IN THE SUPREME COURT OF MISSOURI
EN BANC

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

RESPONDENT'S BRIEF

GRAY, RITTER & GRAHAM, P.C.

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JURISDICTION

Respondent agrees that this Court has jurisdiction over this matter.

SUPPLEMENTAL STATEMENT OF FACTS

Respondent hereby supplements the Statement of Facts filed by Informant as follows:[1]

Disciplinary Hearing Committee Findings and Recommendations:

The three-person disciplinary hearing committee this Court appointed for the purpose of determining whether the Respondent is guilty of professional misconduct [Rule 515(b)] conducted a hearing on July 10, 2018. The hearing panel had the benefit of judging the credibility of the witnesses and examined all testimony and exhibits presented; and, following review, unanimously found that Respondent in sending the three (3) letters did not engage in professional misconduct; and, that neither before or after the sending of each of the three letters in question did Respondent engage in any overreaching or attempt to cause, create, solicit or initiate conduct by the recipients of each of the letters or other Washington University employees to do or not to do anything that would prejudice the rights or position of Washington University. The panel further found and observed that Informant presented no testimony or evidence that Respondent did not act as a reasonable attorney would have acted considered in the light of all of his professional functions. (L.F. 471-479).

[1] Informant's brief throughout cites to the Appendix filed in this matter ("App."); and, Respondent believes that Informant must have intended to cite instead to the Legal File (L.F.) filed with the Court as Respondent cannot find the cited facts and testimony at the Appendix page citations; however, in most instances, the cited page numbers in the Legal File (L.F.) correspond with the fact or testimony cited. Missouri Supreme Court Rule 84.04(e).

Finally, the panel unanimously found that based on all of the facts presented at the hearing that Informant failed to establish by a preponderance of the evidence that the Goffe-Rush and Frazier letters violated Rule 4-4.2; and, in the case of the Dr. Chole communication unanimously found that Respondent was in an ethical dilemma of whether to attempt to protect the legitimate, personal and professional interests of his client, as requested by Dr. Haughey, or to communicate only with the Office of General Counsel on that Friday afternoon of September 25, 2015; and, that he acted in the face of this dilemma in the best interest of his client (L.F. 476). This action by Mr. Dobson turned out to be beneficial and allowed his client, Dr. Haughey, to remain with the university until he found a new position the following March or April and was able to resume his career. (L.F. 304).

Informant solely supports its appeal on whether Rule 4-4.2 was violated by the simple act of sending the letters and ignores the content of and surrounding circumstances of the three (3) letters and, thus, the seminal overriding key issues of whether Mr. Dobson is guilty of professional misconduct. The disciplinary hearing panel looked at the content of each letter, specific facts and all of the surrounding circumstances related to the three (3) letters and correctly determined that Mr. Dobson was not guilty of professional conduct prejudicial to the administration of justice proscribed by Rule 4-8.4(d).

Though not addressed by Informant at the hearing or in its brief, the panel correctly, as directed by Rule 5.15(b), also considered Rule 4-8.4 Misconduct; and, found and determined that Respondent did not engage in any conduct that was prejudicial to the administration of justice; and, most importantly, that Informant presented no evidence that

the administration of justice had been prejudiced in any way by Respondent in sending the three (3) letters.

General Background Developed At Hearing:

The only witness presented by Informant at the disciplinary committee hearing was Joseph J. Sklansky (hereinafter "Mr. Sklansky") who acknowledged that he had filed the complaint with the "State Bar." (L.F. 202). He is one of approximately thirteen (13) attorneys in the office of Washington University's Office of General Counsel. He primarily has responsibilities for employment issues involving all of the university's fourteen thousand (14,000) employees. (L.F. 53). He joined Washington University in 2003. Mr. Sklansky testified in deposition that he had dealt with Mr. Dobson since 2004 up to the current time on roughly ten (10) matters. (L.F. 49-51). Mr. Dobson testified he had for a period of years sent letters of representation directly to senior administrators at Washington University as he did other corporate employers without objection, including no objection by Mr. Sklansky or the university. (L.F. 360, 362, 364, 366).

Proof of Mr. Dobson's past practice exists. In 2004, during Mr. Dobson's representation of Dr. J. C., he sent two letters of representation dated December 20 and 21, 2004 to Washington University's Dean Shapiro. Dean Shapiro was the second highest administrative rank immediately under Chancellor Wrighton. (L.F. 223). On December 22, 2004, Mr. Sklansky replied by letter, fax and U.S. Mail to Mr. Dobson and, without objection to Mr. Dobson sending his letter of representation directly to Dean Shapiro, denied Mr. Dobson's allegations of discrimination suffered by his client and further rejecting Mr. Dobson's proposal for mediation. He indicated that the earlier offer made by

the department chair to Dr. J.C. would be withdrawn. He concluded his letter by advising "please direct any further correspondence on this matter to me." (*Emphasis added*.) (L.F. 405). The dispute involving Dr. J.C. and the University went unresolved, eventually went to litigation, and a jury found in favor of Dr. J.C. and awarded both compensatory and punitive damages against the university to Dr. J.C. Mr. Sklansky acknowledged he was involved in that case; and, it was a "very unpleasant experience for the university." (L.F. 252).

Contrary to the earlier letters in evidence, Mr. Sklansky testified it is his recollection that when Mr. Dobson earlier represented employees of Washington University that Mr. Dobson normally sent letters of representation to the Office of General Counsel for the University. (L.F. 208). Mr. Sklansky provided no documents, letters or files at the hearing indicating that had ever occurred. Mr. Dobson denies that was his practice to send letters to the Office of General Counsel regarding new representation of Washington University employees, as evidenced by the letters to Chancellor Wrighton, Dr. Shapiro and Dr. Eberlein,. (L.F. 284-287).

Background – Mr. Dobson:

Respondent Jerome J. (Jerry) Dobson (hereinafter "Mr. Dobson") obtained his undergraduate education at Washington University and his law school education at George Washington School of Law, graduating with honors in 1978. For over 27 years, his practice has almost exclusively involved employment law. He lectures both in Missouri and nationally on employment law. Mr. Dobson has never been disciplined, reprimanded or sanctioned in his 40 years of practice (L.F. 279-298). Mr. Dobson is a member of the

American College of Trial Lawyers, an organization in which membership is by invitation only. He has also been and a member of the College of Labor & Employment Lawyers and an Adjunct Professor at Webster University.

Mr. Dobson agrees that his first involvement in an adversary matter involving Washington University was in the early 1990's when he represented one of the University's department chairs (L.F. 283).

The Three (3) Letters:

Informant addresses the three (3) letters out of their chronological order; and, Mr. Dobson will address them in the order selected by Informant. Informant and Mr. Sklansky both agree that at no time did Mr. Dobson personally contact any of the three (3) recipients of the letters. The only issue is the sending of the letters. (L.F. 244). As Informant points out, Mr. Sklansky knew Dr. Haughey was represented by Mr. Dobson because of Mr. Dobson's letter to Mr. Sklansky of April 1, 2014 (L.F. 371, Ex. 8) and then again in May of 2014. (L.F. 416, Ex. 3). Then, in the following year with the university fully aware that Mr. Dobson represented Dr. Haughey, on September 25, 2015, the university, without prior notice to Dr. Haughey or Mr. Dobson, placed Dr. Haughey on administrative leave. The university did not notify Mr. Dobson of the fact that the university was placing Dr. Haughey on administrative leave "as of now." Mr. Dobson had to learn of this action from his client under the most emergent of conditions. The action to place Dr. Haughey on administration leave immediately without prior notice was circulated by email on a Friday at 12:49 p.m. to those arguably needing to know; however, it was also circulated to those who had no need to be informed of this action being taken for purposes of which could

only be speculative but were clearly and unduly and immediately harmful to Dr. Haughey. (L.F. 410-411, 297-305).

Dr. Haughey's affidavit was by joint stipulation admitted into evidence at the hearing. (L.F. 406-409, Ex. 21). Dr. Haughey, a full professor and member of the Otolaryngology Department for twenty-seven (27) years, explained he had a less than positive relationship with the Chair of the department, Dr. Chole. Dr. Haughey was called into Dr. Chole's office on Friday, September 25, 2015 at noontime and was, without prior warning, presented a letter by Dr. Chole and Dr. Nussenbaum suspending him from practicing medicine at Washington University School of Medicine and terminating his malpractice insurance which precluded him from performing upcoming scheduled surgeries. Within the hour, Dr. Chole sent the email at 12:49 p.m. to a wide range of physicians, trainees, residents, fellows and research residents within the department stating, "Dr. Haughey is on administrative leave as of now." (L.F. 410-412). It was well-known that Dr. Haughey was to attend, beginning the next day, the American Academy of Otolaryngology annual scientific meeting in Dallas, the biggest national meeting of the year for that specialty. The manner in which the action was taken ensured that members of the organization and colleagues at the American Academy would quickly learn the news of this action taken against Dr. Haughey. As a result of such action, Dr. Haughey concluded the threat to his career and livelihood could not have been greater. He immediately contacted Mr. Dobson and asked his attorney to take whatever action he could to prevent news of his suspension from being disseminated by Dr. Chole and others, especially at the Academy meeting. Mr. Dobson, as he describes, then quickly prepared and sent the letter

to Dr. Chole with a copy to Dr. Shapiro. The September 25, 2015 letter speaks for itself. Dr. Haughey confirms he made an urgent request of Mr. Dobson to immediately attempt to limit dissemination of the action taken against him except to those who had the need to know. Dr. Haughey confirms that Mr. Dobson acted in accordance with his urgent and direct request in an effort to lessen the damage that was being done to his professional reputation by such a wide and unnecessary circulation of the action taken by Dr. Chole, without warning, to place him on administrative leave. Dr. Haughey communicated to Mr. Dobson that his urgent request to act was an attempt to protect Dr. Haughey's legal and economic rights and his academic survival. (L.F. 406-409, Ex. 21).

No testimony was presented by Informant supporting the reasonableness of the manner in which Dr. Chole, without warning, placed Dr. Haughey on administrative leave and notified such a wide group of people, many of whom had no need at all to be notified.

Careful examination of the September 25, 2015 letter to Dr. Chole is critical. (L.F. 382, Ex. 11). The letter requested only: "no further dissemination of this information except to persons who have an absolute need to know that Dr. Haughey is on administrative leave," that "you will maintain the confidentiality of your actions," and, lastly, that "Dr. Haughey will be accorded some measure of due process while you 'review' your concerns." (L.F. 421). It is undisputed that Mr. Dobson did not call either Dr. Chole or Dr. Shapiro, go by their office or in any way ask them to do anything that would in any way compromise the rights of Washington University or put the university in an unfavorable position. No evidence was presented by Informant that the request made by

Mr. Dobson in the emergent September 25, 2015 letter in any way sought to somehow "trap" or disadvantage Washington University.

In September of 2014, when the Dr. Chole letter was sent, it is important to point out that this followed the occurrence in which Mr. Dobson sent his letter of February 27, 2014 (also complained of by Mr. Sklansky) to Lorraine Goffe-Rush, Vice Chancellor for Human Resources, regarding Washington University's employee "MM" which addressed an issue in which the employee only had twenty-four (24) hours in which to respond. (Discussed later.) (L.F. 367, Ex. 5); and, Mr, Sklansky responded eight (8) days later, and then only to complain about his "concerns" with Mr. Dobson's February 27 letter. (L.F. 369, Ex. 6).

The clear intent of the September 25, 2015 letter was to achieve limited dissemination of notice of the action against Dr. Haughey to those who needed to know, and that Dr. Haughey's due process rights be protected. On its face, nothing else was intended by this September 25th letter. The letter demonstrates no intent to prejudice the rights or position of Washington University; and, no such claim has been made by Mr. Sklansky or the university.

Informant, in error, states in his brief that in connection with the September 25, 2015 letter that Mr. Dobson stated that he "believed that Dr. Chole or Dr. Shapiro might forward the email to that (General Counsel's) office." Mr. Dobson, in fact, agreed with Informant's counsel that "[i]n fact, (he) expected Dr. Chole to take that letter and send it to the General Counsel's Office." Mr. Dobson did acknowledge that it would have been a quicker route for the General Counsel's office if he sent it directly; but, that would not have been a

quicker route to Dr. Chole, who was taking the immediate action against Dr. Haughey, which, in his belief, his duty to his client required. (L.F. 333).

Mr. Dobson explained that the urgency in getting to Dr. Chole was that members of the university Otolaryngology Department were going to the same conference as Dr. Chole and Dr. Haughey. Because it was afternoon on Friday, Mr. Dobson reasonably believed that there was insufficient time to find a judge and get a TRO, and he was uncertain how he could communicate his concerns about the important need for privacy and confidentiality of the action taken with Dr. Chole after Dr. Chole landed in Dallas for the conference. Mr. Dobson goes on to say:

> "So I found myself in a real conflict between the obligation to be an advocate for my client under Rule 1.3, and my obligation to not engage in ex parte communication under Rule 4.2. To me the equities clearly weighed in favor of taking action on behalf of Dr. Haughey. I really saw no other choice.
>
> And I will say that I believe Wash U. created this situation. They waited until September 25th to suspend Dr. Haughey right before the conference, right when Dr. Chole was leaving. So they communicated this broadly. We were in a crisis situation that Wash U. created. I did what I thought was appropriate. I wrote a simple letter to Dr. Chole, and I think my letter was direct, and I think it was appropriate . . .."
>
> (L.F. 302)

> ". . . I knew that Dr. Chole and/or Dean Shapiro would notify the General Counsel's Office. But honestly, if I had waited, I believe it could have and would have been catastrophic to Dr. Haughey's career. And I will tell you that Dr. Haughey, after sending this letter, I am aware of no further dissemination of the information. Dr. Haughey was able to leave Washington University somewhere around February or March of 2016. And he's been able to resume his career in Florida. And I believe that this letter played a major role in preserving his career."
>
> (L.F. 304).

Informant states in its brief Dr. Haughey was "terminated." That is incorrect. As indicated by Mr. Dobson, Dr. Haughey continued as a tenured professor until he took his new position in Florida the following year. (L.F. 302-304). Mr. Dobson believes his prompt action made this possible. (L.F. 304).

Informant puts an unfair spin on Mr. Dobson's explanation for why he sent the September 25th correspondence directly to Dr. Chole with a copy to Dr. Shapiro in stating that "his client was being railroaded." Mr. Dobson's testimony was:

> "Dr. Haughey wanted to cooperate. But I was concerned he was being railroaded. You know, you mentioned earlier in your questions about my duty under disciplinary rule – Supreme Court Rule 1.3. I am an advocate for my client. It's important that I advocate for him. I thought he has being bullied by Dr. Chole, and the department, and the Washington U. School of Medicine…. I found Mr. Sklansky to be virtually nonresponsive to my efforts to communicate with him."
>
> (L.F. 296, 371-372, 379-380, 381; Ex. 8, 9 and 10).

Now we turn to the February 27, 2014 communication Mr. Dobson sent on behalf of a client ("MM") was sent to Dr. Goffe-Rush, Vice Chancellor for Human Resources for the university (all 14,000 employees), asserting legal rights and claims on behalf of his client. (L.F. 367, 419; Ex. E). Paragraph 5 of the Information inaccurately states that in his March 7, 2014 response to the February 27, 2014 letter from Mr. Dobson that Mr. Sklansky wrote to Mr. Dobson and "reminded" Mr. Dobson that Sklansky's office represented the University with respect to all legal matters and that all further communications "from your firm <u>on any matter</u>" (*emphasis added*) should be directed to Sklansky's office. To say Mr. Dobson was "reminded" incorrectly infers he had been advised earlier to send communications of representation to only the Office of General

Counsel for Washington University. (L.F. 2). Informant presented no evidence at the hearing that the university or Mr. Sklansky had ever notified Mr. Dobson, prior to the March 7, 2014 letter by Mr. Sklansky to Mr. Dobson, that the Washington University's Office of General Counsel expected any further communications "from your firm on any matter be directed solely to my office." (*Emphasis added.*) (L.F. 369, Ex. 6). In fact, as early as December 22, 2004, Mr. Sklansky, in writing to Mr. Dobson on the Dr. J.C. matter, treated the Dr. J.C. issue as a single "matter" and directed Mr. Dobson "please direct any further correspondence on this matter to me." (*Emphasis added*.) (L.F. 415, Exhibit 2).

No evidence was presented, nor does it exist, that the Office of General Counsel had ever prior to February 27, 2014, communicated to Mr. Dobson it was Mr. Sklansky's position that a letter of representation, on any matter must be sent only to the Office of General Counsel. To suggest that Mr. Dobson was "reminded" that all such communications of representation were to be sent to the Office of General Counsel is inconsistent with the facts presented and has no support in the evidence. Mr. Dobson had a history of sending letters of his representation of an employee or former employee of Washington University in a similar manner as the February 27, 2014 communication to the appropriate administrator at Washington University. The Sklansky communication of March 7, 2014, was the first such communication from Washington University suggesting a different procedure for "all" and "any" communications was to be thereafter followed. (L.F. 420). It should also be noted Mr. Sklansky's response to Mr. Dobson does not address or answer any of the important employee concerns raised by Mr. Dobson on behalf of his

client "MM," including additional time for the employee to consider the severance agreement terms handed to her. (L.F. 256-257, 369).

Mr. Dobson was surprised by Mr. Sklansky's assertion and promptly questioned the correctness of such assertion in his letter to Mr. Sklansky dated March 12, 2014 (L.F. 370, Ex. 7). Mr. Dobson that explained he would "frequently send an initial letter to the person who has terminated my client and/or presented the client with a severance agreement." Mr. Dobson further stated it was his assumption based on past experience that the recipient of the communication would appropriately "notify the office of legal counsel that an employee has retained counsel to represent them . . ." (L.F. 370). Thus, Mr. Sklansky was made aware of Mr. Dobson's disagreement with Mr. Sklansky's position on the appropriate and ethical manner by which Mr. Dobson sent letters of his representation of employees to Washington University. Mr. Sklansky nor anyone associated with Washington University, at any level, has ever responded to Mr. Dobson's March 12, 2014 letter in which Mr. Dobson stated his position. Further, Mr. Sklansky does not dispute that Mr. Dobson had a practice of notifying appropriate administrators (and not the General Counsel's Office) of Washington University of his representation of a Washington University employee. (L.F. 457-458).

Additionally, the March 7, 2014 communication from Mr. Sklansky did not actually allege an ethical violation, it only indicated he was "troubled by your February 27 ex parte letter" to Dr. Goffe-Rush. "Your direct communication with Ms. Goffe-Rush therefore raises concerns regarding compliance with Rule 4-4.2 of the Missouri Rules of Professional Conduct." (*Emphasis added*.) Mr. Sklansky goes on to say, "Any further communications

from your firm on any matter must be directed solely to my office." (*Emphasis added*.) (L.F. 420). The communication here was clearly to state Mr. Sklansky's "concern" and mention the possibility that Rule 4-4.2 might have some relevance. Mr. Dobson responded to Mr. Sklansky by his March 12, 2014 letter (L.F. 370) that his long-time policy and practice had always been to send letters of representation to Washington University in a similar manner. (L.F. 370).

Mr. Dobson explained to the Hearing Panel his long-time practice of sending communications of representation including in 1998 to Chancellor Mark Wrighton (L.F. 360); in 2000 to Dr. Timothy Eberlein (L.F. 362); and in 2004 to Dr. Larry Shapiro (L.F. 364) without there ever having been an objection by anyone from Washington University. (L.F. 458). Mr. Sklansky has never responded to or taken further issue with Mr. Dobson's communication of March 12, 2014. Importantly, there was no evidence presented of any personal contact of Dr. Goffe-Rush by Mr. Dobson relevant to the matter addressed in the February 27, 2014 communication, other than the letter to her. There were no telephone calls, emails, direct conversations, or follow-up communication of any type with Dr. Goffe-Rush, and no evidence that Mr. Dobson did anything to compromise the rights of, or to seek a statement, action or document which could even indirectly impute liability to Washington University. In other words, he did nothing prejudicial to the Administration of Justice.

Lastly, we turn to the October 12, 2016 communication from Mr. Dobson to Dr. Victoria Fraser. This was a time when, though Mr. Sklansky had earlier objected to the September 25, 2015 communication to Dr. Chole as being a violation of Rule 4-4.2, he

still had never at any time disputed or taken issue with the position Mr. Dobson set out in his communication of March 12, 2014, regarding Mr. Dobson's past practice of advising employers, including Washington University of his representation of an employee or former employee. Throughout this, Mr. Dobson made it clear that he would "frequently send an initial letter to the person who has terminated my client and/or presented the client with a severance agreement." (L.F. 370, Ex. 7). Mr. Sklansky's letter of September 29, 2015 does, for the first time, affirmatively allege the violation of Rule 4-4.2 but continues to fail to address Mr. Dobson's earlier explanation of why Mr. Dobson takes the position that Rule 4-4.2 does not apply. When the issue was raised, Mr. Dobson did research Rule 4-4.2, specifically reviewed Committee Comment [7], and concluded he could send the written communications, without any additional personal contact, in the manner the three (3) letters were sent. (L.F. 313).

At the end of Mr. Dobson's direct examination in the hearing, he was asked if he looked back, even with the benefit of hindsight, would he have done anything differently. His frank answer was, "[t]he one piece I can see is that I probably could have put a carbon copy of the letter to Dr. Chole to Joe Sklansky. That would be the one thing I might have done differently. You know, my understanding is I'm not here because I didn't carbon copy him . . .that's not what the complaint's about." (L.F. 320-321).

Again, the disciplinary hearing committee was present with and observed and considered the often conflicting testimony of the only two live witnesses presented at the hearing, Mr. Sklansky and Jerry Dobson.

POINTS RELIED ON

A. UNDER THE THEN EXISTING AND RELEVANT CIRCUMSTANCES AND BACKGROUND OF THE SENDING BY MR. DOBSON OF EACH OF THE THREE (3) LETTERS OF FEBRUARY 27, 2014, SEPTEMBER 25, 2015 AND OCTOBER 12, 2016, THE LETTERS DID NOT CONSTITUTE A VIOLATION OF RULE 4-4.2 AND DID NOT CONSTITUTE PROFESSIONAL MISCONDUCT UNDER RULE 4-8.4.

B. THE DECLARED INTENT AND PURPOSE OF RULE 4-4.2 IS TO CONTRIBUTE 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 UNCOUNSELLED DISCLOSURE OF INFORMATION RELATING TO THE REPRESENTATION. (RULE 4-4.2, COMMENT [1]). NONE OF THE PURPOSES OF RULE 4-4.2 WERE VIOLATED. IT IS NOT, AS INFORMANT SUGGESTS, A QUESTION OF WHETHER THERE ARE EXCEPTIONS TO THE RULE AS SUGGESTED BY INFORMANT. IT IS A QUESTION OF THE APPROPRIATE APPLICATION OF THE RULE.

C. THERE WAS NO EVIDENCE PRESENTED BY INFORMANT IN TESTIMONY OR BY EXHIBITS THAT ANY OF THE THREE (3) LETTERS IN QUESTION INTERFERRED WITH WASHINGTON UNIVERSITY'S OFFICE OF GENERAL COUNSEL'S ATTORNEY-CLIENT RELATIONSHIP WITH ANY OF THE RECIPIENTS OF THE LETTERS OR VICE-VERSA. THE EVIDENCE ESTABLISHED THAT NO ATTORNEY-CLIENT RELATIONSHP WAS EVEN MINIMALLY ADVERSELY AFFECTED OR INTERFERRED WITH OR THAT AN INTENT TO DO BY MR. DOBSON SO EXISTED.

D. INFORMANT DID NOT MEET ITS BURDEN OF PROOF BY A PREPONDERANCE OF EVIDENCE THAT THE RECIPIENTS OF THE LETTER(S) WERE REPRESENTED BY COUNSEL ON THE SPECIFIC MATTER WHICH WAS THE SUBJECT OF THE LETTER(S) OF FEBRUARY 27, 2014 AND OCTOBER 12, 2016; OR, IN THE ALTERNATIVE, A BLANKET ASSERTION BY THE ASSISTANT GENERAL COUNSEL OF THE UNIVERSITY THAT HE OR HIS OFFICE REPRESENTS ALL 14,000 UNIVERSITY EMPLOYEES ON ALL MATTERS, AND NOT JUST EMPLOYMENT MATTERS, IS

UNDER THE FACTS OF AND THE ISSUES BEFORE THIS COURT AN IRRELEVANT ASSERTION AND OVERLY BROAD.

ARGUMENT

The issue(s) in this matter before the Court and the points relied upon by Informant are all understandably intertwined; and, thus, Mr. Dobson's response will be presented collectively also; and, in response to the four (4) subpoints A, B, C and D of Informant's Points Relied On, Mr. Dobson states:

A. UNDER THE THEN EXISTING AND RELEVANT CIRCUMSTANCES AND BACKGROUND OF THE SENDING BY MR. DOBSON OF EACH OF THE THREE (3) LETTERS OF FEBRUARY 27, 2014, SEPTEMBER 25, 2015 AND OCTOBER 12, 2016, THE LETTERS DID NOT CONSTITUTE A VIOLATION OF RULE 4-4.2 AND DID NOT CONSTITUTE PROFESSIONAL MISCONDUCT UNDER RULE 4-8.4.

B. THE DECLARED INTENT AND PURPOSE OF RULE 4-4.2 IS TO CONTRIBUTE 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 UNCOUNSELLED DISCLOSURE OF INFORMATION RELATING TO THE REPRESENTATION. (RULE 4-4.2, COMMENT [1]). NONE OF THE PURPOSES OF RULE 4-4.2 WERE VIOLATED. IT IS NOT, AS INFORMANT SUGGESTS, A QUESTION OF WHETHER THERE ARE EXCEPTIONS TO THE RULE AS SUGGESTED BY INFORMANT. IT IS A QUESTION OF THE APPROPRIATE APPLICATION OF THE RULE.

C. THERE WAS NO EVIDENCE PRESENTED BY INFORMANT IN TESTIMONY OR BY EXHIBITS THAT ANY OF THE THREE (3) LETTERS IN QUESTION INTERFERRED WITH WASHINGTON UNIVERSITY'S OFFICE OF GENERAL COUNSEL'S ATTORNEY-CLIENT RELATIONSHIP WITH ANY OF THE RECIPIENTS OF THE LETTERS OR VICE-VERSA. THE EVIDENCE ESTABLISHED THAT NO ATTORNEY-CLIENT RELATIONSHP WAS EVEN MINIMALLY ADVERSELY AFFECTED OR INTERFERRED WITH OR THAT AN INTENT TO DO BY MR. DOBSON SO EXISTED.

D. INFORMANT DID NOT MEET ITS BURDEN OF PROOF BY A PREPONDERANCE OF EVIDENCE THAT THE RECIPIENTS OF THE LETTER(S) WERE REPRESENTED BY COUNSEL ON THE SPECIFIC MATTER WHICH WAS THE SUBJECT OF THE LETTER(S) OF FEBRUARY 27, 2014 AND OCTOBER 12, 2016; OR, IN THE ALTERNATIVE, A BLANKET ASSERTION BY THE ASSISTANT GENERAL COUNSEL OF THE UNIVERSITY THAT HE OR HIS OFFICE REPRESENTS ALL 14,000 UNIVERSITY EMPLOYEES ON ALL MATTERS, AND NOT JUST EMPLOYMENT MATTERS, IS UNDER THE FACTS OF AND THE ISSUES BEFORE THIS COURT AN IRRELEVANT ASSERTION AND OVERLY BROAD.

I. Argument

The Supreme Court of Missouri has established an enlightened and highly respected attorney disciplinary system. This hearing is conducted on only the Information filed and the evidence presented related to the Information and nothing else (Rule 5.15). Informant has the burden of proving all allegations contained in the Information justifying the imposition of discipline. Informant must establish by a preponderance of the evidence presented that Mr. Dobson both (a) first, engaged in conduct that constituted a violation of Rule 4-4.2; and (b) second, that Mr. Dobson is guilty of "misconduct" by "engaging" in conduct prejudicial to the Administration of Justice, Rule 4-8.4. Only if the preponderance of the evidence proves those two requirements can discipline be recommended by the disciplinary hearing panel. [Missouri Supreme Court Rule 5.15(d)].

The matter before this Court centers around three straightforward communications sent by Mr. Dobson to administrators at Washington University in St. Louis -- the communications of February 27, 2014, September 25, 2015 and October 12, 2016. There is no dispute the communications were sent or about their wording. That is not the issue.

The issue is whether, under all the circumstances and evidence presented at the hearing, those communications violated Rule 4-4.2(a), and additionally did Mr. Dobson, by sending the letters, engage in prohibited misconduct prejudicial to the administration of justice.

Informant presented no evidence or witness testimony that any of Mr. Dobson's three communications violated Rule 4-4.2. Assistant General Counsel, Joseph Sklansky said it was his belief that they did but he also acknowledged he did little research or review of the actual interpretations and application of Rule 4-4.2. (L.F. 242). There was absolutely no factual evidence or testimony presented (even from Mr. Sklansky) that Mr. Dobson did anything that was prejudicial to the Administration of Justice, or that he was guilty of misconduct mandating discipline. To the contrary, there was testimony under oath by Judge Michael Manners that Mr. Dobson, in connection with the three communications acted in the manner that a reasonable attorney, considering all his professional functions, would do under the same or similar circumstances. (L.F. 149-154). Judge Manners explained that, in addition to being a judge, he had handled matters on behalf of employees as a practicing lawyer. (L.F. 131). He also had many times sent letters of representation to employers on behalf of an employee. (L.F. 133).

Informant presented no evidence to counter the testimony by Judge Manners. His testimony is critical as whether an ethical violation occurred. The Missouri Supreme Court in *In re Madison*, 282 S.W.3d 350 (Mo. banc 2009) stated that a finding of a violation of the Rules of Professional Conduct depends "on what the reasonable attorney considered in light of all his professional functions, would do under the same or similar circumstances." Judge Manners testified that Mr. Dobson did act as a reasonable attorney would considered

in the light of all his professional functions. In other words, Judge Manners testified that Mr. Dobson acted ethically and supported that testimony by referring to the Supreme Court Committee Comment under Rule 4-4.2 and the ABA Annotated Model Rules. Judge Manners did not provide an opinion on what the rule(s) mean or speak to any questions of law. (L.F. 149-161). He was not asked to testify as to what the "law" is, only what a reasonable attorney would do under the three (3) sets of circumstances that existed with Mr. Dobson.

Just as importantly, Informant presented no evidence or ever contend that in sending any of the three communications that Mr. Dobson was attempting to, or did, improperly in any way compromise the rights of Washington University with respect to the matters addressed in each of the communications, or in any way cause a representative or employee of Washington University by act or omission to impute liability or responsibility to the organization (Washington University) for some sort of civil liability (*See* Rule 4-4.2, Comment [7]). *See also* ABA Annotated Model Rules of Professional Conduct regarding Rule 4.2 which provides:

> "[1] This Rule 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."

Informant presented no evidence of overreaching, or an attempt to do so by Mr. Dobson, nor evidence of any attempt to obtain uncounseled disclosure by Mr. Dobson.

II. Three Communications at Issue

The Information contains some incorrect facts.

The Goffe-Rush letter. The first allegation in the Information (Paragraphs 4 and 5) addresses the February 27, 2014 communication, Mr. Dobson sent on behalf of a client, who was a former employee of Washington University and was sent to Dr. Goffe-Rush, the Vice Chancellor for Human Resources for the university, asserting legal rights and claims on behalf of his client. (L.F. 367, Ex. 5).

Paragraph 5 of the Information inaccurately states that in response to the February 27, 2014 Dobson communication Assistant Vice Chancellor and Associate General Counsel (Mr. Sklansky) wrote to Mr. Dobson and "reminded" Respondent that Sklansky's office represented the University with respect to all legal matters and that all further communications "from your firm on any matter" should be directed to Sklansky's office. To say Mr. Dobson was "reminded" infers he had been advised earlier to send communications of representation to only the Office of General Counsel for Washington University. The word "reminded" is defined as "make someone think about something again." (Merriam Webster Dictionary.)

No evidence was presented, nor does it exist, that the Office of General Counsel had ever prior to February 27, 2014, communicated to Mr. Dobson it was Mr. Sklansky's position that a letter of representation, on any matter must be sent only to the Office of General Counsel. To suggest that Mr. Dobson was "reminded" that all such communications of representation were to be sent to the Office of General Counsel is inconsistent with the facts presented and has no support in the evidence. Mr. Dobson had

an undisputed long history of sending letters of his representation of an employee or former employee of Washington University in a similar manner as the February 27, 2014 communication (i.e., sent to the appropriate administrator at Washington University). The Sklansky communication of March 7, 2014, was the first such communication from Washington University suggesting a different procedure for "all" and "any" communications was to be thereafter followed. (L.F. 369, Ex. 6).

Mr. Dobson was surprised by Mr. Sklansky's assertion and promptly questioned the correctness of such assertion. Mr. Dobson confirmed to Mr. Sklansky in a communication dated March 12, 2014 (L.F. 370, Ex. 7) that Mr. Dobson had "frequently sent an initial communication to the person who has terminated my client and/or presented the client with the severance agreement." Mr. Dobson further stated it was his assumption based on past experience that the recipient of the communication would appropriately "notify the office of legal counsel that an employee had retained counsel to represent them . . ." Thus, Mr. Sklansky was thus made aware of Mr. Dobson's disagreement with Mr. Sklansky's position on the appropriate and ethical manner by which Mr. Dobson sent letters of his representation of employees to Washington University. Thereafter, however, Mr. Sklansky nor anyone associated with Washington University, at any level, ever responded to Mr. Dobson's March 12, 2014 letter in which Mr. Dobson stated his position. No one at Washington University, even up through the hearing date, addressed, or even responded to Mr. Dobson's position as set out in his March 12, 2014 correspondence. At the hearing it was not disputed by Mr. Sklansky that Mr. Dobson had a long-time practice

of notifying appropriate administrators (and not the General Counsel's Office) of Washington University of his representation of a Washington University employee.

Also, importantly, the March 7th communication from Mr. Sklansky did not actually allege an ethical violation, it only indicated he was "troubled by your February 27 ex parte letter. . ." ". . . your direct communication with Ms. (GR) therefore raises concerns regarding compliance with Rule 4-4.2 of the Missouri Rules of Professional Conduct." Mr. Sklansky then goes on to say, "Any further communications from your firm on any matter must be directed solely to my office." (*Emphasis added*.) (L.F. 369, Ex. 6). The importance of Mr. Sklansky's insisting he be the sole person contacted "on any matter" is addressed below. The expressed tenor of the communication here was clearly to state Mr. Sklansky's "concern" and mention the possibility that Rule 4-4.2 might have some relevance. Mr. Dobson then promptly advised Mr. Sklansky in writing by his March 12, 2014 letter that his long-time policy and practice had always been to send letters of representation to Washington University in a similar manner. It should be noted that up through the date of the disciplinary panel hearing, no evidence was presented that anyone from Washington University ever responded to Mr. Dobson's March 12, 2014 letter disagreeing with Mr. Dobson's position.

Mr. Dobson explained to the hearing panel his long-time practice of sending communications of representation including in 1998 to Chancellor Mark Wrighton, in 2000 to Dr. Timothy Eberlein, and in 2004 to Dr. Larry Shapiro without there ever having been a single objection by anyone from Washington University. (L.F. 283-287). Since Mr. Sklansky did not respond to Mr. Dobson's communication of March 12, 2014,

Mr. Dobson could reasonably conclude following the lack of response that Mr. Sklansky, at least at that point, was less concerned regarding Mr. Dobson sending communications of representation in the same manner as he had always done. Importantly, there was no evidence presented of any contact by Mr. Dobson relevant to the matter addressed in the February 27, 2014 communication, other than simply sending the letter to Dr. Goffe-Rush. There were no telephone calls, emails, direct conversations, or follow-up communication of any type with Dr. Goffe-Rush, and no evidence that Mr. Dobson did anything to compromise the rights of, or to seek a statement, action or document which could impute liability to Washington University. There was no evidence he attempted to do so. In other words, he did nothing prejudicial to the administration of justice.

There is also evidence that any time Mr. Dobson knew in advance that Mr. Sklansky was specifically involved in a matter (or "the matter" as addressed in Supreme Court Committee Comment [7] of our Rules of Professional Conduct) that he always communicated directly with Mr. Sklansky. See the letters of March 12, 2014, April 1, 2014 and May 27, 2014 for examples where Respondent would communicate directly with Mr. Sklansky on "a" matter or "the matter" having to do with Mr. Dobson's representation of his client Dr. Haughey. (L.F. 366, 371 and 379; Ex. 4, 8 and 9).

September 25, 2015 communication regarding Dr. Haughey. The best way to understand the background of the September 25, 2015 Dobson communication to Dr. Chole is to (a) evaluate the explanation and testimony by Mr. Dobson at the hearing, (b) to review the Affidavit of Bruce Haughey, M.D., Mr. Dobson's client (L.F. 406-409; Ex. 21), and (c) review Dr. Chole's email of September 25, 2015 at 12:49 p.m. (L.F. 410-

411; Ex. 22). Such review will reveal the immediate potentially damaging effect of the action taken by Dr. Richard Chole five (5) days before his retirement and, just hours before the end of the day, a Friday, and one day before the important annual conference of the American Academy of Otolaryngology was to be held in Dallas, Texas. This was an emergency situation, likely strategically timed and broadcasted via a widely distributed email by Dr. Chole that had the clear known effect of damaging permanently Dr. Haughey.

The September 25, 2015 communication to Dr. Chole from Mr. Dobson is self-explanatory. A careful reading of that communication sent by Mr. Dobson simply requested that any disciplinary action against Dr. Haughey, which had just been announced by Dr. Chole a couple of hours earlier, be kept confidential and not disseminated to those having no legitimate right to such information and asking that the rights of fundamental due process to be provided to Dr. Haughey. This was sent within a couple of hours following the strategic email sent by Dr. Chole. It is important to mention also that the September 25, 2015 communication was sent 18 months after Mr. Dobson had reaffirmed to Mr. Sklansky in his March 12, 2014 communication his practice of sending letters of representation and at no time between March 12, 2014, and September 25, 2015 had Mr. Sklansky again taken specific issue with Mr. Dobson's explained practice of sending communications of representation to Washington University administrators. It is clear from Mr. Dobson's testimony and Dr. Haughey's affidavit that the September 25, 2015 communication sounded a note of an immediate emergency by Mr. Dobson on behalf of Dr. Haughey. Mr. Sklansky did not respond to this crisis situation until September 29th when he mailed a communication to Mr. Dobson which did not address any of the

important substantive issues contained in Mr. Dobson's September 25th communication, but simply for the first time directly asserted that the communication was a violation of Rule 4-4.2. Mr. Sklansky also importantly conveys to Mr. Dobson, as he had earlier, that it is Mr. Sklansky's position that "any further communications from your firm on any matter must be directed solely to my office." (*Emphasis added.*) (L.F. 422, Ex. 8).

As will be established later, this represents a misunderstanding by Mr. Sklansky of the intention and interpretation of Rule 4-4.2. In fact, in the hearing testimony Mr. Sklansky acknowledged that he had not diligently researched in detail the intent and implications of Rule 4-4.2 and was unfamiliar with many of the ABA interpretations of Rule 4-4.2. (L.F. 242).

October 12, 2016 letter to Dr. Fraser. The next communication Mr. Sklansky complained of was the October 12, 2016 communication from Mr. Dobson to Dr. Victoria Fraser. Though Mr. Sklansky had objected to the September 25, 2015 communication to Dr. Chole as being a violation of Rule 4-4.2, he still had never at any time earlier disputed or taken issue with the position Mr. Dobson set out in his communication of March 12, 2014, regarding his accepted past practice of advising employers, including Washington University, of his representation of an employee or former employee. In fact, throughout this entire series of communications, Mr. Sklansky never by telephone or written communication addressed Mr. Dobson's past practice with Washington University leaders such as Chancellor Wrighton, Dr. Eberlein or Dean Shapiro. Mr. Sklansky's letter of September 29, 2015 does, for the first time, affirmatively allege the violation of Rule 4-4.2 but makes no effort to address Mr. Dobson's earlier explanation of why Mr. Dobson does

not believe Rule 4-4.2 applies. Mr. Dobson was also aware at this time that Mr. Sklansky had never objected to Mr. Dobson sending letters of representation directly to Dr. Shapiro; and, Mr. Sklansky became involved in that matter. (L.F. 96). It is important that Mr. Dobson did research Rule 4-4.2 and specifically reviewed Committee Comment [7] and concluded he could send the letters of representation in the manner he sent. Judge Manners agrees with Mr. Dobson as discussed below.

Washington University's practice of untimely responses to Mr. Dobson. While perhaps not totally relevant, it is important to note that an associate of Mr. Dobson sent an original document retention request communication directly to the Office of General Counsel regarding the firm's client C.W. on February 25, 2016 (L.F. 384, Ex. 13) and that communication was finally acknowledged and responded to by Mr. Sklansky eight (8) months later on October 18, 2016. (L.F. 401, Ex. 18). It is worthwhile to note the tenor of Mr. Sklansky's response, which appears in the legal file. (L.F. 401, Ex. 18). Unfortunately, there was no indication that Mr. Sklansky was going to timely treat any of Mr. Dobson's firm's concerns for or on behalf of his clients with any immediate action. That can present a tremendous problem for a lawyer trying to fulfill his duty to a client to act diligently under the requirements of Rule 4-1.3 (Diligence). It is a dilemma that has been addressed by our Missouri Supreme Court in the PREAMBLE to the court's Rules of Professional Conduct:

> "[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person...."
>
> Missouri Supreme Court Rule 4 – Preamble: A Lawyer's Responsibilities.

> "[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and the law itself. . . No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of some discretion…."
>
> "[16] …..The rules simply provide a framework for the ethical practice of law."
>
> "[19] ….The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on a basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain and incomplete evidence of the situation."
>
> Missouri Supreme Court Rule 4 – Scope.

III. Relevant Hearing Testimony

Joseph Sklansky, General Counsel and Vice Chancellor of Washington University, who filed the Disciplinary Complaint "with the Bar" was the first witness. He identified only the three communications sent by Mr. Dobson as being an issue for him. He did not at any time state, or even infer, that Washington University was disadvantaged or its rights compromised by any of the communications from Mr. Dobson or that Mr. Dobson was in some way trying to use Washington University employee acts, conduct or response to impute liability to Washington University. Mr. Sklansky offered no testimony or explanation as to how the communications were in any way prejudicial to the

Administration of Justice or were an attempt to "trap" or take advantage of Washington University.

Jerome Dobson testified. The Committee was able to reflect on Mr. Dobson's demeanor, his frank and candid answers, his explanation as to why and to whom he selected to send each of the communications in question in the manner he did. Mr. Dobson confirmed that at no time did he have direct contact with the recipients of those communications other than the communication itself and never at any time overreached or tried in any way directly or indirectly to compromise the rights of Washington University or to impute any act or failure to act by a Washington University administrator to Washington University. He also explained that he researched Rule 4-4.2, including [7] of the Committee Comment and was convinced he had not violated and was not violating Rule 4-4.2, and that he had engaged in no misconduct. He further explained that he has never in his entire career been the subject of a court sanction in any of his multiple court cases; and, that neither he nor any member of his firm has ever been sanctioned or been the subject of discipline. Though again, not relevant, he explained the emotional toll that this complaint has taken on him. He has been a leader in many legal organizations including a member of the American College of Trial Lawyers which is open to membership by invitation only. We are more than willing to allow this Court to judge the credibility of Mr. Dobson, and whether he is an ethical practicing trial attorney and, more to the point, was so in his dealings with Washington University.

Dr. Haughey Affidavit. Though not a live or deposed witness, Dr. Bruce Haughey submitted an Affidavit which was admitted into evidence and can be considered the same

as testimony by agreement. Dr. Haughey explained the urgent situation of the early afternoon of September 25, 2015 and his direct request to his lawyer Jerome Dobson to take immediate action to protect him from significant financial and professional harm.

Judge Michael Manners. Judge Manners gave a lengthy videotaped deposition that we had hoped to play the video deposition for the hearing panel, but because of technical difficulties the parties were unable to do so. Judge Manners testified in his professional opinion, based on a reasonable degree of professional certainty that Mr. Dobson "had acted as a reasonable attorney, when considered in the light of all his professional functions, would do under the same or similar circumstances." This is the standard to be used in a case where the conduct of an attorney is at issue, as dictated by *In Re Madison*, 282 S.W.3d 350 (Mo. banc 2009).

Judge Manners testified that in his opinion Mr. Dobson acted professionally and ethically, and in his testimony, he referred frequently to The Missouri Rules of Professional Conduct, ABA Formal Opinions and the Annotated Rules of Professional Conduct as promulgated by the American Bar Association.

IV. Mr. Dobson has not violated Rule 4-4.2 nor is he guilty of professional misconduct. Rule 4-8.4.

The Missouri Rules of Professional Conduct are practically identical to the American Bar Association Annotated Rules of Professional Conduct. Thus, the ABA Annotated Rules are a valid and proper source for how Missouri Rules are to be interpreted, as are the ABA Formal Opinions (ABA Formal Opinion 95-396, July 28, 1995).

> "The fact that an organization has a general counsel does not itself prevent another lawyer from communicating directly with the organization's constituents. See, e.g., *SEC v. Lines*, 669 F. Supp. 2d 460 (S.D.N.Y. 2009) (neither organization nor president necessarily 'represented' in particular matter simply because corporation has general counsel); *Terra Intern., Inc. v. Miss. Chem. Corp.*, 913 F. Supp. 1306 (N.D.Iowa 1996) ("[A]n employer cannot unilaterally create or impose representation of employees by corporate counsel…. '[A]utomatic representation' [would] impede the course of investigation leading to or following the filing of a lawsuit."); *Humco, Inc. v. Noble*, 31 S.W.3d 916 (Ky. 2000) (knowledge that corporation has in-house counsel is not actual notice of representation); ABA Formal Ethics Op. 95-396 (1995) (general counsel cannot assert blanket representation of all employees); Alaska Ethics Op. 2006-1 (2006)."
>
> Annotated Model Rules of Professional Conduct (8th ed. 2015).

"Similarly, retaining counsel for 'all' matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized 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 prohibition on communications to apply. Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule." ABA Formal Opinion 95-396, July 28, 1995.

> "The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented *in the matter to be discussed*. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. "
>
> Missouri Supreme Court Rule 4-4.2, Comment [8].

In light of the "actual knowledge" requirement for a violation of Rule 4-4.2, knowledge of representation in one matter does not constitute knowledge of representation in a new matter. While the University may be a constant in the three alleged violations, each matter may properly be considered a separate matter for which separate notification of representation is appropriate, and separate communication obligations are recognized.

To determine whether any of the three (3) communications violated the provisions of Rule 4-4.2 the purpose of the rule must be considered, and that purpose must be considered in reference to each communication.

> " [T]wo primary purposes are cited to justify the rule: 1) protection of the interests of clients, who might otherwise fall prey to manipulative opposing counsel; and 2) prevention of attorneys misleading opposing parties with impunity."
>
> *The Prohibition of Communication with Adverse Parties in Civil Negotiations: Protecting Clients or Preventing Solutions*, 14 *Geo. J. Legal Ethics* 1165, 1166 (2001).

Neither of these policy considerations have been implicated by Informant in any of the communications.

Other courts have also opined as to the purpose for the 4.2 prohibition on communications with represented parties.

> "The rule serves to: (1) prevent an attorney from circumventing opposing counsel in order to obtain statements from the adversary; (2) to preserve the integrity of the attorney-client relationship; (3) to prevent the inadvertent disclosure of privileged information; and (4) to facilitate settlement by involving lawyers in the negotiation process. *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y.1990) (discussing Disciplinary Rule 7–104(A)(1) of the New York Code of Professional Responsibility); see also *Valassis v. Samelson*, 143 F.R.D. 118, 120 (E.D.Mich.1992) (discussing the purpose of Rule 4.2). "

Smith v. Kalamazoo Ophthalmology, 322 F.Supp.2d 883, 888 (W.D. Mich. 2004).

§ 4.2 - Communication with Person Represented by Counsel, Ann. Mod. Rules Prof. Cond. § 4.2

Here, none of Mr. Dobson's communications were couched in a way to obtain any statement from an adversary. Similarly, no disclosure of privileged information was sought, requested or contemplated by the communications. At no time did he attempt or even suggest that any attorney-client relationship be terminated or altered in any way. Finally, none of the communications could even remotely be considered settlement negotiations. Thus, none of the identified purposes of the rule have been triggered.

In determining the propriety of communication with an allegedly represented party, the court in *S.E.C. v. Lines*, 669 F.Supp.2d 460, 464 (S.D.N.Y. 2009), clearly recognized that:

> "An organization is not necessarily "represented," however, simply because it has general counsel; it must have an attorney-client relationship with respect to the matter at issue."

A similar blanket representation ban was recognized by the court Iowa court in *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 913 F. Supp. 1306, 1317 (N.D. Iowa 1996):

> "This court agrees with these rejections of "automatic representation" of all employees, and will not assume that all employees of Terra are represented by Terra's counsel unless they fall within a category of employees who may reasonably be held to be automatically represented or have specifically agreed to be represented by Terra's counsel. The Carter–Herman and Brown decisions are correct that an employer cannot unilaterally create or impose representation of employees by corporate counsel. Such an "automatic representation" rule would serve no useful purpose, but would instead impede the course of investigation leading to or following the filing of a lawsuit."

The Virginia Bar has recognized that under Rule 4.2, an attorney need not assume representation where none has been specified.

> "Accordingly, unless the plaintiff's lawyer is aware that the defendant/insured's lawyer also represents the insurer, the plaintiff's lawyer may communicate with the insurance adjuster or other employees of the insurer without consent from the defendant/insured's lawyer. LEOs 550, 687, 1169, and 1524 are overruled to the extent that they state or imply that the lawyer for the defendant/insured always represents the insurer as well, thereby requiring plaintiff's lawyer to seek the insured's lawyer's consent before communicating with the insurance adjuster."
>
> Va. Ethics Op. 1863 (September 26, 2012).

Mr. Sklansky took, depending on the occasion, inconsistent positions stating the Office of General Counsel represented the university on "all legal matters" (L.F. 420, Ex. 6) or "this matter." (L.F. 405, Ex. 20).

In resolving a motion to disqualify counsel based on an ex parte communication with the represented party, the court in *Curanovic v. Cordone*, 140 A.D.3d 823, 33 N.Y.S.3d 409 (N.Y. App. Div. 2016), reasoned that the fact that the in-person conversation did not involve any confidential information, but rather involved matter which would have been known to all parties played a pivotal role in the court's determination that no improper conduct had occurred.

Much the same could be stated about the communications after the in –house attorney became unresponsive. The communication involved matters known to both parties and was not offered for the purpose of soliciting any confidential communications.

See also *Spencer v. Steinman*, 179 F.R.D. 484, 491 (E.D.Pa.1998); *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F.Supp. 723, 728 (N.D.Ill.1996).

In many civil contexts, a simple communication for settlement purposes is not considered unethical in the absence of deceit, defamation or solicitation by counsel. See *Sturr v. State Bar of California*, 338 P.2d 897 (Cal. 1959); *In the Matter of Syfert*, 550 N.E.2d 1306 (Ind. 1990); *Kentucky Bar Asso. v. De Camillis*, 547 S.W.2d 446, 447 (Ky. 1977); *In re Frith*, 233 S.W.2d 707, 713 (Mo. 1950); *In re Kent*, 187 A.2d 718, 719 (N.J. 1963); *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 250-251 (Tx. App. 1999).

Notice is not prohibited communication. Mr. Dobson's letters were "notice" communications. The provisions of Rule 4.2 implicitly recognize that not all written interactions constitute a violation of Rule 4.2. This fact was also recognized by the Indiana Bar in determining whether or not notice, as required under the terms of a contract amounted to an ethical violation when it was provided to a client known to be represented by counsel. The Indiana State Bar Association, recognized that certain notices need not trigger the restrictions of Rule 4.2

> "Nevertheless a notice given strictly under the terms of a contract or other agreement existing prior to the dispute at hand may avoid criticism under Rule 4.2 if it does not amount to a 'communication.'
>
> In respect to Rule 4.2 the Committee believes that so long as a written or oral notice does no more than announce the position, intention or prospective behavior of a party, as clearly contemplated by an agreement which predated the matter in dispute, such a notice is not a "communication" within the meaning of Rule 4.2."
>
> Opinion No. 1 of 2003, Res Gestae, May 2003, at 12, 14 (IN. Bar 2003).

While the letter of September 25, 2015 to Dr. Chole did not involve a contractual obligation, it did nothing more than place the recipient on notice of the need to protect the employee's privacy interests. It did not solicit protected information, denigrate opposing counsel or seek to usurp the attorney-client relationship.

The Missouri courts have clearly recognized and applied an objective standard in determining whether or not an attorneys' conduct constituted an ethical violation of the Rules of Professional Conduct.

> "*In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991), rejected a subjective standard. *Westfall* held that an objective standard applies, under which the finding of a violation depends "on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Id.* at 837, quoting *In Re Graham*, 453 N.W.2d 313, 322, cert. denied sub nom., *Graham v. Wernz*, 498 U.S. 820, 111 S.Ct. 67, 112 L.Ed.2d 41 (1990)."
>
> *In re Madison*, 282 S.W.3d 350, 353 (Mo. 2009).

And more recently, the court in *In re Gardner*, 565 S.W.3d 670, 677 (Mo. 2019), recognized the importance of considering all the facts and circumstances of the alleged misconduct, and reaffirmed the objective approach set forth in *Madison.*

> "[T]his Court looks at the individual facts and "considers the ethical duty violated, the attorney's mental state, the extent of actual or potential injury caused by the attorney's misconduct, and any aggravating or mitigating factors." *In re McMillin*, 521 S.W.3d 604, 610 (Mo. banc 2017). This Court looks for guidance from the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards) and applies those standards and its prior cases to those facts. *In re Madison*, 282 S.W.3d 350, 360 (Mo. banc 2009)."
>
> *In re Gardner*, 565 S.W.3d 670, 677 (Mo. 2019).

CONCLUSION

Mr. Dobson understands that the disciplinary hearing panel's unanimous findings and recommendation that the Information be dismissed is reviewed de novo. As Respondent herein, Mr. Dobson only requests that this Court, after reviewing the careful, objective and thorough considerations given to this important matter by the panel, follow the recommendations made unanimously by the panel and dismiss the Information. Such dismissal shall protect the honor and reputation of a highly-respected and professionally competent St. Louis attorney and end this difficult ordeal for him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties electronically through the Courts' electronic filing system, on this 9th day of May, 2019, to all parties of record.

/s/Maurice B. Graham

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 Informant and Informant'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 10,525 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

/s/Maurice B. Graham