IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JEROME J. DOBSON	)	**Supreme Court No. SC97683**
5017 Washington Pl, Suite 300, Fl 3	)	
St. Louis, Missouri 63108-1240	)	
	)	
Missouri Bar No. 32099	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SAM S. PHILLIPS #30458
DEPUTY CHIEF DISCIPLINARY COUNSEL
3327 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Telephone
(573) 635-2240 - Fax
Email: Sam.Phillips@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

BACKGROUND

This is an attorney discipline involving Jerome Dobson, Respondent. Mr. Dobson has represented plaintiffs in employment law cases in St. Louis for more than thirty-five years.

Informant charges Respondent with violating Rule 4-4.2 by communicating directly with his client's supervisors at Washington University, despite his knowledge that (a) the University was represented by counsel in the matters; and (b) the University's counsel had explicitly asked Respondent to communicate with him. Respondent admits the *ex parte* contact and at one point acknowledged the violation but seeks to justify it.

Rule 4-4.2 is set out here:

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

QUESTIONS PRESENTED

Rule 4-4.2 requires lawyers to obtain consent from opposing counsel before communicating with opposing parties. Missouri courts and comments to Rule 4-4.2 apply the rule to corporate party supervisors. Respondent admits that he communicated with his client's employer (a supervisor) without obtaining consent from the employer's counsel.

1. Is Respondent excused from communicating directly with employer supervisors by his past practice of communicating directly with supervisors?

2. Is Respondent excused if he believed that his direct correspondence was in his client's best interests, and required by his duty of diligence under Rule 4-1.3?

3. Is Respondent excused if he believed that exigent circumstances outweighed his obligation to communicate through counsel as set out in Rule 4-4.2?

4. Respondent admits directly contacting the opposing employer's supervisors but argues that his correspondence was in a new or different matter. Respondent's client had been disciplined for repetitive behavior; Respondent represented the employee (his client) through that discipline process by corresponding with the employer's general counsel, who consulted with the employee's supervisors throughout the process. Did Respondent violate Rule 4-4.2 by communicating with the employer without seeking consent from the supervisor's attorney, when the employee was dismissed for his ongoing behavior?

5. Respondent offered the testimony of a retired circuit judge as to his understanding of the meaning of Rule 4-4.2, and as to whether Respondent's conduct was reasonable and whether he violated Rule 4-4.2. The Hearing Panel, over objection, allowed and relied on the expert's opinions. Should the Panel have considered, and should this court consider, that testimony?

STATEMENT OF FACTS

Jerome Dobson, Respondent, is a St. Louis attorney who has represented plaintiffs in employment law issues for most of his career. **App. 279-280; 336**. He started practicing in 1978 in Washington, D.C. and in Missouri in 1982. For the past twenty-seven years, he has engaged in exclusively in employment law. **App. 280.** He has handled several cases on behalf of doctors employed by Washington University. He has not been previously disciplined.

He explained his general approach to dealing with opposing party's cases by telling the Disciplinary Hearing Panel: "I've litigated against virtually every major corporation in St. Louis. Nobody has ever directed me to communicate solely through General Counsel, except for Washington University . . . It's always been my practice to communicate with somebody in a responsible way that I think is in a position to speak on behalf of the institution that I'm bringing a claim against." **App. 284.**

Respondent's Representation of His Client, Dr. Haughey

In early 2014, Respondent's client (Dr. Bruce Haughey) was employed by Washington University. Following numerous behavioral incidents involving colleagues, the University, through Haughey's supervisor (Dr. Richard Chole) required him to attend certain retraining classes, participate in psychological testing and an anger management course, and to improve his self-control. **App. 373, 374.** Per the University, Dr. Haughey had violated University policy and his behavior and professionalism issues had been problematic for some time and had repeatedly been addressed by Dr. Chole and others. **App. 374.**

After the University communicated these requirements, Dr. Haughey retained Respondent to represent him in his dealings with the University. On Dr. Haughey's behalf, Respondent reviewed Dr. Chole's letter to his client describing his behavior and conditions for continued employment. **App. 371; 373-374.** Respondent drafted a letter to Sklansky on April 1, 2014. **App. 371.** Respondent sent email letters to Washington University's Associate General Counsel Joseph Sklansky in May 2014. **App. 379-380.** At that time (April and May 2014), he did not write directly to Dr. Chole or others in University administration. Instead, Respondent reported to the General Counsel that he represented Dr. Haughey and asked Mr. Sklansky several questions about the University's ongoing requirements for Dr. Haughey. **App. 379-380.** One day after receiving Respondent's letter, Mr. Sklansky replied to Respondent by email and regular mail. **App. 383**. According to Mr. Sklansky, his files indicated Respondent's previous correspondence about six other clients had been mostly sent to the General Counsel. The record shows two exceptions in 1998 and 2004 and another incident in February 2014, after which Sklansky reminded Respondent that he represented the university and that he was "troubled" by Respondent's *ex parte* correspondence. Sklansky also specifically referred to Rule 4-4.2. **App. 274-276; 360; 362; 364**; **369; 402.** Respondent testified that he didn't believe it was true that he routinely contacted the General Counsel during that ten-year period or that he had additional cases with Washington University during that period**. App. 319; 320.**

Eighteen months after Respondent's May 2014 letter to Mr. Sklansky about Dr. Haughey, the University placed Dr. Haughey on administrative leave, on September 25, 2015. He immediately called Respondent. **App. 384; 408-411.** Both Dr. Haughey and

Respondent report being "surprised by the University's actions." In his affidavit for the Panel, Dr. Haughey said there had been "no warning" and that he was completely surprised "by his termination." **App. 406.** Respondent said this: "Dr. Haughey had no idea it was coming . . . it was frankly stunning. It was unexpected." **App. 298.** He added: "I was completely surprised." **App. 299.**

The record describes the rest of the story of Dr. Haughey's termination and Respondent's 2014 involvement in the matter. Dr. Haughey's supervisor (Dr. Chole) wrote to Dr. Haughey in January 2014, spelling out the University's concerns. **App. 373-374.** Dr. Chole was the same supervisor who terminated Dr. Haughey in September 2015. In his January 2014 letter, Dr. Chole told Dr. Haughey "recurring issues" have arisen "involving inappropriate actions"; he described "behavior . . . repeatedly characterized as bullying, abusive, intimidating, condescending, and belittling." **App. 374.** Dr. Chole further explained to Dr. Haughey: "We have spoken about these episodes numerous times," and "these behaviors have invariably recurred." **App. 374.** Chole wrote the matters were a "serious concern of mine as well as many of your colleagues and leadership within the School of Medicine." **App. 374.** Dr. Chole noted a discussion in the previous fall (2013) in which Dr. Haughey expressed a "willingness to take this problem seriously." **App. 374.**

Dr. Chole's letter laid out the University's demands and the consequences if Dr. Haughey's behavior did not improve. At that time, January 2014, the immediate consequences included: (a) Dr. Haughey's removal as the chief of his division; (b) a salary reduction; (c) mandatory assessment and, if necessary, treatment, paid for by Dr. Haughey;

(d) video monitoring in the operating room; (e) evaluations after four and twelve months; (f) and, a requirement to maintain collegial and respectful interactions with staff. **App. 374-376.**

Finally, Dr. Chole described additional consequences if Dr. Haughey's behavior did not improve. Dr. Chole wrote: "This action is your last chance at remediation." and "... failure to make dramatic and sustained changes in your professional behavior will jeopardize your career at Washington University, up to and including dismissal from the University." **App. 377.**

During the disciplinary hearing, Respondent discussed Respondent's Exhibit 8. **App. 292.** That exhibit included an unsigned copy of a letter, with no letterhead, from him and addressed to Mr. Sklansky, dated April 1, 2014. Respondent's April 1 letter asked for more information about Haughey's behavior and the reasons for Haughey's mandated evaluation. **App. 371.** In that April 1 letter, Respondent acknowledged review of Dr. Chole's January 31, 2014 letter to Dr. Haughey, which laid out the university's ongoing concerns with Haughey's behavior and established consequences for his failure to improve. **App. 373; 374-377**.

Respondent testified that he sent the April 1 letter and that Sklansky did not respond. **App. 293-294**. He offered Sklansky's non-responsiveness as a reason for bypassing Mr. Sklansky when he sent his September letter about Dr. Haughey. **App. 301; 331.** Sklansky, in fact, replied within days to Respondent's December 2004 letter, and his February 2014 letter about MM, and to his May 27, 2014 letter about Dr. Haughey. **App. 413; 414; 416; 418; 419; 420**. Respondent eventually acknowledged the possibility that he

did not send it. **App. 322-325.** He could not explain why he could find letterhead and signed copies of his other correspondence to Mr. Sklansky, but not that letter. **App.323-324.**

The University's attorney, Mr. Sklansky, described the reasons for Washington University's September 2015 disciplinary actions against Dr. Haughey. He said: "They were behavioral and professionalism issues over an extended period of time that gave rise to some serious concerns about patient care." **App 212**. They were the same as those leading to the University's requirements that Haughey be evaluated and trained on anger management in 2014. **App. 222-224; 258; 265.** Per Sklansky, Dr. Haughey was placed on administrative leave in September 2015 because those "issues persisted." **App. 224.** Mr. Sklansky explained that he had been consulting with Dr. Chole and Dr. Shapiro about Dr. Haughey's issues for a couple of years; he was consulting with Dr. Chole throughout Dr. Haughey's disciplinary process. **App. 224; 265.**

In September 2015, immediately after the University suspended Dr. Haughey, Respondent said Haughey was "panic stricken" and was concerned about Dr. Chole's alleged indiscretion in notifying certain University personnel that Dr. Haughey was no longer authorized to operate at the hospital. **App. 300.** Respondent told the Panel that it was an "extremely difficult situation" because a national conference of Dr. Haughey's peers was scheduled for the next day. Per Dr. Haughey, Dr. Chole was also expected to attend and Dr. Haughey was concerned his suspension might become public at the conference. **App. 408-411.**

Respondent's *Ex Parte* Letter to Washington University Administrators

When Dr. Haughey asked for his legal help in September 2015, Respondent chose to email a demand letter directly to Dr. Haughey's supervisors, Dr. Chole and Dr. Shapiro. **App. 331-332, 382.** He did not send a copy to Mr. Sklansky, or anyone else in the General Counsel's office. He said he believed that Dr. Chole or Dr. Shapiro might forward the email to that office. **App. 302-304; 333; 412-422.**

Respondent told the Panel that his letter to Dr. Chole "simply requested that the disciplinary action be confidential." **App. 462.** In fact, Respondent's letter to his client's supervisors offered his legal conclusions about Washington University's internal operations. And, he opined in the letter that Dr. Chole had already distributed information about Dr. Haughey's dismissal to physicians who "had no need to know of this information." Also, he attempted to explain Washington University's policies, positing that "disciplinary matters are confidential by Washington University." **App. 382.** In that September 25, 2015 letter to Dr. Chole, Respondent described his personal legal analysis by writing about the University's policies and his client's legal rights: "your action in disseminating this information appears to be a breach of that policy as well as Dr. Haughey's privacy rights." **App. 382**.

Respondent further stated his personal expectation that "there will be no further dissemination of this information except to persons who have an absolute need to know that Dr. Haughey is on administrative leave." His letter described the University's actions in suspending Dr. Haughey as a deprivation "of Dr. Haughey's fundamental right to due

process." Respondent concluded by noting his expectation "that Dr. Haughey will be accorded some measure of due process while you "review" your concerns." **App. 382.**

Four days later, Mr. Sklansky wrote to Respondent that he had again reviewed Rule 4-4.2; Mr. Sklansky reminded Respondent that he previously explained that correspondence about employment claims should go through his office. **App. 383**. Earlier, Sklansky had told Respondent that his office represented the University in all legal matters. **App. 402, 369, 405, 49-50, 67,218-219, 235.**

Respondent's Explanations for Bypassing Opposing Counsel

Respondent explained his decision to bypass the University's attorney (Mr. Sklansky) in several ways. First, he said that he contacted the University administration (Mr. Sklansky's client) because, in his view, his client was being railroaded and Mr. Sklansky had been non-responsive. He added that even if he had reached out to Sklansky, that Sklansky had no obligation to contact anyone else at the University. **App. 296; 301.** Next, Respondent justified his actions by saying that Mr. Sklansky's client, Washington University, "created the situation." **App. 302-303.** Respondent said he knew Dr. Chole was Dr. Haughey's supervisor, but that he saw no alternative to the direct communication. **App. 317.**

Respondent told the Hearing Panel he wrote a "simple letter" to Dr. Chole; he said: "I think it was appropriate." **App. 302.** In further justification, he added: "I believe this letter played a major role in preserving [his client's] career. That is what I did and that is why I did it. And I believe that what I did is consistent with the purposes of the rule." **App. 304-305.** Respondent later told the panel, "If I contacted Joe Sklansky, I had

absolutely no faith whatsoever was going to do anything because I had sent him two prior letters. He did nothing." **App 331.** Finally, he said, "I had to make a difficult decision under exigent circumstances. The clock was ticking, and I made the decision that I thought was best for my client." **App. 331.**

In the disciplinary hearing, Respondent was asked to further analyze his actions in connection with Rule 4-4.2 and its Comments. He agreed that Rule 4-4.2 would apply to him even if a represented opposing party had initiated or consented to the communication. **App. 326.** Respondent also agreed that nothing within Rule 4-4.2 provides an exception for "exigent circumstances." **App. 330-331.** He said the duty to his client under Rule 4-1.3 (diligence) put him in a "conflict" and "an impossible situation," which had been "created" by Mr. Sklansky's client. **App. 330-331.** Consequently, he said, "I made the decision that I thought was best for my client." **App. 331.** Respondent further justified his actions by saying: "I did not ask for information from anybody. I simply told him [Dr. Chole] that he needed to stop." **App. 331.**

Respondent also reasoned that by sending his letter directly to Dr. Chole, he assured a "quicker route" to the University than if he had sent the letter to the General Counsel's office. **App. 333.**

At one point in the disciplinary hearing, Respondent explicitly confirmed his belief that his letter to Dr. Chole was a violation of Rule 4-4.2, that he believed it was justified because of exigent circumstances. **App. 330.** Later, Respondent said this: "I don't know whether Rule 1.3 trumps Rule 4-4.2." **App. 332.** In discussing another letter Respondent

sent to Washington University, Respondent acknowledged that Rule 4-4.2 contains no exclusion just because his client might be damaged. **App. 343-344.**

***Ex Parte* Communication with University Administrators for Other Clients**

In addition to Respondent's direct communications to Mr. Sklansky's client while representing Dr. Haughey, the Information charges two other incidents. In both other cases, Respondent represented current or former Washington University employees.

In a separate 2014 matter, also charged in this Information, Respondent wrote directly to the Washington University Human Resources Director, without seeking consent from the University's attorney. That February 27, 2014 letter was sent three months before he first wrote to Mr. Sklansky about Dr. Haughey. **App. 419; 421.** In his February letter Respondent explained he represented his client (M.M.) in the matter and requested that the Human Resources Director consider a "mutually agreeable severance agreement". **App. 214-215; 419.** In that letter, Respondent asked the Human Resources Director to respond or to refer the matter to the "appropriate representative of Washington University." **App. 419.** In response, eight days later, Mr. Sklansky wrote to Respondent; saying he was "troubled by" Respondent's "*ex parte*" letter to the Human Resources Director. Mr. Sklansky referred Respondent to Rule 4-4.2 and wrote "any other communication from your firm on any matter must be directed to my office." **App. 217-218; 420.** The Human Resources Director had authority to obligate the University in M.M.'s case. **App. 216-217.**

In October 2016, Respondent sent a demand letter directly to his client's supervisors at Washington University. **App. 423-434.** As Mr. Sklansky explained to the Panel, the letter recipients had oversight over Respondent's client (C.T.); Mr. Sklansky had

previously consulted with the recipient about the subject of the October 2016 letter. The recipient (Dr. Fraser) was in a position to obligate the University. **App. 231.** That incident is also charged in this Information.

In 2004, ten years before these charged matters, Respondent wrote directly to the Washington University executive supervisor of one of his clients. **App. 415**. In that 2004 letter, Respondent made demands and provided legal analysis that the University had violated his client's rights. **App. 413.** In response, Mr. Sklansky asked Respondent to communicate directly with him. **App. 415.**

Expert Testimony Received by the Hearing Panel

At the hearing, Respondent offered the deposition testimony of retired Judge Michael Manners. Mr. Manners was asked to – and did – offer his opinion on the legal issues now before this Court. In Mr. Manners' testimony, he first said "rather than me opining as to what the law does or does not require, I should focus on what a reasonable attorney would think was required of him or allowed to him under the same or similar circumstances." **App. 135.** Mr. Manners agreed with this statement: "it's not the appropriate subject of expert testimony as to whether or not a rule of professional conduct has been violated." **App. 177.** And Mr. Manners also agreed with this statement: "in no instance would it be reasonable for an attorney to violate a rule of professional conduct." **App. 177.**

He explained that he considered and analyzed the following: Missouri's Rules 4-4.2 and 4-1.3, the ABA's Annotated Model Rules of Professional Conduct, this court's decision in *In re Madison*, 282 S.W.3d 350 (Mo. banc 2009). That case is an attorney

discipline matter involving Rule 4-8.2 and 4-3.5 (improper criticism of the judiciary and conduct intended to disrupt a tribunal). He said he also relied on the Preamble to Missouri's Rule 4. **App. 135-137.** He also considered an ABA Formal Opinion and two non-discipline cases involving communication between plaintiff's counsel and defendant to solidify a lien.

Informant repeatedly objected during Mr. Manners' deposition conducted by Respondent's counsel and again when the deposition testimony was offered during the disciplinary hearing. **App. 140; 145; 148; 160; 164; 166; 167; 199; 348)**

Despite his acknowledged parameters for expert testimony on legal issues, Mr. Manners offered explicit interpretations of Rule 4-4.2. As an example, he quoted from an ABA Opinion, saying this: "In order for the [Rule 4-4.2] prohibition to apply, the subject matter of the representation needs to have crystalized between the client and the lawyer; therefore, a client or her lawyer cannot simply claim blanket, inchoate representation, for all future conduct, whatever it may prove to be, and expect the prohibitions on communications to apply. Indeed, in those circumstances the communicating lawyer could engage in communications with the represented person without violating the rule." **App. 153.** Then, Mr. Manners described his understanding of some the facts in this case and added his own conclusion: "So my opinion is that . . . a reasonable attorney could engage in communications with the represented person without violating the rule." **App. 153-154**.

In responding to a question, Mr. Manners answered affirmatively that he "found" that Respondent was "presented with an ethical dilemma between his obligations under Rule 1.3, his duty to his client and the obligations of 4.2" **App. 154-155**. Mr. Manners

specifically addressed some of the facts in this case in opining on Rule 4-4.2's applicability. He assumed that the issues addressed in Respondent's May 2014 correspondence to Mr. Sklansky (about Dr. Haughey's discipline) and Respondent's letters to Dr. Chole in September 2015 were "different matters." **App. 160-161.** As noted, Mr. Sklansky explained that the matters were the same. Dr. Haughey had ongoing behavioral and professionalism problems. **App. 212.** According to Mr. Sklansky, those ongoing issues were the facts that caused Dr. Chole to suspend Dr. Haughey's practice at Washington University in September 2015. In giving his testimony, Mr. Manners apparently was not fully aware of ongoing issues between Respondent's 2014 and 2015 letters to Washington University concerning Dr. Haughey and his supervisor, Dr. Chole. **App. 177-178.** He said that his opinion could change depending on the evidence about any ongoing or related activity. **App. 177-178.**

Mr. Manners reiterated his assumption when asked to give an opinion as to whether a "reasonable attorney" would send the letters Respondent sent to Washington University lay staff. Based on his assumptions, Mr. Manners concluded that Respondent's September 25, 2015, letter to Dr. Chole about Dr. Haughey was a "different matter" because it was the first notice of Dr. Haughey's suspension. **App. 170.** As noted above, Respondent had reviewed the University's description of and concerns about Dr. Haughey's ongoing problems; he had corresponded with General Counsel's Office about those issues. **App. 416; 371-377.**

POINT RELIED ON

THE COURT SHOULD DISCIPLINE FOR VIOLATING RULE 4-4.2 BECAUSE:

A. RESPONDENT ADMITTED SENDING A LETTER TO THE OPPOSING PARTY'S MANAGER WITHOUT NOTICE TO OR CONSENT FROM OPPOSING COUNSEL;

B. RULE 4-4.2 OFFERS NO EXCEPTIONS BASED ON:

(1) BALANCING HIS CLIENT'S BEST INTERESTS AGAINST RULE 4-4.2;

(2) HIS OBLIGATION TO ACT DILIGENTLY ON BEHALF OF HIS CLIENT;

(3) "EXIGENT CIRCUMSTANCES";

(4) PREVIOUS *EX PARTE* CORRESPONDENCE WITH THE SAME OPPONENT;

C. RESPONDENT'S *EX PARTE* LETTER INTERFERED WITH THE OPPOSING PARTY'S ATTORNEY-CLIENT RELATIONSHIP BY DECLARING HIS VIEWS ON LEGAL ISSUES AND THE OPPOSING PARTY'S INTERNAL POLICIES, AND BY DEMANDING THAT THE OPPOSING PARTY TAKE SPECIAL ACTION;

D. RESPONDENT KNEW THE OPPOSING PARTY WAS REPRESENTED BY COUNSEL IN THE MATTER RESPONDENT ADDRESSED IN HIS LETTER.

ARGUMENT

THE COURT SHOULD DISCIPLINE FOR VIOLATING RULE 4-4.2 BECAUSE:

A. RESPONDENT ADMITTED SENDING A LETTER TO THE OPPOSING PARTY'S MANAGER WITHOUT NOTICE TO OR CONSENT FROM OPPOSING COUNSEL;

B. RULE 4-4.2 OFFERS NO EXCEPTIONS BASED ON:

(1) BALANCING HIS CLIENT'S BEST INTERESTS AGAINST RULE 4-4.2;

(2) HIS OBLIGATION TO ACT DILIGENTLY ON BEHALF OF HIS CLIENT;

(3) "EXIGENT CIRCUMSTANCES";

(4) PREVIOUS *EX PARTE* CORRESPONDENCE WITH THE SAME OPPONENT;

C. RESPONDENT'S *EX PARTE* LETTER INTERFERED WITH THE OPPOSING PARTY'S ATTORNEY-CLIENT RELATIONSHIP BY DECLARING HIS VIEWS ON LEGAL ISSUES AND THE OPPOSING PARTY'S INTERNAL POLICIES, AND BY DEMANDING THAT THE OPPOSING PARTY TAKE SPECIAL ACTION;

D. RESPONDENT KNEW THE OPPOSING PARTY WAS REPRESENTED BY COUNSEL IN THE MATTER RESPONDENT ADDRESSED IN HIS LETTER.

Summary of the Charges

The Information charges Respondent with violating Rule 4-4.2 by sending an *ex parte* letter dated September 25, 2015 and two other letters on unrelated matters. Informant does not ask the Court to find violations for those other letters about his clients, M.M. and C.T. He sent those letters without consent to University supervisors in February 2014 and October 2016. But, it is relevant to the remaining charge in that the facts in the 2014 case involving MM establish that the University's attorney reminded Respondent of his obligation (under Rule 4-4.2) to contact him before reaching out to University administrators and supervisors, just sixteen months before he sent the September 25, 2015, letter related to Dr. Haughey

The Information also charges Respondent with violating Rule 4-8.4(d) (interference with the administration of justice) by the same conduct alleged under Rule 4-4.2. Informant is focused only on the Rule 4-4.2 violation. In this particular case, a proven breach of Rule 4-8.4(d) – on top of the 4-4.2 violation - would be unlikely to warrant an additional sanction.

Admissions and Justifications

Respondent admits writing to his client's supervisor about an employment law issue. He admits sending the letter by email directly to two supervisors without prior notice

to - or consent from - the University counsel. That letter, dated September 25, 2015, addressed his client's termination for behavior that had recurred for at least two years.

Respondent's evidence establishes that earlier during that two-year period, he twice communicated with the University's attorney about his client's employment status and the requirements the University imposed on his client for repeated misconduct. The University sent a letter to Respondent's client in January 2014 explaining that he would be monitored, that it was his "last chance" and that "dismissal" would result from additional misconduct.

Respondent argues that his letter was not a violation because Washington University, (his client's employer and the opposing party), "created the problem" by firing his client and notifying some of his colleagues one day before a national conference of his client's peers. He further explained that contacting the University's lawyer would have delayed his effort to achieve his goal of persuading the University to take and refrain from taking certain actions.

It is not difficult to imagine the reaction of a lawyer representing a plaintiff against a large corporation if the corporate lawyer communicated directly to the represented plaintiff without consent. Would it be considered an innocuous request if the corporate lawyers explained: "You created this problem. Our company did not violate your rights. We expect you to report our action to no one. We will decide who needs to have this information." What "exigent circumstances might justify" the corporate counsel's to engage in that *ex parte* correspondence with a plaintiff?

Clients' "Best Interests" Provide No Excuse for Ignoring Rule 4-4.2

Respondent's expert suggests a need for lawyers to weigh their duty of diligence, exigent circumstances, and their client's interests against their obligation to seek consent from opposing counsel under Rule 4-4.2 before communicating with opposing parties. Respondent's theory, that is, lawyers should be allowed to exercise judgment as to whether to engage in *ex parte* contact with opponents, would offer justification for violating the rule - in almost every representation. What lawyer hasn't dealt with an opposing counsel who made negotiating unduly difficult? Who hasn't believed that they could reach quicker settlements with the opposing party if only the opposing counsel would get out of the way? What attorney hasn't secretly wished they could explain the law to an opposing party in their own terms and demand capitulation? In terms most applicable here, if a lawyer could engage in *ex parte* communication with an opposing party whenever they believed that approach was better for their client, or was justified by a client's next day conference, or was excusable because the opposing party "created the situation", the exceptions would quickly swallow the rule.

Fortunately, lawyers neither must nor may weigh those interests; Rule 4-4.2 provides no such exceptions or suggestion for balancing. The rule is straightforward: "In representing a client, a lawyer shall not communicate with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order," Rule 4-4.2.

Rule 4-4.2's purpose is explained in Comment 1.

> [1] Rule 4-4.2 contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

Respondent's argument - that competing interests, such as exigent circumstances and duty of diligence might justify breach of Rule 4-4.2 - is not supported by either the rule or its Comments. And, his theory is rebutted by plain language in the first Comment to Rule 4-1.3, the diligence rule he relies on to justify breach of Rule 4-4.2. Rule 4-1.3 certainly establishes an obligation to act diligently on behalf of clients. But, Comment 1 to Rule 4-1.3 reminds attorneys that they may not rely on that rule to justify overzealous misconduct or rule violations:

> A lawyer shall act with reasonable diligence and promptness in representing a client. **Rule 4-1.3.**
>
> Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and *take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor*. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may

> have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 4-1.2. *The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.* (Emphasis added.)

The Hearing Panel's found **(App. 476)** that Respondent "was in an ethical dilemma of whether to attempt to protect the legitimate, personal and professional interest of his client as requested by Dr. Haughey, or to communicate only with Office of General Counsel on that Friday afternoon, September 25, 2015." That finding recognizes what many lawyers feel when they may wish Rule 4-4.2 did not exist. But it does exist, and it includes no balancing act. Respondent's only dilemma was whether he should violate the rule to achieve his goal.

A 2014 federal case in Illinois offers key guidance on Respondent's argument that he could properly weigh his client's interests in deciding whether to communicate with a manager at a University about his client's case. *Goswami v. DePaul* University, 8 F. Supp 3d 1004 (U.S. Dist. Ct. N.D. Il 2014). In the Illinois case, the attorney represented a professor in a discrimination matter after DePaul University denied the professor's request for tenure. The professor's attorney wanted to contact university administrators and other professors, including those who had managerial authority over her client. She argued that her need to prepare by interviewing fact witnesses predominated over the University's desire to "shield its employees from access in order to ensure its effective representation."

Goswami v. DePaul University, 8 F. Supp 3d at 1013. The court rejected her theory, describing it as "one-sided," and noted that her argument "begs the question and ignores the reality of our adversary system. *Goswami v. DePaul* University, 8 F. Supp 3d at 1014. The Illinois court rejected plaintiff's "contention that unless her lawyers had untrammeled access to [the manager] they could not effectively represent her." *Goswami v. DePaul* University, 8 F. Supp 3d at 1014. Like the St. Louis University case, the DePaul case is not an attorney discipline matter. Instead, in both cases, the courts sanctioned the lawyers within the underlying civil litigation. In the instant matter, no civil litigation ensued between Respondent's client and Washington University; this court provides the only remedy for Respondent's breach.

Other courts have rejected Respondent's argument that zeal and his client's best interests justify breach of fundamental ethics rules. In allowing sanctions against a law firm involved in violations of the Fair Debt Collection Practice Act, the United States Supreme Court reminded all lawyers of the limits to zeal:

> "To the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is hardly unique in our law. "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." " *Nix v. Whiteside*, 475 U.S. 157, 168, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Lawyers face sanctions, among other things, for suits presented "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. Rules Civ. Proc. 11(b), (c). Model rules

> of professional conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests. See, *e.g.*, ABA Model Rules of Professional Conduct 3.1 (2009) (requiring nonfrivolous basis in law and fact for claims asserted); 4.1(truthfulness to third parties).

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 600, 130 S. Ct. 1605, 1622, 176 L. Ed. 2d 519 (2010).

In 1993, the Eastern District Court of Appeals in Missouri sanctioned a lawyer for frivolous filings on behalf of his client in circuit and appellate court. The court rejected the lawyer's argument that his duty to his client justified frivolous filings.

Nolfo v. Dubin, 861 S.W.2d 136 (Mo. App. 1993)

In 2001, the Federal District Court in Kansas was asked to address possible exceptions to Rule 4.2. (The Kansas rule is identical to Missouri's version of Rule 4-4.2.) In that Kansas case, plaintiff's lawyer responded to an unsolicited contact from a human resources manager for the town the lawyer was suing on behalf of a former town employee. The human resources manager initiated the contact and wanted to be represented by plaintiff's counsel in a potential class action against the town. The Kansas Court ruled that the manager's initiated contact created no exception to Rule 4.2 proscriptions. Further, the court rejected the plaintiff's lawyer's theory that his later representation of the manager allowed him to communicate directly with the manager. *Hammond v. City of Junction City, Kansas*, 167 F. Supp. 2d 1271 (U.S. Dist. Ct. KS. 2001).

In 2009, a federal court in Colorado prohibited defense counsel from using an investigation to contact the plaintiff before clarifying whether plaintiff's counsel in a

separate but similar case also represented him in the instant case. *McClelland v. Blazin Wings, Inc.*, G7S F. Supp. 2d 1074 (D. Co. 2009).

Interference with the University's Attorney/Client Relationship

Respondent and his expert argued that he didn't *overreach* or *interfere with the university's attorney client relationship* because his letter simply requested that the University refrain from further dissemination of his client's termination. While that argument is without merit in itself, Respondent's *ex parte* letter, which he acknowledged would expedite a process that the University's lawyers might delay, did much more. Respondent counseled Mr. Sklansky's clients that they had distributed information to people "who had no need to know of this information." He described his view of the law, writing that the University had violated his client's privacy rights. And, he interpreted the University's own policies, declaring they had violated University policies on confidentiality.

A violation of Rule 4-4.2 requires proof of neither overreaching nor interference with an attorney-client relationship; the *ex parte* communication is the violation. But, when a lawyer offers *ex parte* legal advice to a represented opposing party, it cannot be reasonably argued that the lawyer has not interfered with an attorney-client relationship. When that *ex parte* advice includes legal conclusions, and is accompanied by specific demand for action, overreaching occurs.

The Hearing Panel also based their conclusion on an additional misunderstanding of Rule 4-4.2. The Panel found "no evidence" that Respondent "was in any way attempting to prejudice the rights of Washington University or to cause either any act or failure to act

that would have imputed in way liability toward Washington University." **App. 477, 478**. As noted, such findings are not material to the question of whether Respondent violated the rule. They are not elements of Rule 4-4.2. As importantly, the Panel missed some facts and law. Respondent admits he attempted and succeeded in persuading the University to follow his demands while bypassing their attorney. And, the Panel failed to appreciate the University's right to get legal advice from their counsel, unimpeded by Respondent's intentional intrusion. His conduct and admitted intent seems the definition of an attempt to prejudice the University's rights.

Only Opposing Counsel, not Opposing Parties, Can Give Consent

Respondent also offers evidence that he had previously contacted Washington University administrators without complaint. Respondent suggests a theory that earlier direct contacts with other non-lawyer supervisors, including the University Chancellor, somehow justify his continued *ex parte* contact. When Respondent argues that the Chancellor or other administrator failed to complain about his 1998 or 2004 *ex parte* contacts, he implies that his 2015 contact must be acceptable. His argument misses the point of Rule 4-4.2. He cannot obtain consent from the opposing party to talk directly to the opposing party. Only the opposing counsel can grant that. Neither acquiescence to nor invitation by the opposing party justifies direct communication with them. See Comment 3 to Rule 4-4.

The ABA/BNA Lawyers' Manual summarizes the issue: "The decision to permit direct communication with a represented person's counsel is for the person's counsel to

make." ABA/BNA Lawyers' Manual on Professional Conduct – Obligations to Third Persons 71-301. The 9th Circuit put it this way: "We note initially that it would be a mistake to speak in terms of a party "waiving" her "rights" under Rule 2–100. The rule against communicating with represented parties is fundamentally concerned with the duties of attorneys, not with the *rights* of parties. *United States v. Lopez***,** 4 F.3d 1455, 1462 (9th Cir. 1993)**.** The 9th Circuit recognized that California Rule 2-100 followed Model Rule 4.2. That court also reported the history and breadth of Rule 4.2 concepts:

> "The California rule tracks the language of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, which in turn is nearly identical to its predecessor in the Model Code of Professional Responsibility, Disciplinary Rule 7–104(A)(1). A similar prohibition appears under Canon 9 of the ABA's Canons of Professional Ethics, which were promulgated in 1908. Not simply an American invention, the prohibition has roots which can be traced back to English common law. *See, e.g., In Re Oliver,* 2 Adm. & Eccl. 620, 622, 111 Eng.Rep. 239, 240 (1835) ("When it appeared that Mrs. Oliver had an attorney, to whom she referred, it was improper to obtain her signature, with no attorney present on her part. If this were permitted, a very impure, and often a fraudulent, practice would prevail.") (Lord Denman, C.J.). Today some version of the rule is in effect in all fifty American states." *United States v. Lopez*, 4 F.3d 1455, 1458–59 (9th Cir. 1993)

The Ends Don't Justify the Means

Respondent also justified ignoring Rule 4-4.2 by explaining that he achieved his goal, saying: "I believe this letter played a major role in preserving [my client's] career. That is what I did and that is why I did it," and "I made the decision that I thought was best for my client."

The Preamble to Rule 4 Reminds Lawyers to Comply with Court Rules

Respondent also argued that the **Preamble** to Rule 4 supports his theory that he could ethically subordinate other duties to his client's best interests. He points to the second paragraph, which indicates, inter alia, "As advocate a lawyer zealously asserts the client's position under the rules of the adversary system." Rule 4-4.2 is, of course, one of those "rules of the adversary system." In other words, zeal is no excuse for cheating the system. The Preamble's fifth paragraph puts it another way:

> [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.

Respondent's *ex parte* letter, which he admits was a successful means of achieving his client's goal, had the express purpose of getting what he wanted by intimidating his opponent while bypassing his opponent's lawyer.

Finally, Respondent argued to the Panel that the ninth paragraph of the Preamble justifies his conduct. Clearly, that paragraph acknowledges that conflicting responsibilities

occur in the practice of law. But the paragraph again reminds lawyers to play by the rules, even while zealously working for their clients:

> [9] "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests *within the bounds of the law*, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." Rule 4, Preamble, Paragraph 9 [emphasis added].

The Recipients of Respondent's Letter were University Administrators, within the Protection of Rule 4-4.2

To be sure, *ex parte* communication with persons in an opposing institution is not the same as communicating with an individual. But, Comment 7 clarifies that issue:

> [7] In the case of a represented organization, Rule 4-4.2 prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule 4-4.2. Compare Rule 4-3.4(f). In communicating with a current or former constituent of an organization, a

lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4-4.4.

Respondent does not seem to argue that his contacts were defensible under a theory that the recipients of his letter (Dr. Chole and Dr. Shapiro) were not within a group of people he could not contact. The application of Rule 4-4.2 to organizations was clarified by this court in a 1993 mandamus case, *State ex rel Pitts v. Roberts*, 857 S.W.2d 200 (Mo. banc 1993). This court adopted the language then in contained in the Comment to Rule 4-4.2. The Comment at that time was less descriptive than the Comment in place at the time of Respondent's alleged violation and today.

Indeed, courts in Missouri have explicitly included heads of a University academic department in that protected group because they have managerial responsibilities. *Hill v. St. Louis University*, 123 F.3d 1114, 1120 (8th Cir 1997). In the *Hill* case, the 8th Circuit affirmed the Eastern District Court Judge Steven N. Limbaugh's conclusion that an attorney for a plaintiff in a civil rights action should be sanctioned for violating Rule 4-4.2. That attorney had contacted a department chair at St. Louis University. Facts indicating the Chair actually presided over a different department than where the plaintiff worked was deemed immaterial to the Rule 4-4.2 violation. *Hill v. St. Louis University*, 123 F.3d at 1121. The 1997 St. Louis University case, where plaintiff's counsel was sanctioned for violating Rule 4.2, is also helpful in that it reminds this Court of its *Pitts* ruling on the categories of persons protected by Rule 4-4.2. In that key 1993 decision, this Court adopted these three categories of persons who may not be contacted without corporate counsel's consent: (1) persons having managerial responsibility on behalf of the organization; (2)

persons whose acts or omissions in connection with the matter litigated may be imputed to the organization; and (3) persons whose statements may constitute admission on the part of the organization." *State ex rel Pitts v. Roberts*, 857 S.W.2d 200, 202 (Mo. 1993).

Respondent Knew the University Was Represented by Counsel in the Matter Addressed in his Letter to the University

Comment 8 to Rule 4-4.2 clarifies the requisite knowledge for a rule violation. The rule applies where the contacting lawyer knows the person contacted is represented in the matter. Per Comment 8, a lawyer's knowledge may be inferred from the circumstances. Here, Respondent previously communicated with the University's attorney about the conditions the University imposed on his client for the misconduct that led to his dismissal. Comment 8 does not allow Respondent to "evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." To that point, Respondent corresponded with the University lawyer about his client's continued conditions of employment in April and May 2014. The University lawyer answered immediately, just as he did in March 2014 in response to Respondent's letter to the University about MM. The university told Dr. Haughey that it was his "last chance" and that dismissal would be the next consequence. Any claim that Respondent and client were "stunned" by his client's dismissal in September 2015 is disingenuous. And, if Respondent didn't think in September 2015 that the University lawyer might still represent the university in dealing with Dr. Haughey's behavior , he closed his eyes - both to the obvious and to what he actually knew. In any event, Respondent admits that he chose to bypass the General Counsel's office, with a purpose to expedite the results of his demands.

This Court's 2009 *Madison* Decision Provides No Helpful Guidance

Respondent, his expert and the Panel rely on a 2009 Missouri discipline case to argue that his conduct was reasonable, in light of all the circumstances and in light of his claimed conflict between Rule 4-1.3 (diligence) and Rule 4-4.2. In the case they point to, this Court applied an objective standard in deciding the attorney violated Rule 4-8.2 (the rule prohibiting false statements about a judge's qualifications or integrity) and Rule 4-3.5 (the rule prohibiting conduct intended to disrupt a tribunal. *In re Madison*, 282 S.W. 3d 350 (Mo. 2009). The respondent in that case, Mr. Madison argued that he subjectively believed the things he said about the judge. He argued that it shouldn't matter if he was wrong and that it shouldn't matter even his beliefs were unreasonable. The Court disagreed, holding that he was guilty because no reasonable attorney would believe the claims he made.

At least two analyses explain why *Madison* is inapplicable. First, Mr. Dobson is really arguing that he subjectively decided that he should ignore Rule 4-4.2 to achieve his client's goal. After the fact, Mr. Manners and the Panel decided that Respondent's decision was reasonable and that Mr. Manners could properly testify to that. That theory is wrong because Rule 4-4.2 contains simply asks these questions:

- Was Respondent representing a client?
- Did he communicate with an opposing party (corporate supervisor)?
- Did he know the opposing party was represented by counsel in the matter he communicated about?

- Did he have the consent of the opposing party's lawyer? Or, was he authorized other law or a court order?

Those are facts for the Court to decide; if the elements are met, a violation has occurred. Unlike Rule 4-8.2, involving criticism of judges, and probably Rule 4-1.5 (excessive fees), none of the elements of Rule 4-4.2 allow lawyers to compare themselves to other members of the bar.

Second, Respondent's tactic was not reasonable. Not one of his justifications for skirting the rule have merit: His past *ex parte* communications are no excuse; only the lawyer, not the opposing party, can give consent. His theory - that an attorney acting in a client's best interests need not comply with Rule 4-4.2 - if deemed reasonable, would leave no purpose for the rule. His suggestion that he didn't know the General Counsel represented the University in dealing with Dr. Haughey's persistent behavior problems is contradicted by his own correspondence (to the General Counsel) about those issues and by his review of the University's ongoing monitoring plan for Dr. Haughey. That claim is also refuted by Comment 8 to Rule 4-4.2, which offers no help to lawyers who close their eyes to the obvious. And, his argument that his letter didn't violate the rule because it simply asked the University to stop disseminating information is contrary to the facts. His letter included several legal opinions and demands. In any event, the rule doesn't permit lawyers to send *ex parte* letters to opposing parties, even if they are "simply" asking the party to stop doing something.

Respondent's theory also fails the reasonableness test for another reason. Assume, for the purposes of argument, that he did not know the University was represented by its

General Counsel. Under that assumption, Respondent violated Rule 4-4.3 by offering advice to an unrepresented person whose interests were different than his client's.

The University's Ongoing Discipline of Respondent's Client Was the Only Matter

The Lawyers Manual on Professional Conduct explains, "Rule 4.2 applies to any "matter", whether civil, criminal, administrative, investigative or transactional. It applies whether or not any formal proceedings have been instituted . . ." ABA/BNA Lawyers Manual on Professional Conduct, Obligations to Third Persons, Sec.71:302.

Respondent's expert suggests that his September 2015 *ex parte* letter to Dr. Chole involved a different matter than Dr. Haughey's 2014 discipline and warning of future dismissal. The dismissal action that the University took in September 2015 (described by Respondent and his client as surprising, stunning, and without warning) resulted from Dr. Haughey's "recurring issues" that Dr. Chole described in early 2014, when Respondent represented Haughey. The termination came sixteen months after Respondent wrote his second letter to the University's counsel (Mr. Sklansky) about the University's requirement for Dr. Haughey to undergo assessment. It came less than two years after Dr. Chole gave Dr. Haughey a "last chance at remediation" and less than two years after Dr. Chole insisted in January 2014 that "failure to make dramatic and sustained changes . . . will jeopardize your career at Washington University, up to and including dismissal." Respondent had reviewed that January 2014 letter from Dr. Chole.

As noted, Mr. Sklansky, who represented the university throughout and consulted with Dr. Chole about Haughey's employment situation, testified that the matters and issues

were the same. They were recurring issues and consequences for ongoing behavior, following an unmet set of employment conditions.

Mr. Manners opined that because the matters were not related, "Rule 4.2 had no applicability." **App. 170.** Mr. Manners may not have understood that the single issue was the University's ongoing discipline of Dr. Haughey for recurrent behavior, but Mr. Sklansky and Dr. Chole understood. Most importantly, Respondent and his client knew that was the only matter.

Mr. Manners relied on an ABA Opinion to analyze these issues. But that opinion explains why they rule required Respondent to obtain Mr. Sklansky's consent before contacting the University administrators on behalf of Dr. Haughey:

> "By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. Communications With Represented Persons, ABA Formal Op. 95-396

Is Expert Testimony Proper in this Case?

In determining whether Respondent violated Rule 4-4.2, the Hearing Panel, over Informant's objection, accepted, considered and ultimately relied on expert testimony on questions of law. Although Respondent and his expert acknowledged that his expert's

testimony should not be applied to determine whether Respondent violated 4-4.2, the panel explicitly relied on Respondent's expert witness in making that determination.

Informant recognizes that this Court makes a de novo determination of the issues, "independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law." *In re Farris*, 472 S.W.3d 549, 557 (Mo. 2015). In light of that understanding, Informant is comfortable that the Court will ignore the expert's testimony, as he offered no facts. The point is included here so that Court is aware of the practice and so that it recognizes the Panel's conclusions were based on the expert witness' flawed analysis of the law.

The Panel testimony described Mr. Manners' analysis as "expert testimony" and noted that it was "unrefuted". **App. 475.** As noted, Mr. Manners agreed with this statement: "it's not the appropriate subject of expert testimony as to whether or not a rule of professional conduct has been violated." **App. 177.** Despite that acknowledgement, Mr. Manners opined at length about the reasonableness of Respondent's actions and advised the Panel on the law, indicating that a Respondent's reasonableness is the key determinant in deciding whether a violation of rules occurred. **App. 135-140.** And, he opined on specific related legal points. He offered his view on whether an attorney may limit opposing counsel's access by demanding compliance to Rule 4.2 in future matters. **App. 149-152.** He analyzed another aspect of the rule, concluding that Respondent's *ex parte* September 25, 2015, letter to Dr. Chole described a situation that "had not ripened into a matter at that time." **App. 170.** Based on that conclusion, Mr. Manners then told the panel: "there simply was no applicability of Rule 4.2 at that time." **App. 170.**

The panel indicated reliance on Mr. Manner's purported conclusion that "Respondent acted ethically in sending all three communications at issue." **App. 474-475.** Informant cannot locate anything in the record to support that Mr. Manners' actually offered that specific opinion. That language may have been adopted from Respondent's trial brief to the panel where he argued in support of using Mr. Manners' testimony to decide that issue: "Judge Manners testified that in his opinion Mr. Dobson acted professionally and ethically. . ." **App. 464.** Earlier in his trial brief, Respondent also wrote this: "In other words, Judge Manners testified that Mr. Dobson acted ethically . . ." **App. 455.** (At the time Respondent's trial brief was submitted, the transcript of Judge Manner's testimony may not have been available.)

In recent past, Disciplinary Hearing Panels in other cases have received and relied on expert testimony on legal analysis of rule violations offered by judges retired from this court and others. By allowing that practice, panels have missed opportunities to undertake the difficult but essential job of applying facts to law and law to facts. Panels can be most helpful when they allow adversarial practitioners to present and argue the law. The hearing process has much less value when panels instead allow purported experts' conclusions to decide these cases. A federal court in New York explained the risk of permitting experts to analyze the law: "Experts may not invade the court's province by testifying on issues of law. The judge's expert knowledge of the law makes any such assistance at best cumulative, and at worst prejudicial." *In re Initial Public Offering Securities Litigation,* 174 F. Supp. 2d 61. (U.S. Dist. Ct. S.D.NY 2001).

Other Jurisdictions' Use of Expert Testimony

in Determining Violations in Attorney Discipline Matters

It seems the majority of courts facing the question reject the use of expert witnesses in deciding whether lawyers violate rules of professional conduct. The Massachusetts Supreme Judicial Court decided that expert testimony concerning the fact of an ethical violation is not appropriate in attorney disciplinary proceedings because the fact finder does not need assistance understanding and applying the ethical rules. *In re Crossen*, 880 N.E.2d 352 (Mass. 2008) and *In re Curry*, 880 N.E.2d 388 (Mass. 2008). Recently, in 2016, the Massachusetts court also rebuffed a theory similar to Respondent's in the instant case, *In re Diviacci*, 62 N.E.3d 38, 45 (Mass. 2016). The Massachusetts court rejected the respondent attorney's argument that his conduct be "evaluated under a subjective, good faith basis standards." *In re Diviacci*, 62 N.E.3d at 46.

The Wyoming Supreme court decided that expert testimony on the question of whether an attorney violated Rule 3.1(c) was neither necessary nor proper. The Wyoming rule at issue has similarities to Missouri Rule 4-3.1 in that both prohibit bad faith court filings. The Wyoming respondent argued that Bar Counsel was required to offer expert testimony to prove a violation. In rejecting that argument, the court explained:

> Rule 3.1(c) likewise presents a clearly identified standard. The question before us, under Rule 3.1(c), is whether, to the best of Mr. Stinson's knowledge, information, and belief, his filings in the federal proceedings were supported by fact and not interposed for an improper purpose such as to harass or publicly embarrass. This question requires that we review the

> filings signed by Mr. Stinson and compare his statements in those filings with what he knew when he signed the filings. The record contains the evidence that will allow us to complete this comparison, and we are therefore not presented with questions that require us to use subjective or undefined standards to formulate an answer. The Bar was therefore not required to present expert testimony on the Rule 3.1(c) question. *Bd. of Prof'l Responsibility, Wyoming State Bar v. Stinson*, 337 P.3d 401, 411–12 (Wyo. 2014).

Wyoming ruled further that the expert testimony as to whether a violation occurred should not have been considered and that a witness' legal conclusions based on something less than the full record should not be considered:

> The expert opinions on whether Mr. Stinson violated Rule 3.1(c), on the other hand, are not opinions that assist the trier of fact in understanding the evidence or determining a fact in issue. They instead offer a legal conclusion, which is the province of the Board and this Court.
>
> Answering the question of whether Mr. Stinson's conduct violated Rule 3.1(c) is properly left to the Board and ultimately this Court. As we discussed earlier, Rule 3.1(c) is not a rule of professional conduct that requires definition or clarification by expert testimony because the rule sets forth an objective standard that the Board and this Court are able to apply to the facts in evidence. Importantly, our decision whether there has been a violation of the Rules of Professional Conduct must be based on the entire evidentiary

> record. *See Richard,* 335 P.3d at 1040–41, n. 1 (emphasizing that this Court's decision is based on "an independent review of the entire record"); *Davidson,* , 205 P.3d at 1012 (this Court's "determination must be made upon the evidence that was presented to the Board at the hearing"). This highlights the deficiency in an expert opinion on the ultimate conclusion of law. In most cases, and certainly in this case, the expert opinions are based not on the entire evidentiary record before the Board but rather on a narrow subset of the evidence. . *Bd. of Prof'l Responsibility, Wyoming State Bar v. Stinson*, 337 P.3d 401, 419 (Wyo. 2014).

The witnesses in that Wyoming case, like Mr. Manners, made assumptions based on incomplete evidence. In the instant case, Respondent's expert (Manners) assumed, contrary to the record evidence, that the matter Respondent addressed in his September 2015 letter to University administrators about Dr. Haughey was a new matter. To his credit, Mr. Manners acknowledged that his analysis might be different if the facts about that matter did not match his assumptions.

North Dakota has repeatedly ruled that "expert testimony regarding the interpretation of the rules of professional conduct and whether a rule has been violated is inappropriate in a disciplinary proceeding". *In re Disciplinary Action against McKechnie* v. 656 N.W.2d 661-666 (ND 2016). Like other courts, North Dakota's Supreme Court distinguished the use of experts in malpractice cases from discipline proceedings. *McKechnie,* 656 N.W.2d at 666. The North Dakota court explained that distinction by noting that while "standard of care" is a necessary element in malpractice matters, in

discipline cases, the standard of care is the relevant rule of professional conduct. *McKechnie*, 656 N.W.2d at 667.

As the North Dakota court pointed out, exclusion of experts does not prohibit counsel from making legal arguments within the adversarial process; instead exclusion simply prevents a witness from submitting an "oral brief" on the issues before the court. *McKechnie*, 656 N.W.2d at 667. That court also announced their intent "to ignore expert testimony in [their] de novo review." *McKechnie*, 656 N.W.2d at 667.

Illinois has also rejected expert testimony intended on "establishing the meaning of the disciplinary rules and the ultimate conclusion that no provision of the code had been violated." *In re Masters*, 438 N.E.2d 187 (IL 1982). Since 1982, the Illinois Attorney Discipline Commission has relied on the *Masters* decision to reject proffered expert opinions in attorney discipline cases. *In the Matter of Levy*, IL Disp. Op. 08CH4 Hearing Board of the Illinois Attorney Registration and Disciplinary Commission 2012 WL 3013803.

Indiana does not permit purported expert testimony in attorney discipline cases, declaring "the testimony of expert witnesses on the subject of the practice of law is not proper evidence, as it is the province of this Court to determine what the practice of law is". *In re Matter of Kellen*, 792 N.E.2d 865 (IN 2003).

Oregon refuses to accept expert testimony in these cases:

This court previously has expressed its reservations about the propriety of this kind of testimony in disciplinary cases. See *In re Brandsness*, 299 Or. 420, 434, 702 P.2d 1098 (1985). This case shows why. If the expert testimony were offered to explicate some

external standard of actual practice, it might be admissible. However, DR 1–102(A)(3) does not involve such a standard. The evidence therefore amounted to nothing more than an oral brief as to why one particular construction of the governing disciplinary rule would not be violated by a particular hypothetical set of facts. The Accused was able to make the same legal arguments through counsel, and did so. The evidence was not admissible. *In re Conduct of Leonard*, 784 P.2d 95, 100 (1989)

On the other hand, it appears that California and Nebraska courts permit experts to testify in attorney discipline cases. *Matter of Harney*, 3 Cal. Bar Rptr. 266, 276-277 (State Bar of California 1995) 1995 WL 170223; *State ex rel Nebraska State Bar Ass'n v. Miller* 602 N.W.2d 486 (NE 1999). Texas also permits expert testimony in attorney discipline cases. Perhaps it is significant that in Texas, juries can decide the facts. *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602 at 607, 616) (Tex. Ct. App. 2004).

Whether expert testimony on questions of law, including whether a Respondent violated a rule, should be permitted in hearings before a Disciplinary Hearing Panels may not be material *at this point - in this case*. That's only because the Court will undertake a *de novo* review of this case and make its own determinations of both fact and law. But, the practice is not helpful, and is often prejudicial. The practice is contrary to longstanding recognition that judges are the best and exclusive experts on what the law is. The use of witnesses to present "oral briefs" on the law should be stopped, as it has been in the great majority of jurisdictions where the issue has been addressed.

Reprimand is the Appropriate Sanction

In 1938, a Missouri court disciplined an attorney for violating rules intended to protect clients from overreaching by opposing counsel. The Court of Appeals reproved an attorney who settled a case with the opposing party, without obtaining consent from that party's lawyer. *In re Atwell*, 115 S.W. 527 (Mo. App. 1938).

Also, the ABA Sanction Standards support the imposition of a Reprimand. Standard 6.32 suggests a suspension when a lawyer knowingly engages in improper communication and causes injury. Standard 6.32 allows for a reprimand when a lawyer negligently engages in improper communication and causes injury or potential injury to the outcome of a proceeding. Standard 6.32 permits an admonition following an isolated instance of improper communication where there is little injury or little interference with the outcome of the legal proceeding. ABA, Standards for Imposing Lawyer Sanctions.

Relevant mitigating factors in this case include an absence of previous discipline, an absence of dishonesty, and cooperation with the disciplinary proceedings. ABA Standards 9.32(a),(b) and (e)**.** Relevant aggravating circumstances include a refusal to acknowledge the wrongful nature of misconduct and substantial experience. ABA Standards 9.22(g) and (i).

At the close of the hearing, Informant asked the Panel to issue an admonition. **App. 452-453**. Under Rules 5.16 and 5.19, a public reprimand is the mildest sanction the Court may issue. Although Informant believes Respondent was aware of his obligations under Rule 4-4.2, and acted consciously, his lack of previous disciplinary history mitigates; a Reprimand is appropriate.

CONCLUSION

Informant asks the Court to find and conclude that Respondent violated Rule 4-4.2 by communicating directly to a represented opposing party without obtaining the consent of the other party's lawyer, and that his communication involved a matter that he knew the opposing party was represented by counsel. Previous *ex parte* communication to the same or other opposing parties provide no excuse. And, a lawyer may not justify a Rule 4-4.2 violation by offering that his client benefitted.

Informant further asks the Court to issue a Public Reprimand to Respondent, require him to comply with Rule 5.27, and to pay costs and fees in accordance with Rule 5.19(g).

Respectfully submitted,

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

By: _____

SAM S. PHILLIPS #30458
DEPUTY CHIEF DISCIPLINARY COUNSEL
3327 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Telephone
(573) 635-2240 - Fax
Email: Sam.Phillips@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2019, the Informant's Brief was sent to Respondent and Respondent's counsel via the Missouri Supreme Court e-filing system to:

Mr. Jerome J. Dobson
5017 Washington Pl, Suite 300, Fl 3
St. Louis, MO 63108-1240
Respondent

Mr. Maurice B. Graham
701 Market Street, Suite 800
St. Louis, MO 63101
Attorney for Respondent

Sam S. Phillips

CERTIFICATION OF COMPLIANCE: 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. The brief was served on Respondent and Respondent's counsel through the Missouri electronic filing system pursuant to Rule 103.08.
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 11,655 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Sam S. Phillips