IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
CARL E. SMITH,	**)**	**Supreme Court #SC91696**
	)	
Respondent.	**)**	

INFORMANT'S REPLY BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

NANCY RIPPERGER #40627
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
(573) 635-2240 fax
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH MADE NUMEROUS FALSE STATEMENTS ABOUT JUDGES AND PUBLIC LEGAL OFFICERS WITH RECKLESS DISREGARD AS TO THEIR TRUTH OR FALSITY.

In re Chmura, 626 N.W.2d 876 (Mich. 2001)

In re Sandlin, 12 F.3d 861, 865 (9th Cir. 1993)

Anthony v. Virginia State Bar, 621 S.E.2d 121 (Va. 2005)

In re Surrick, 338 F.3d 224 (3rd Cir. 2003)

Rule 4-8.2(a)

Rule 4-8.4(d)

Rule 55.03(c)

POINT RELIED ON

II.

THIS COURT SHOULD DISBAR MR. SMITH BECAUSE DISBARMENT IS APPROPRIATE FOR A LAWYER WHO USES FALSE STATEMENTS FOR PERSONAL GAIN AND BECAUSE THERE ARE AGGRAVATING FACTORS WHICH SUGGEST THAT MR. SMITH SHOULD RECEIVE THE MOST SEVERE DISCIPLINE.

People v. Small, 962 P.2d 258 (Co. 1998)

In re Madison, 282 S.W.3d 350 (Mo. banc. 2009)

Rule 4-8.2(a)

Rule 5.225(a)

ABA Standards for Imposing Lawyer Sanctions

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH MADE NUMEROUS FALSE STATEMENTS ABOUT JUDGES AND PUBLIC LEGAL OFFICERS WITH RECKLESS DISREGARD AS TO THEIR TRUTH OR FALSITY.

Informant will reply to the arguments raised in Mr. Smith's Points Relied On I, II, III and a portion of IV under Informant's Point Relied On I. In Informant's judgment, the issues raised by Mr. Smith in these Points best correspond to whether Mr. Smith violated Rule 4-8.2(a) addressed in Informant's Point Relied On I.

Mr. Smith asserts that he should not be disciplined for his actions because he was engaging in protected political speech. He then cites to *In re Chmura*, 626 N.W.2d 876 (Mich. 2001) (*Chmura II*), for support of his argument. Mr. Smith states that the Michigan Supreme Court declined to discipline an attorney for speech made during a judicial campaign because the Court found that the speech was "political speech." Resp.'s Br. p. 37. While it is true that the Michigan Court did not discipline the attorney, the Court did not forbid all restrictions on political speech. Rather the Court declined to discipline the attorney because it found that the attorney's statements were either literally true, substantially true despite some inaccuracies, or communicated mere rhetorical hyperbole. *Id.* at 896-97. While prohibitions on political speech do require strict

scrutiny, an attorney can be disciplined for political speech when the attorney knowingly or with reckless disregard makes false statements about judges or public legal officers. *In re Chmura*¸608 N.W.2d 31, 44 (Mich. 2000) (*Chmura I).* This is the very conduct Mr. Smith has been charged with committing.

Mr. Smith next argues that he cannot be disciplined because Informant failed to establish actual malice by "clear and convincing evidence." To buttress his argument, Mr. Smith cites to *First National Bank of St. Louis v. Ricon,* 311 S.W.3d 857 (Mo. App. E.D. 2010); *Bugg v. Vanhooser Holsen & Eftink,* 152 S.W.3d 373, 377 (Mo. App. W.D. 2005); and *Doe v. TCI Cablevision,* ED 78785 (Mo. App. E.D. 2002). Resp.'s Br. p. 40.

Missouri law does not dictate that Informant must establish actual malice by "clear and convincing evidence." First, the *Doe* opinion is an unpublished opinion.[1] As such, it is neither binding nor persuasive precedent. *Craft v. Philip Morris Cos.,* 190 S.W.3d 368, 376 (Mo. App. E.D. 2005). In addition, in all three cases the Court's statements were mere dicta rather than a direct ruling on the issue. *Rowden v. Amick*¸ 446 S.W.2d 849, 857 (Mo. App. 1969), appears to be the only direct ruling on the issue and it holds that in a defamation case the public official's burden of proof regarding malice is by a "preponderance of the evidence."

Moreover, this is not a defamation case but an attorney discipline case. In Missouri, professional misconduct by an attorney is established by a preponderance of

[1] This Court accepted transfer of the case. *Doe,* 110 S.W.3d 363 (Mo. banc 2003). This Court did not reach the issue of the burden of proof in defamation cases.

the evidence. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). In *In re Sandlin*, 12 F.3d 861, 865 (9th Cir. 1993), the Ninth Circuit noted that while the standard for determining malice in defamation cases was "clear and convincing evidence", a lesser standard was appropriate in attorney discipline cases. The Court noted "as officers of the court attorneys do not stand in the shoes of ordinary citizens" and "the interests in protecting the public, maintaining confidence and preserving the integrity of the legal profession" weigh heavily in the matter. This Court should apply the "preponderance of the evidence" standard to this case.

Mr. Smith asserts that this Court should use a subjective standard to determine whether he acted with actual malice. Resp.'s Br. p. 42. As discussed more fully in Informant's Brief, Informant advocates that this Court retain the objective standard set forth in *In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991).

Mr. Smith states that he did not act with actual malice because the statements he included with his pleadings were affidavits and the affiants had sworn to tell the truth. Resp.'s Br. pp. 43-46. He asserts that the affiants could have testified at a criminal trial and their testimony would have supported a criminal conviction. This fact is not relevant in determining whether Mr. Smith acted with reckless disregard. If affiants had testified at a criminal trial they would have been subject to cross-examination, the trier of fact would have had the opportunity to assess their credibility, and would have considered their testimony along with other evidence presented at the trial. Mr. Smith attached the affidavits to court pleadings and provided copies to the media. He presented the statements contained in the affidavits both to the court and to the media as "facts" rather

than unsubstantiated allegations in which the trier of fact should determine the truthfulness.

Mr. Smith goes on to note that Ms. Brayfield and Ms. Calvert's statements would have supported the issuance of a probable cause search warrant. Mr. Smith is incorrect. Resp.'s Br. p. 45. When a search warrant is sought upon information obtained from a confidential informant, the government must show under the totality of circumstances probable cause supports the issuance of a warrant. *Illinois v. Gates*, 462 U.S. 213 (U.S. 1983). The court's inquiry encompasses several factors, including: (1) the extent to which the police have corroborated the informant's statements; (2) the degree to which the informant has acquired knowledge of the events through firsthand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and the police officer's application for the search warrant. *U.S. v. Sims*, 551 F.3d 640, 644 (7th Cir. 2008). Also relevant to the analysis is the mental stability of the informant, the informant's criminal background and any animus the informant may have had against the defendant. *U.S. v. Stout*, 641 F. Supp. 1074 (N.D. Cal. 1986); *U.S. v. Granger*, 596 F. Supp. 665 (W.D. Wis. 1984)*; U.S. v. Stewart*, 337 F.3d 103 (1st Cir. 2003).

Mr. Smith did not attempt to verify or corroborate any of the allegations in the affidavits. **App. 144** (Tr. 506). Ms. Brayfield and Ms. Calvert's affidavits lacked detail. **App. 221-24** (Ex. 45). Ms. Calvert did not state that she had personal knowledge of the events set forth in the affidavit. Most of the allegations concerned events that allegedly occurred many years ago. Ms. Brayfield and Mr. Jarrett showed personal animosity against individuals named in their affidavits. **App. 84** (Tr. 269); **119** (Tr. 408). Ms.

Brayfield had an extensive criminal history[2] and Mr. Jarrett showed signs of mental instability. **App. 59 (**Tr. 174); **78** (Tr. 243-44); **92** (Tr. 301-02); **98-101** (Tr. 325-37); **108-09** (Tr. 366-67). Accordingly, Mr. Jarrett, Ms. Brayfield and Ms. Calvert's statements would not have provided sufficient grounds for the issuance of a search warrant.

Mr. Smith contends that this Court cannot discipline him unless his actions had an impact on the administration of justice.[3] Resp.'s Br. pp. 48-53. He then states that Informant did not plead or prove that his actions affected the administration of justice and, consequently, his due process rights have been violated. Resp.'s Br. pp. 48-59.

The seminal decision regarding the applicability of the due process clause to lawyer disciplinary proceedings is *In re Ruffalo,* 390 U.S. 544 (1968). In *Ruffalo,* the attorney had been disbarred on charges unrelated to what was pled in the state's charging

---

[2] Although no evidence was presented at trial on the issue, Mr. Smith states in his Brief that Ms. Calvert also has a criminal record. Resp.'s Br. 45.

[3] Mr. Smith also asserts that Informant pled this case as a violation of Rule 4-8.2(a) instead of Rule 4-8.4(d) (conduct prejudicial to the administration of justice) in an attempt to avoid the First Amendment Freedom of Speech issues. Resp.'s Br. 48-59. Mr. Smith is mistaken in his assertion. Informant pled this case as a violation of Rule 4-8.2(a) because the "facts" of this case were on point with the elements of Rule 4-8.2(a). Rule 4-8.4(d) is a catchall for conduct that falls outside the parameters of other rules and generally is not plead when there is a specific rule on point.

documents. The United States Supreme Court found that in lawyer disciplinary proceedings a lawyer is entitled to procedural due process, and that due process includes fair notice of the charges sufficient to inform and provide a meaningful opportunity for explanation and defense. Decisions subsequent to *Ruffalo* have refined the concept of due process as it applies to lawyer disciplinary hearings and have held that there is no stringent or technical requirements in setting forth allegations or descriptions of alleged offenses. Due process is met even though specific conduct or specific rule violations are not alleged in the original charging document if the conduct or rule violation is related to or is within the scope of the conduct and rule violations specifically charged. *See Florida Bar v. Fredericks,* 731 So.2d 1249, 1253-1254 (Fla. 1999) (due process rights met when attorney charged with affirmative misrepresentations regarding nonexistent lawsuit and disciplined also for failure to act with reasonable diligence and provide adequate communication). Thus, in order to meet Mr. Smith's due process rights Informant did not have to specifically plead that Mr. Smith's actions interfered with the administration of justice.

Mr. Smith goes on to assert that in order to show that Mr. Smith's actions interfered with the administration of justice, Informant was required to present evidence that Mr. Smith's actions: (1) caused someone to lose an election, (2) damaged a business, (3) played a role in the governor failing to appoint Judge Moody to an appellate position,

(4) embarrassed the tribunal,[4] or (5) prevented the tribunal from ruling in some manner. Resp.'s Br. p. 54. Mr. Smith cites to *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) for his assertion. In *Gentile*, The United States Supreme Court held that an attorney's right to free speech could be "extremely circumscribed" in the courtroom and outside the courtroom when related to pending cases. The United States Supreme Court went on to explain the limitations on free speech are based upon a lawyer's obligation to abstain from public debate that will obstruct the administration of justice. The Court held that the appropriate test for balancing a lawyer's free speech rights against the restriction imposed by the Rules of Professional Conduct is whether the conduct in question creates a "substantial likelihood of material prejudice to the administration of justice." *Id.* at 1074-75.

It was not necessary for Informant to present evidence that Mr. Smith's actions prejudiced the outcome of any of the cases in which he filed the pleadings. In *Anthony v. Virginia State Bar*, 621 S.E.2d 121 (Va. 2005), the Virginia Supreme Court considered whether an attorney who had recklessly made numerous false statements about judges in pleadings could be disciplined. The attorney alleged his conduct was protected by the First Amendment, citing to *Gentile.* The Court noted:

> Judges are no more immune from criticism in the public forum than are any other public office-holders, although their ability to reply to it is

[4] There was testimony presented by Informant that Mr. Smith's statements embarrassed the judges and prosecutors in the circuit.

> extremely limited. A judge's errors are subject to correction on appeal, and judicial misconduct is subject to discipline by independent bodies created by statute. Judges are subject to removal or impeachment for wrongdoing pursuant to constitutional provisions, and they are responsible for violations of the law as are all other citizens. The judicial branch of government, however, is uniquely dependent upon the trust of the people for the effective performance of its work. It commands no armies and does not control the public purse. It is especially vulnerable to unfounded attacks that undermine public confidence in its integrity. Reckless attacks by lawyers are especially damaging, for the reasons discussed above.
>
> We hold that a derogatory statement concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity, tends to diminish the public perception of the qualifications or integrity of the judge. Such a statement creates a substantial likelihood of material prejudice to the administration of justice **as a matter of law** and is not, therefore, constitutionally protected speech.

Id. at 126-27 (bolding added). Thus, derogatory statements concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity creates, **per se**, a substantial likelihood of material prejudice to the administration of justice.

Mr. Smith contends that Rule 4-8.2(a) is void for vagueness or overbroad because it does not require the statements made against judges to be false. Resp.'s

Br. pp. 60-63. Mr. Smith then cites to *Chmura I,* 608 N.W.2d 31, to support his argument. While the plain language of Rule 4-8.2(a) does not require the statement to be false, this Court does not need to strike down Rule 4-8.2(a). Rather, this Court should limit Rule 4-8.2(a) to false statements based upon the holding in *Chmura I.* In *Chmura I,* a judge challenged the constitutional validity of Judicial Canon 7 (B)(1)(d). The canon provided that a candidate for judicial office should not use or participate in any type of public communication that the candidate knows or reasonably should know is false, fraudulent or misleading. The Court found that the canon chilled debate regarding the qualifications of a candidate as it applied to statements other than false statements, i.e. factual omissions. Even though the Court found the canon overbroad **it did not strike it down**. Rather it narrowed the canon to prohibit a judicial candidate from knowingly or recklessly using or participating in the use of any form of public communication that is false. 608 N.W.2d at 541-45.

Mr. Smith complains that it would violate his due process rights if this Court found that the burden of persuasion rested with him after Informant had established a prima facie case, as he had not known of the requirement at the time he presented his case. Resp.'s Br. p. 68. Mr. Smith's arguments are off the mark. In *In re Surrick*, 338 F.3d 224 (3rd Cir. 2003), this very issue was before the Court. The district court had found that once disciplinary counsel had made a prima facie case of false allegations, the burden shifted to the attorney to demonstrate that the allegations were true or that the attorney had an objectively reasonable belief that

the allegations were true, based upon a reasonably diligent inquiry. *Id.* at 235. The Third Circuit found that the district court's holding was in no way unexpected or indefensible as it was well-established that every court pleading containing an averment of fact is required to state that the assertion is true based upon the pleader's personal knowledge, information or belief and that such averments must be supported by oath or affirmation made subject to certain penalties.

Similarly, Missouri Supreme Court Rule 55.03(c) provides that when presenting a claim or argument in a pleading an attorney is certifying that to the best of the attorney's knowledge, belief or information, **formed after an inquiry reasonable under the circumstances,** that the claim, or argument has evidentiary support (bolding added). Like the attorney in *Surrick,* Mr. Smith already had the burden of persuasion when he signed and filed the pleadings in question, as he certified that the claim had merit. Thus, his due process rights will not be violated if this Court finds that after Informant established a prima facie case, the burden shifted to Mr. Smith to prove that his accusations were true or that, following a reasonably diligent inquiry, he formed a reasonable belief that the accusations were true.

II.

THIS COURT SHOULD DISBAR MR. SMITH BECAUSE DISBARMENT IS APPROPRIATE FOR A LAWYER WHO USES FALSE STATEMENTS FOR PERSONAL GAIN AND BECAUSE THERE ARE AGGRAVATING FACTORS WHICH SUGGEST THAT MR. SMITH SHOULD RECEIVE THE MOST SEVERE DISCIPLINE.

Mr. Smith asserts that he should not be disbarred because this case is not a case where he violated Rule 4-8.2(a) but rather is a conflict of interest case deserving a lesser level of discipline. More specifically, Mr. Smith contends that he allowed Mr. Jarrett's interests to be absorbed into his own. Resp.'s Br. pp. 64-77. Mr. Smith's argument is ludicrous. This is not a conflict of interest case. It is a case about an attorney making false statements against judges and prosecutors with reckless disregard as to the truth or falsity of the statements. Distributing the voter information packet was not done as part of his representation of Mr. Jarrett and the statements Mr. Smith made in his Motion to Quash the Subpoena and in his petition for writ of prohibition were made after Mr. Smith was no longer representing Mr. Jarrett.

Even assuming *arguendo* this was a conflict of interest case, the ABA Standards For Imposing Lawyer Sanctions ("ABA Standards") support disbarment. ABA Standard 4.31 provides that absent aggravating or mitigating circumstances, disbarment is generally appropriate when a lawyer, without the informed consent of the client, engages

in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client. Mr. Smith knew that his interest in smearing the good name of the local judges and prosecutors were adverse to Mr. Jarrett's interest.

Next, Mr. Smith argues that he should not be disbarred because he did not act "knowingly". Rather he asserts that he merely acted "negligently" because the DHP Panel found that he acted with "reckless disregard" as to the truth or falsity of the allegations he made against the local judges and prosecutors.

Mr. Smith is mixing apples and oranges. The substantive rule at issue in this case is Rule 4-8.2(a). It provides that a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or public legal officer. Under this substantive rule, Informant has to show that the attorney knew either the statements in question were false or that the attorney acted in reckless disregard as to the truth or falsity of the statements. The evidence presented at hearing showed that Mr. Smith acted in reckless disregard of the truth or falsity of the statements because he did nothing to independently verify any the allegations in the affidavits. Thus, Informant proved that Mr. Smith violated Rule 4-8.2(a).

The ABA Standards address the appropriate level of discipline for a violation of the Rules of Professional Conduct. ABA Standard 6.2 provides that disbarment or suspension is generally appropriate when a lawyer **knowingly** violates a court order or rule. While Mr. Smith may not have known whether the statements in question were

false he clearly **knew** that he was acting with reckless disregard when he used the affidavits in pleadings and distributed them to the press, as he had done nothing to independently verify any of the allegations in the affidavits. Thus, his actions were knowing when applied to the ABA Standards for discipline. *See People v. Small,* 962 P.2d 258 (Co. 1998) (an attorney's conduct which is reckless is deemed "knowing" under the ABA scienter standards for determining the level of discipline).

Mr. Smith contends that this Court should impose a stayed suspension with probation against his license. Informant adamantly opposes Mr. Smith's recommendation. Rule 5.225(a) provides that a stayed suspension with probation is only appropriate when the attorney has not committed an act warranting disbarment. As discussed in Informant's brief, the ABA Standards dictate that Mr. Smith should be disbarred. In addition, to impose a stayed suspension against Mr. Smith would be very inconsistent with the discipline imposed in *In re Madison*, 282 S.W.3d 350 (Mo. banc. 2009). In *Madison*¸ this Court suspended the attorney. Mr. Smith's actions were much more egregious than Mr. Madison's. Mr. Madison's statements resulted from his poor anger management skills. Unlike Mr. Madison, Mr. Smith's actions were designed to help himself and his friend in their campaigns and to intimidate the judge and prosecutor when he feared he might be indicted for his actions.

CONCLUSION

For the reasons set forth above and in Informant's Brief, this Court should:

(a) Find that Mr. Smith violated Rule 4-8.2(a) when he:

1. distributed the "voter information packet" with Mr. Jarrett's attached affidavit;
2. filed the Motion to Disqualify Jason MacPherson with the Jarrett affidavit attached and incorporated;
3. filed the Motion to Disqualify Chris Wade with the Pam Brayfield and Janice Calvert affidavits attached and incorporated; and
4. filed a Petition for Writ of Prohibition with the Court of Appeals accusing members of the judicial system and prosecutors of the 44th Circuit of calling a grand jury as a conspiracy to threaten him and imprison innocent people; and

(b) Disbar Mr. Smith.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

By: _____
Nancy L. Ripperger #40627
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
(573) 635-2240 fax
Nancy.Ripperger@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July 2011, two copies of Informant's Reply Brief and a CD containing the Reply Brief in Microsoft Word format have been sent via First Class mail to:

Daniel Brogdon
BRUCE GALLOWAY, LLC
107 North 2nd Street
Ozark, MO 65721

_____
Nancy L. Ripperger

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 4,176 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the disk for viruses and that it is virus free.

_____
Nancy L. Ripperger