahnd, the answer was clear: he treated the Supporters as he would want to be treated and told them the truth and the whole truth—the good news and the bad—even the parts that were difficult to hear including that they had been lied to and that the news media would almost certainly report on their support for a convicted child sex abuser. He did so by discussing the matter first with the Supporters privately, rather than under the glare of cross-examination, which undoubtedly would have been more burdensome and embarrassing to the Supporters.

The OCDC would require a different path. The OCDC construes the Rules of Professional Conduct to require the prosecutors to have laid in the weeds; either surprising the Supporters in Court with the mountain of evidence of their friend's guilt and also concealing the near certainty of publicity related to their support, or abdicating their duty to the people of Missouri to advocate effectively for a just sentence. The OCDC would require Mr. Zahnd and his assistants to subject the Supporters to the crucible of cross-examination without first giving the Supporters the opportunity to learn the entire truth about the person to whom they had lent their good names and credibility. After requiring the prosecutors to ambush the Supporters in open Court, the OCDC

would muzzle the prosecutors from ever sharing with the public any public information that may have led to social opprobrium of those Supporters.

Justice, fair play, and the Rules of Professional Conduct do not support the OCDC's position. This Court should not require Mr. Zahnd to violate his conscience, **Preamble to Rule 4, cmt. 7** ("[A] lawyer is also to be guided by personal conscience."), abrogate the Golden Rule, and sandbag the Supporters—one of whom he considered a personal friend—merely because a criminal defense attorney failed to advise the Supporters of the natural consequences of writing letters in support of Mr. Paden. Indeed, contrary to the OCDC's position, Mr. Zahnd believed then and he believes now that it was *in* the interest of justice not *contrary* to the administration of justice for him to be completely honest with and not withhold material information from Mr. Paden's Supporters.

B. Letter writing campaigns are improper, unhelpful, incompetent evidence, and when conducted ex parte, unethical.

Despite the OCDC's persistent characterization to the contrary, the Supporters were *not* witnesses in the Darren Paden Case. They were not designated as witnesses by the defense in accordance with the Rules of Criminal Procedure. **Mo. R. Crim. P. 25.05(2)** (requiring defense counsel to disclose to counsel for the State "the names and last known addresses of persons, other than the defendant, whom defendant intends to call as witnesses at any hearing"). They were not served as with subpoenas by the defense. They were not called as witnesses. They were not sworn as witnesses. They did not testify in court. Rather, they were simply Supporters of Mr. Paden who, at the

behest of his attorney, sought to influence the judge outside of the courtroom by communicating *ex parte* by letter. This is plainly improper. *See* ***In re Eisenstein*****, 485 S.W.3d at 767** (J. Wilson, dissenting) (not "appropriate for the Court to consider … letters … sent … directly to chambers.").

Judge Wilson has recently reiterated this Court's earlier sharp criticism of letter writing campaigns orchestrated by attorneys in an attempt to influence courts:

> It is unfortunate that recent cases, including this case, indicate that there may be a growing belief that the Missouri judiciary will be responsive to appellate practice techniques much resembling the letter writing bombardments and the petition signing campaigns to which legislative bodies are subjected. We do not believe that the citizens of Missouri either expect or want a judiciary which responds to such practices.

Id. (quoting ***In re Frick*****, 694 S.W.2d 473, 480 (Mo. banc 1985)**). Such letters have "no utility when sent to [the] Court outside the record." ***Id.***

An *ex parte* letter sent to a Court is also not competent evidence. *See, e.g.,* ***Robin Farms, Inc. v. Bartholome*****, 989 S.W.2d 238, 252 (Mo. App. W.D. 1999)** ("The law is well settled that the mere fact that a letter purports to have been written and signed by one in authority to do so is, in itself, insufficient to establish the authenticity and genuineness of the letter."). It should go without saying that a letter that arrives at the judge's chambers through the mail is not self-proving. While the OCDC and Amici

NACDL and MACDL repeatedly refer to the letters as evidence, they were not.[14] Evidence is presented by lawyers in a courtroom. It does not arrive in the judge's mailbox. Imagine the reaction of the criminal defense attorneys that amici represent if a prosecutor solicited the public to send letters directly to a judge alleging the defendant's bad character. They would be outraged and rightly so.

Not only are such letter-writing campaigns "futil[e]" and of "no utility," ***Eisentein,* 485 S.W.3d at 767**, and incompetent evidence, they also violate the Rules of Professional Conduct when they are orchestrated by an attorney. A lawyer shall not "communicate ex parte with [a judge] during the proceeding unless authorized to do so by law." **Rule 4-3.5(b)**. Just as an attorney cannot communicate *ex parte* with a judge, an attorney cannot solicit another person to communicate *ex parte* with a judge. **Rule 4-**

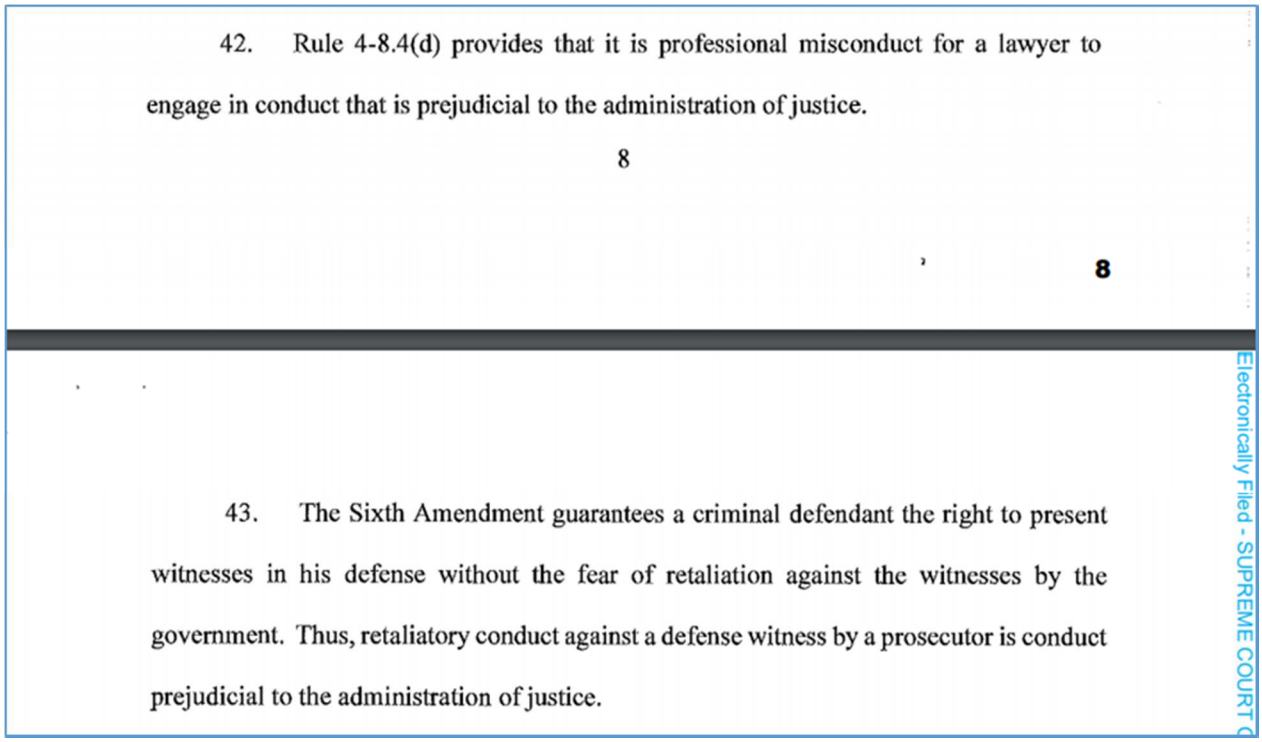
[14] The OCDC cites ***State v. Berry*, 168 S.W.3d 527 (Mo. App W.D. 2005)** and ***Martin v. State*, 291 S.W.3d 846, 849-50(Mo. App. W.D. 2009)** for the proposition that "hearsay is permitted routinely" sentencing. Contrary to the OCDC's assertion, ***Berry*** and ***Martin*** hold merely that information in a pre-sentence investigation by the Missouri Division of Probation and Parole is admissible. **Section 557.026, RSMo**, and **Missouri Rule of Criminal Procedure 29.07(a)(2)** expressly make that information admissible at sentencing. Those cases do not hold that hearsay is generally admissible in the absence of a statute or rule specifically making hearsay admissible. Even if hearsay were generally admissible at sentencing, the hearsay "evidence" would still have to be presented in Court and not sent by letter to a judge's chambers.

8.4(a) ("It is professional misconduct for a lawyer to … violate or attempt to violate the Rules of Professional Conduct … through the acts of another."); *see also* ***Eisenstein***, **485 S.W.3d at 767**. ("[S]uch letters demonstrate a lack of understanding of the process spelled out in Rule 5 and a lack of respect for the canons of judicial ethics.").

Ironically, rather than protecting the citizens of the State of Missouri from an unethical letter writing campaign, the OCDC seeks to protect that *ex parte* communication coordinated by the criminal defense attorney. The OCDC seeks discipline, in large part, because it contends Mr. Zahnd proposed the withdrawal from the Court's consideration improper, unhelpful, incompetent and unethical letters. That is a perversion of legal ethics.

C. The Information alleges a violation of Rule 4-8.4(d) based on a violation of Mr. Paden's Sixth Amendment Rights, but when this theory was conclusively disproven at the Disciplinary Hearing, the OCDC abandoned that theory and switched to unpled theories.

In the Information, the **Rule 4-8.4(d)** claim is based solely on an infringement of Mr. Paden's Sixth Amendment right to compulsory process to present witnesses without fear of retaliation. No other consideration regarding of the administration of justice is even mentioned in the Information:



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

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43. The Sixth Amendment guarantees a criminal defendant the right to present witnesses in his defense without the fear of retaliation against the witnesses by the government. Thus, retaliatory conduct against a defense witness by a prosecutor is conduct prejudicial to the administration of justice.

Information ¶¶ 42-43. The OCDC's use of the word "thus" (i.e, as a result or consequence of this; therefore; in the manner now being indicated or exemplified; in this way) makes it clear that the **Rule 4-8.4** claim is based entirely on the assertion that "[t]he Sixth Amendment guarantees a criminal defendant the right to present witnesses in his defense . . . ." Information, ¶ 43

However, the OCDC was mistaken in its assertion that "[t]he Sixth Amendment guarantees a criminal defendant the right to present witnesses in his defense . . . " as it applied to the sentencing of Darren Paden. Information, ¶ 43. There is no **Sixth Amendment** right to present witnesses *at sentencing*. The OCDC apparently confused the guarantee of the compulsory process clause of the **Sixth Amendment** to present witnesses during the guilt phase of a trial, as recognized in ***Washington v. Texas*, 388**

U.S. 14, 18 (1967), with a **Sixth Amendment** guarantee to present witnesses at sentencing, which has *never* been recognized by *any* federal court.

All federal appellate courts to have taken up the issue agree there is *no* **Sixth Amendment** right to call witnesses at sentencing. *See, e.g.*, ***United States v. Cruzado-Laureano*, 527 F.3d 231, 238 (1st Cir. 2008); *United States v. Rodriguez*, 336 F.3d 67, 70 (1st Cir. 2003)**; ***United States v. Olvera*, 954 F.2d 788, 792 (2d Cir. 1992)**; ***United States v. Prescott*, 920 F.2d 139, 143 (2d Cir. 1990)**; ***United States v. Giltner*, 889 F.2d 1004, 1008 (11th Cir. 1989)**; ***United States v. Fogel*, 829 F.2d 77, 90 (D.C. Cir. 1987)**; ***United States v. Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986)**; ***United States v. Heller*, 797 F.2d 41, 43 (1st Cir. 1986); *United States v. Jackson*, 700 F.2d 181, 191 (5th Cir. 1983)**; ***United States v. Buitrago,* 4:09-CR-194, 2014 WL 12705620, at *2 (E.D. Tex. Feb. 14, 2014)**; ***Irwin v. Trim*, 4:12 CV 0420, 2014 WL 201512, at *8 (N.D. Ohio Jan. 17, 2014)**; ***State v. Kempf*, 163 Wis. 2d 1093, 474 N.W.2d 529 (Ct. App. 1991)**; *see also* **Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C.L. Rev. 1771, 1846 (2003)**.

The OCDC, apparently realizing that its original legal theory is untenable, attempts to cobble together unpled theories mid-proceeding. This is not permitted. The Information must "state briefly the grounds upon which the proceedings are based." **Rule 5.11(c)**. The Sixth Amendment was the grounds stated in the Information for a violation of **Rule 4-8.4(d)** and the only grounds stated. The OCDC is constrained by its Information.

The OCDC now contends that the administration of justice entitles litigants to conduct *ex parte* letter writing campaigns directly to a judge outside the courtroom and

that anything that discourages such a practice is prejudicial the administration of justice. *But see* ***In re Eisenstein***, **485 S.W.3d at 767** (J. Wilson, dissenting) (not "appropriate for the Court to consider … letters … sent … directly to chambers."). There is no right to conduct an *ex parte* letter writing campaign and such campaigns are antithetical to the administration of justice.

Next, the OCDC criticizes *for the very first time in its brief* the manner by which Mr. Hagg's subpoena was completed[15] (the Nashes were never placed under subpoena). A simple comparison of the allegations of Information to the Informant's Brief exposes the failure to plead this theory:

Information	Brief
44. Respondent violated: a. Rule 4-8.4(d) when he:	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:
i. attempted to get Mr. and Ms. Nash to withdraw their reference letter by threatening them that if they did not withdraw their letter he would give their names to the media to be published as supporters of child molestation; and	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
ii. included the Nashes' names and	C. Intentionally embarrassing and

[15] There is no evidence that Mr. Zahnd participated in any way in the preparation of the subpoena in question.

employment information in his news release and stated they supported a child molester over the victim.	harassing the character reference letter writers in his press release when they failed to submit to his demands.

Even Amici NACDL and MACDL recognize that the issuance of the subpoenas was not "charged conduct" in this case. Brief of Amici Curiae NACDL and MACDL p. 19, n. 1. Mr. Zahnd has a right to notice of grounds upon which the charges are based. Fundamental fairness and due process prohibit imposing for discipline on a theory not pleaded.

D. Violation of Rule 4-8.4(d) cannot stand alone

As discussed in detail above, Mr. Zahnd did not violate **Rule 4-4.4** with his truthful recounting of information in the public record about the Paden sentencing after it concluded. As the Disciplinary Hearing Panel found and as discussed below, Mr. Zahnd did not violate **Rule 4-3.4(a)**. The sole remaining alleged violation is based on **Rule 4-8.4(d)**, sanctioning conduct prejudicial to the administration of justice.

Conduct that does not violate any other disciplinary rule cannot violate **Rule 4-8.4(d)** as prejudicial to the administration of justice unless it is so "egregious" and "flagrantly violative of accepted professional norms" as to "undermine the legitimacy of the judicial process." ***In re Discipline of Attorney*, 815 N.E.2d 1072, 1079 (2004)** (construing Massachusetts rule sanctioning conduct "prejudicial to the administration of justice"). **"**Without such limiting interpretations of [a rule sanctioning conduct 'prejudicial to the administration of justice'], the rule presents the risk of vagueness and arbitrary application." ***In re Discipline of Two Attorneys*, 660 N.E.2d 1093, 1099 (1996).** The broad scope of rules equivalent to Rule 4-8.4 raises due process concerns. See, e.g.,

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 comment c (2000) (discussing "risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent ... and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it"); **Comment to Rule 8.4 of the Alaska Rules of Professional Conduct (2003)** ("Paragraph [d] of the ABA Rules was omitted because it is too vague"). A "cabining construction" is necessary to protect the due process rights of attorneys charged with conduct "prejudicial to the administration." ***In re Discipline of Attorney*, 815 N.E.2d at 1080.**

Confronting a witness whose opinions are based on a misunderstanding of the facts and then criticizing that misinformed opinion to other people with the power to impose negative consequences on the witness is not the type of egregious conduct violates Rule 4-8.4(d) standing alone. ***Id.* at 1078-79.**[16]

In ***In re Discipline of Attorney***, **815 N.E.2d 1072**, a seasoned attorney with substantial experience in litigation involving fires and explosions took the deposition of a state trooper assigned to investigate a fire. During the deposition, the attorney so undermined the trooper's testimony and expertise that the trooper eventually requested a postponement of the deposition so that he could obtain advice of counsel. The trooper

[16] The Disciplinary Hearing Panel apparently did not consider Mr. Zahnd's conduct egregious since even though they found a violation of 4-8.4(d) they recommended the lowest degree of discipline available to them.

was so upset by the deposition that he called the attorney a "jerk" and a "highly offensive expletive." In the attorney's opinion, the trooper was "incompetent" and "hostile." The attorney was not concerned about the effect of the trooper's testimony because he "believed [the trooper's] credibility at trial would be undercut by effective cross-examination." The attorney caused a copy of the deposition transcript to be given to the trooper's supervisor, and he told the supervisor that the trooper was incompetent in the hope that the trooper would be removed from further fire investigation work. ***Id.*** **at 1074-1077.**

As argued by the OCDC in the case against Mr. Zahnd, the Massachusetts disciplinary authority contended that the attorney attempted to "intimidate [the trooper] and/or influence his testimony" and, as such, was prejudicial to the administration of justice. The Board of Bar Overseers unanimously dismissed the petition, and the Massachusetts Supreme Court affirmed that decision that no ethical rule was violated. **Id. at 1076-78, 1083.**

The facts of this Massachusetts case are strikingly similar to the facts of the case at bar, certainly more similar than any case relied on by the OCDC. In both cases, there were contentious encounters with individuals who wanted to provide suspect opinions to the Court. In both cases, the attorney publicized those suspect opinions with negative consequences (although in Mr. Zahnd's case, the information publicized was already public and the judicial proceeding was concluded). In both cases, the attorney was accused of intimidation. The result in both cases should also be the same: dismissal of the charges.

III. Response to Informant's Point Relied on III: There is no evidence of a violation of Rule 4-3.4(f)

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." **Rule 4-3.4(f).** Thus, under the plain letter of the Rule, to establish a violation of **Rule 4-3.4(f)**, the OCDC bears the burden of pleading and proving that Mr. Zahnd (or an assistant he directly supervised) requested the Nashes and/or Mr. Hagg to withhold relevant information from defense counsel. The OCDC cannot pass even its threshold burden; no such allegation is pleaded in the Information, reason alone to reject the claim. Nor did the OCDC prove such allegation. Instead, the OCDC uses a strained interpretation of **Rule 4-3.4(f)** in an effort to turn conduct that does not fit within the plain letter of the Rule into a violation of the **Rule 4-3.4(f)**.

A. <u>The OCDC's allegations do not fit the letter or spirit of Rule 4-3.4(f)</u>

Rule 4-3.4(f) is concerned with ensuring discovery of relevant information. It is intended to prohibit a lawyer from asking a fact witness not to talk to opposing counsel about a case or not to provide a relevant document about which opposing counsel had no knowledge. Nothing of that sort occurred in this case. Mr. Hagg, Judge Shafer and Mrs. Nash all testified that no prosecutor ever told them to withhold information from the defense, or discussed whether they should communicate with the defense in any way. Certainly, the Supporters never behaved as though they believed they ought not to

communicate with the defense. Mr. Hagg and the Nashes and/or their counsel have communicated consistently with the defense before and after the meetings.

It appears that the OCDC's real concern is not that the defense did not have access to the Supporters' reference letters, the purpose of **Rule 4-3.4(f)**. Rather, its concern is with the prosecutors' alleged use of "intimidation tactics," *i.e.,* supposedly telling the Supporters that if they did not withdraw their letters, the State would issue a news release indicating that the Supporters supported child molestation. *See* Information, ¶ 37.

Mr. Zahnd adamantly denies threatening Mrs. Nash or that Mr. Seufert threatened Mr. Hagg. But even if they were true, a request to "withdraw" character reference letters already in the hands of defense counsel is not the equivalent of requesting the Supporters to "refrain from giving" relevant information to the defense counsel. In fact, the evidence showed that not only had the Nashes' and Mr. Hagg's letters of support already been given to defense counsel (indeed, the defense attorney orchestrated the letter writing campaign), they were submitted to the Platte County Court and made a part of the public record in the *Paden* case. Thus, the defense, and indeed, the world, had discovery of, and access to, the letters.

The OCDC's suggestion that a request to withdraw information already in the adverse party's hands and of public record is the equivalent to a "request to refrain from voluntarily giving information" appears to be entirely novel. Legal research does not reveal a single case where a disciplinary authority in the United States has similarly

interpreted a rule similar to **Rule 4-3.4(f)**. The facts alleged simply do not fit within the letter or spirit of **Rule 4-3.4(f).** [17]

B. If Construed as the OCDC Urges, Rule 4-3.4(f) Fails to Give Fair Notice of What Constitutes an Ethical Violation.

The Constitution requires laws to give fair notice of what is permitted and what is proscribed. A law is void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." ***Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)**.

The prohibition in **Rule 4-3.4(f)** on its face seems simple and straightforward: a lawyer may not tell a person not to communicate with the other side. But the OCDC's application of **Rule 4-3.4(f)** to proscribe an attorney's attempt to persuade a witness to reconsider and withdraw her opinion that is already in the adverse party's hands is so far outside the plain language of the Rule, it would require lawyers to guess at the Rule's meaning and reasonable lawyers may differ as to its application. Mr. Zahnd did not understand, nor would a reasonable attorney understand, from the Rule's language that **Rule 4-3.4(f)** goes farther than the plain text, which is limited to requesting a person to "refrain from voluntarily giving information to another party." If this Court accepts the

[17] In the entire body of American published case law, the phrase "request to refrain" has appeared in the same case as "intimidation tactics" once: ***Curry v. D.C.*, 195 F.3d 654, 666 & n.3 (D.C. Cir. 1999)**, a sexual harassment case having nothing to do with legal ethics. And even in ***Curry***, those terms are not used in relation to each other whatsoever.

OCDC's nuanced interpretation of **Rule 4-3.4(f),** it would deprive Mr. Zahnd and, indeed, every attorney, of fair notice of whether their conduct is ethical. The Panel correctly dismissed this claim, and this Court should do the same.

IV. The cases relied on by the OCDC in requesting a suspension are easily distinguishable and the most similar cases show that no discipline is warranted.

The OCDC relies on three disciplinary cases to request a suspension of Mr. Zahnd's license to practice law: ***In re Campbell*, 199 P.3d 776 (Kan. 2009)**; ***In re Warrick*, 44 P.3d 1141 (Idaho 2002)**; and ***Oklahoma State Bar v. Cox*, 48 P.3d 780 (Okla. 2002)**.[18] Each is so dissimilar to the case at bar as to have little value in determining any sanction.

[18] The OCDC considers it an aggravating circumstance that Zahnd considered the claims frivolous. As to half of the OCDC's charges, Mr. Zahnd's concerns have been substantiated. At least some of the claims were undeniably completely unsupported by any evidence. Informant abandoned its claim under **Rule 4-3.8** before the Disciplinary Hearing Panel made its recommendation. In briefing to this Court, Informant has shifted from seeking discipline under **Rule 4-3.8** for the Facebook post to using it as an example of how Mr. Zahnd should have communicated with the public. Informant's Brief p. 44 Likewise, the Disciplinary Hearing Panel concluded that there was "no evidence presented" of a violation of **4-3.4(f)**. DHP Decision pp. 17-18. Informant also abandoned its pleaded theory of a violation of **Rule 4-8.4(d)** based on a violation of Mr.

In ***Campbell*****,** a prosecutor disseminated images of minors consuming alcoholic beverages, photographs of a minor partially clothed, and photographs of sexual intercourse between minors. The prosecutor's conduct would likely constitute a felony in the State of Missouri. It should go without saying that the distribution of child pornography is vastly different from the conduct of which Mr. Zahnd is accused – the recounting of truthful, public information about judicial proceedings after they conclude.[19]

Paden's **Sixth Amendment** rights. Surely, Zahnd should not be subject to additional discipline for not conceding claims that Informant did not and could not prove.

[19] The OCDC suggests that Mr. Zahnd was somehow untruthful in his testimony to the Panel. Those allegations are baseless. First, the OCDC claims that Mr. Zahnd's office did not seek a decades-long sentence in the Swanepoel case. That allegation ignores not only the sworn testimony of Mr. Zahnd, but also of Mr. Perry. Tr. 408:22-409:4; 665:10-20. The OCDC relies solely on Judge Hull's testimony that the State agreed it would not make a specific sentencing recommendation in the Swanepoel case, which is true. But Judge Hull also testified that the State asked the Court to "consider the whole range of punishment and do justice for this little girl." Tr. 695:17-20. Judge Hull further testified that the State "made it clear" that 100 days in jail "was an insufficient amount of jail time for Mr. Swanepoel." Tr. 704:11-16. Second, the OCDC claims the State was never concerned with the effect of Mr. Hagg's or the Nashes' letters on the Court, because a legal assistant in Mr. Zahnd's office said he had spoken with Mr. Zahnd and his assistant

In ***Warrick*****,** a prosecutor wrote "waste of sperm" and "scumbag" on a jail's inmate control board next to the name of a criminal defendant. The prosecutor also failed to take reasonable remedial measures to correct a prosecution witness' false testimony that the witness had not entered into plea agreement with State. There is no allegation that Mr. Zahnd used insulting epithets in any way. Further, presenting false testimony casts substantial doubt on a lawyer's fitness to practice law. The facts of ***Warrick*** are completely different than the case at bar, and it provides little guidance, if any, as to an appropriate sanction.

Finally, in ***Cox*****,** an attorney told the opposing expert witness that he would "dig up dirt" on the expert and sent the expert a subpoena requesting information regarding an alleged previous involvement in a 1980 illegal wiretapping. There is no allegation that Mr. Zahnd threatened or attempted to "dig up" private information to use as leverage.

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prosecutors and they were not concerned that the Judge would be swayed by the letters. The record shows the legal assistant was not privy to the attorneys' litigation strategy meeting regarding the case, but it is true that Mr. Zahnd and his assistants were not concerned that the Court would be persuaded by the letters *precisely because they had developed a plan to confront the letter writers with the truth about the defendant by subpoenaing them to testify*. Mr. Zahnd and Mr. Seufert testified to that very fact. **Tr. 384:3-12; 388:17-389:4; 390:1-7; 391:17-392:14; 394:1-395:12; 410:11-410:20; 412:22-25; 415:15-21; 416:13-17; 499:6-14; 585:22-590:13.**

Rather, Mr. Zahnd merely repeated information which was already public and directly related to the case. As with the previous cases, **Cox** is inapposite.

The two cases that are factually most similar to the case at bar are ***Gentile*, 501 U.S. 1030** and ***In re Discipline of Attorney*, 815 N.E.2d at 1079.**

As discussed at length above, in ***Gentile***, an attorney identified a witness by name and occupation and sharply criticized him by accusing the witness of serious crimes and corruption while the case was pending. No discipline was imposed.

In ***In re Discipline of Attorney***, also discussed more fully above, an attorney had a contentious deposition with a witness whose opinions were ill-informed. The attorney then disclosed the witness' incompetence to the witness' supervisor in the hopes he would be removed from the case. The attorney's conduct did not violate the ethical rules and no discipline was imposed.

These factually similar cases should guide this Court, and the Information against Mr. Zahnd should be dismissed.

In this case, Mr. Zahnd's News Release contained only truthful, public information regarding a judicial proceeding after that proceeding concluded. The table below includes all 25 cases cited by the OCDC in which discipline was imposed. Not one of those cases imposed discipline on an attorney for recounting true, public information about a case after its conclusion

Cases Cited by Informant in Which Discipline was Imposed

Case: *Attorney Grievance Commission v. Gansler*, 835 A.2d 548 (Md. 2003) **Facts:** Prior to charging case, prosecutor publicly described defendant's confession and other evidence against him. In separate case, prosecutor publicly announced details of plea negotiations. Prosecutor also publicly gave his opinion that defendants in two cases were guilty.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	Yes	No	Yes	No

Case: *Florida Bar v. Charnock*, 661 So.2d 1207 (Fla. 1995) **Facts:** Attorney procured a tenant, entered into the lease, and directed and secured affidavit of the tenant for the purpose of utilizing Rule of Civil Procedure to delay the transfer of actual possession pursuant to the writ of possession. Attorney then testified untruthfully that another attorney advised him to procure a tenant in an attempt to shift the blame for his conduct away from himself.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	No	No	No	No

Case: *In re Abrams*, 257 P.3d 167 (Ariz. 2011) **Facts:** Judge engaged in long-term sexual relationship with an attorney regularly appearing before him. Judge repeatedly propositioned a different attorney for sex, groped that attorney and left her lewd messages. After attorney rebuffed these advances, judge retaliated against her in court proceedings.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	No	No	No	No

Case: *In re Ayala*, 693 P.2d 580 (N.M. 1985) **Facts:** Attorney settled civil suit on condition that opposing party, the victim and primary witness in the related criminal case, assist in his client's criminal appeal; then requested opposing attorney misrepresent these facts to Disciplinary Board. In separate case, attorney attempted to persuade a witness to assert 5th amendment privilege by threatening to press criminal charges and by offering to pay witness. Attorney then procured a false affidavit from his client denying these events took place. Finally, attorney paid money to that client and sent gifts to him in an effort to buy his silence concerning attorney's misconduct.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	No	No	No	Yes

Case: *In re Brizzi*, 962 N.E. 2d 1240 (Ind. 2012) **Facts:** Prosecutor, in pretrial press release, shared his personal opinion as to the defendants' guilt and recited information in the probable cause statement without the required explanation that a charge is merely an accusation and that the defendant is presumed innocent until proven guilty.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	Yes	No	Yes	No
Case: *In re Burns*, 657 N.E.2d 738 (Ind. 1995) **Facts:** Attorney physically threatened opposing party, stated he would kill opposing party and called opposing party an obscenity.	No	No	No	No
Case: *In re Campbell*, 199 P.3d 776 (Kan. 2009) **Facts:** Prosecutor disseminated images of minors consuming alcoholic beverages, photographs of a minor partially clothed, and photographs of sexual intercourse between minors	Yes	No	No	No

Case: *In re Chavez*, 390 P.3d 965 (N.M. 2017) **Facts:** Prosecutor issued 94 subpoenas over two years that were not issued by a sitting grand jury nor reviewed by any judicial officer and were not connected to any cases before the court.	N/A	No	No	No
Case: *In re Comfort*, 159 P.3d 1101 (Kan. 2007) **Facts:** Attorney wrote vitriolic letter accusing opposing counsel of serious ethical violations with "absolutely no basis for making those allegations." Attorney then sent the letter to various members of the community.	No	No	No	No

Case: *In re Eisenstein*, 485 S.W.3d 759 (Mo. 2016) **Facts:** Attorney failed to disclose that client had improperly accessed opposing party's email and obtained confidential information. Attorney then threatened opposing counsel during the pendency of the litigation and/or to avoid an ethics complaint	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	N/A	No	No	No
Case: *In re Goude*, 374 S.E.2d 496 (S.C. 1988) **Facts:** During sentencing argument, defense attorney called child molestation victim "a little piece of thieving, stealing, juvenile delinquent," this "thing," and "this little lying piece of —— (expletive)." Also, upon seeing a deputy with his hand on the victim's shoulder after sentencing, defense attorney stated: "You'd better watch out. You might get AIDS."	No	No	Yes	Yes

Case: *In re Madison*, 282 S.W.3d 350 (Mo. 2009) **Facts:** Attorney falsely accused judge of racism and of being part of an "evil network." Attorney, who had been previously convicted of aggravated assault, repeatedly sent harassing letters to judge even after judge recused herself from his case causing judge to fear for her safety.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	No	No	Yes	Yes
Case: *In re Royer*, 78 P.3d 449 (Kan. 2003) **Facts:** Attorney arranged sale, for $1, of his client's unsafe storm-damaged building, which had negative value, to buyer who was homeless and unemployed alcoholic, so that client could avoid paying costs of demolishing building.	N/A	N/A	No	No
Case: *In re Shelhorse*, 147 S.W.3d 79 (Mo. 2004) **Facts:** Attorney failed to comply with continuing legal education (CLE) requirements and failed to respond to inquiries by disciplinary authorities.	N/A	N/A	No	No

Case: *In re Smith*, 848 P.2d 612 (Or. 1993) **Facts:** Attorney for workers' compensation claimant prepared letter threatening litigation if examining doctor expresses particular medical opinion in course of compensation proceeding, even though doctor would have been absolutely immune from suit.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	No	No	Yes	No
Case: *In re Storment*, 873 S.W.2d 227 (Mo. 1994) **Facts:** Attorney advised client to lie under oath and knowingly elicited false testimony.	No	No	Yes	No
Case: *In re Walsh*, 182 P.3d 1218 (Kan. 2008) **Facts:** Attorney falsely said that he had mailed materials to opposing counsel when he had not. In negotiating settlement, attorney included condition that other parties refrain from voluntarily providing testimony in the disciplinary hearing.	No	No	Yes	No

Case: *In re Warrick*, 44 P.3d 1141 (Idaho 2002) **Facts**: Prosecutor wrote "waste of sperm" and "scumbag" on jail's inmate control board next to name of criminal defendant. Attorney also failed to take reasonable remedial measures to correct prosecution witness' false testimony that witness had not entered into plea agreement with State.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	No	No	Yes	No
Case: *In re Westfall*, 808 S.W.2d 829 (Mo. 1991)[20] **Facts:** Without any basis, prosecutor accused judge of deliberate dishonesty and purposefully ignoring the law to achieve his personal ends.	No	Yes	Yes	Yes
Case: *In re White*, 707 S.E.2d 411 (S.C. 2011) **Facts:** Attorney sent letter to client's	No	No	No	No

[20] Westfall was called into question by ***Smith v. Pace*, 313 S.W.3d 124, 135 (Mo. 2010)** ("The scrutiny of a state's interest in regulating lawyer speech may be significantly higher today than when this Court decided ***Westfall***.")).

landlords and to town manager that questioned whether town manager had a soul, stated that manager had no brain, and called leadership of the town "pagans," "insane," and "pigheaded."				
Case: *In re White-Steiner*¸ 198 P.3d 1195 (Ariz. 2009) **Facts:** Attorney improperly dealt with client trust accounts and failed to supervise those responsible for maintaining the firm's trust accounts.	N/A	N/A	No	No
Case: *Kentucky Bar Ass'n v. Reeves*, 62 S.W.3d 360 (Ky. 2002) **Facts:** Attorney sent letter putatively on behalf of his client, but incorporated personal provocative language regarding a judge's son and demanding remedies not available in the legal system and thereby used it as a means to further his own interests in his own case by causing recusal of judge.	No	No	Yes	No

Case: *North Carolina State Bar v. Sutton*, 791 S.E.2d 881 (N.C. 2016) **Facts:** In seven separate cases, attorney engaged in disruptive, dishonest and vulgar behavior. In one of these seven cases, attorney videoed himself falsely impugning the integrity of the investigating officer in his client's pending criminal cases and falsely accusing the Sheriff's Department of a criminal act. Attorney then posted the video to YouTube, admittedly not to assist his client, but because he was a "smart-aleck."	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	No	Yes	Yes	No
Case: *Oklahoma Bar Association v. Bednar*¸ 299 P.3d 488 (Okla. 2013) **Facts:** Attorney failed to appear at depositions hearings, threatened to file lawsuits against witnesses for fraud and breach of contract if they testified, exhibited a pattern of missing deadlines and forged a document filed with the Court.	No	No	Yes	No

Case: *Oklahoma State Bar Association v. Cox*, 48 P.3d 780 (Okla.2002) **Facts:** Attorney told opposing expert witness that he would "dig up dirt" on him and sent expert a subpoena requesting information regarding an alleged previous involvement in a 1980 illegal wiretapping.	True Statement	Only Public Info.	Re: Judicial Proceeding	Proceeding Concluded
	N/A	No	Yes	No

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2018, a copy of Respondent's Brief is being served upon all counsel of record through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

/s/ Edwin H. Smith
Edwin H. Smith

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 25,942 words according to Microsoft Word, which is the word processing system used to prepare this brief.*

/s/ Edwin H. Smith
Edwin H. Smith