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STATEMENT OF JURISDICTION

In this original disciplinary proceeding, Respondent, attorney Carl Smith, agrees with the jurisdictional statement of Informant, the Office of Chief Disciplinary Counsel, that this Court holds jurisdiction over attorney discipline matters pursuant to Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, common law, and Section 484.040, RMSo 2000.

COUNTER-STATEMENT OF FACTS

This Counter-Statement of Facts will restate some of the essential facts relayed by counsel for the Office of Chief Disciplinary Counsel ("Informant" or "OCDC") in its brief. However, this is not done to unreasonably repeat the facts of the case, but to clarify some statements made in Informant's Statement of Facts. Further, the Counter-Statement of Facts will be organized somewhat differently than Informant's Statement of Facts.[1]

1. Carl Smith

At the center of this disciplinary action is attorney Carl Smith ("Respondent"). Respondent has practiced civil and criminal law since 1987. (Transcript ("Tr.") 418). As an attorney, Respondent served as a member of the Skyline School Board, and then served a four-year term (1994-1998) as the Douglas County Prosecutor. (Tr. 418). Prior to Respondent's career in the practice of law, he served as a Los Angeles policeman for seven years, during which time he executed various responsibilities, such as criminal investigations, warrant work, and work in the court and jail system of Los Angeles County. (Tr. 419).

[1]Respondent's Counter-Statement of Facts will include no discussion of Count I of the Information, only because the Disciplinary Panel found insufficient evidence to find Respondent guilty of misconduct as to Count I and Informant is requesting no relief as to that count. (Informant's Brief ("Inf. Br.") at 8). Respondent joins Informant in requesting that this Court dismiss Count I of the Information.

Throughout his career, Respondent learned that law enforcement and prosecutors often rely on confidential informants to prosecute drug cases. (Tr. 419-20). Often, these informants have prior convictions. (Tr. 419-20). As prosecutor, Respondent often had to rely on drug users and drug dealers to catch drug users and drug dealers, finding that generally only drug users were acquainted with the drug culture well enough to possess reliable information. (Tr. 420). Other prosecutors did this as well. (Tr. 421).

2. Forty-Fourth Circuit

a. Judge John Moody

Judge John Moody serves as the Circuit Judge for the 44th Circuit. (Tr. 28).He has held this position since 1998. **(**Tr. 28). He also served as the Wright County Associate Circuit Judge for twelve years. (Tr. 28).

b. Judge Craig Carter

Judge Craig Carter serves as the Associate Circuit Judge for Douglas County. (Tr. 351). He has held this position since 2005. (Tr. 351-52).He was originally appointed by Governor Matt Blunt after Judge Roger Wall resigned. (Tr. 351).He was elected to the position in 2006.

c. The MacPhersons

Cynthia MacPherson has a private law practice in Mountain Grove, Missouri. (Tr. 205). She practices with her son, Jason MacPherson, who also testified at the disciplinary hearing (Tr. 205). She previously served as the Prosecutor for Audrain and Wright Counties. (Tr. 205). Ms. MacPherson is well-acquainted with Tom Cline. (Tr. 206).

Jason MacPherson has practiced law since 1996 and is the Wright County Prosecutor, along with maintaining a private practice. (Tr. 305).He took office in 2007.He also serves as the Douglas County Assistant Prosecutor and handles cases in which the elected Douglas County Prosecutor, Chris Wade, has a conflict and handles the child support cases for Douglas County. (Tr. 249-50).

d. The Wades

Dan Wade has practiced law in Ava, Missouri since 1974. (Tr. 230).He currently practices with his son, Chris Wade, and has a general civil practice. (Tr. 230). Mr. Wade has served two terms as the Douglas County Prosecutor. (Tr. 231).

Chris Wade has practiced law since 2000. (Tr. 249).He has served as the Douglas County Prosecutor since 2007 and is the Wright County Assistant Prosecutor, along with maintaining a private practice. As the Wright County Assistant Prosecutor, he handles matter in which the elected Wright County Prosecutor, Jason MacPherson, has a conflict and handles the child support cases for Wright County. (Tr. 249-50).

e. Tom Cline

Tom Cline has served as the Ozark County Prosecutor since 1989. (Tr. 165). He has a background in law enforcement and public administration. (Tr. 166-67).Mr. Cline has served as a criminal investigator and child support administrator for both Audrain and Wright Counties, a deputy sheriff for Audrain County and the public works director for Mountain Grove, Missouri. (Tr. 166-67). He is a long-time friend of local attorneys Cynthia and Jason MacPherson. (Tr. 166-69).He previously worked for Cynthia MacPherson when she served as the prosecutor for Audrain and Wright Counties. (Tr.

166-67). For a number of years he played in a band with Jason MacPherson. (Tr. 168-69).

f. Forty-Fourth Circuit Background

The Judiciary and the 44th Circuit Bar got along reasonably well until recent years. (Tr. 29).Problems began developing in the Circuit when the Circuit received a very large grant to implement a drug court. (Tr. 30); (Tr. 118).Disputes arose regarding the appointment of the drug court prosecutors. (Tr. 30); (Tr. 118).The dispute resulted in the local Judiciary and Bar dividing into sides. (Tr. 30); (Tr. 118). Mr. Smith, attorney John Bruffett, attorney Chris Swatosh, and attorney Larry Tyrell, formed an alliance. (Tr. 118).Mr. Smith became very anti-Judge Moody and anti-Dan Wade. (Tr. 353).Mr. Smith's animosity or dislike for Judge Moody and Dan Wade grew to the point that Mr. Smith advised Judge Carter when he was appointed that Judge Moody and the Wades were evil and crooked and that he should not associate with Judge Moody or the Wades. (Tr. 353-54).

g. The Affiants

i. Ron Jarrett

Mr. Ron Jarrett is Tom Cline's former son-in-law. (Tr. 170-71). Mr. Jarrett was married to Tom's daughter, Barbara Cline. (Tr. 170-71).He previously worked as an administrator of a local nursing home. (Tr. 244).Mr. Jarrett is known for telling bizarre, unbelievable stories. (Tr. 243-44); (Tr. 367).These stories include statements that: (a) he has FBI agents assigned to protect him because his work is so secret; (b) Tom Cline tried to run a background check on him once and four federal agents arrived at Mr. Cline's door

within 30 minutes of the background check; (c) a deer chased him up a tree and he had to fight it off with a pocket knife; and, (d) he has two little things sitting on his shoulder, one being bad and the other good, and both things are telling him what to do. (Tr. 173); (Tr. 367-68).Four people that testified at the disciplinary hearing considered it a possibility that Mr. Jarrett is mentally ill. (Tr. 174); (Tr. 243-44); (Tr. 325-37); (Tr. 366-67). Ron Jarrett did not testify at the disciplinary hearing.

ii. Pam Brayfield

As Informant delightfully points out, Pam Brayfield is a convicted felon. (Inf. Br. 11; Tr. 390). Over Respondent's objection, the Panel received a Highway Patrol Criminal History Record shows that she received a twenty-year sentence for the distribution of drugs, a two year sentence for forgery, another two year sentence for forgery, a two year sentence for first degree assault, a four year sentence for receiving stolen property, and a four year sentence for stealing. (Tr. 301-02). She was also charged, but acquitted (because it was self-defense), of manslaughter after she shot and killed her husband at the Cox Medical Center. (Tr. 399-400).

WhenRespondent served as the Douglas County Prosecutor, he prosecuted Ms. Brayfield for forgery charges. (Tr. 390).Judge Moody sentenced her to prison on at least one occasion. (Tr. 45-46). Dan Wade also criminally prosecuted her. (Tr. 233).

At the time Ms. Brayfield provided Respondent with her affidavit, Respondent was representing her in a third party child custody dispute with her daughter-in-law. (Tr. 403). Ms. Brayfield's son, Michael Johnson, was serving time in a federal penitentiary on a drug conviction, and Ms. Brayfield had obtained visitation rights with the

grandchild. (Tr. 234-35); (Tr. 267-68).There were disputes about the visitation with the child's mother. (Tr. 234-35); (Tr. 267-68).

Before Ms. Brayfield provided her affidavit to Respondent, she requested that Chris Wade bring criminal charges against her daughter-in-law for failing to abide by the court ordered visitation schedule. (Tr. 267-69); (Tr. 408).When Mr. Wade instructed Ms. Brayfield that she should address the issue through a family access motion, Ms. Brayfield became upset with Mr. Wade. (Tr. 269); (Tr. 408).

Also, prior to Ms. Brayfield providing the affidavit, Ms. Brayfield became upset with Mr. Wade for failing to file drug charges against the daughter-in-law. Mr. Wade received a probable cause statement from a city police officer wanting to charge Ms. Brayfield's daughter-in-law with possession of marijuana. (Tr. 269-71).The daughter-in-law had reported to police that someone had stolen marijuana out of her car while it was parked at the Ava campus of Drury College. (Tr. 269-70).Under the corpus delicti doctrine, which requires corroborative evidence in order for a confession to be admissible, Mr. Wade did not believe that he could prosecute the daughter-in-law and declined to file charges. (Tr. 271). After Mr. Wade declined to charge the daughter-in-law, Ms. Brayfield sent an e-mail to the President of Drury College and the instructors at the campus accusing Mr. Wade of allowing drug sales to occur on campus. (Tr. 271); (Tr. 409). Ms. Brayfield testified at the disciplinary hearing, discussed more fully below.

iii. Janice Calvert

Janice Calvert provided Respondent with an affidavit. Informant's witnesses testified that they did not know Ms. Calvert. (Tr. 194); (Tr. 213); (Tr. 234). Respondent

did not know Ms. Calvert until she appeared in his office with Pam Brayfield one day and volunteered to provide him with an affidavit. (Ex. 47). Ms. Calvert did not testify at the disciplinary hearing.

3. Voter Information Packet – Jarrett's Affidavit

In the 2006 election, local attorney John Bruffett ran against Judge Moody for the Circuit Judge position. (Tr. 30-31). The then sitting Wright County Prosecutor, Larry Tyrell, ran against Lynette Veenstra for the Wright County Associate Judge position, and the then sitting Douglas County Prosecutor, Chris Swatosh, ran against Craig Carter for the Douglas County Associate Circuit Judge position. (Tr. 30).John Tyrell, Larry Tyrell's son, ran against Jason MacPherson for the Wright County Prosecutor's position and Respondent ran against Chris Wade for the Douglas County Prosecutor's position. (Tr. 30-31).

During June and July 2006, Respondent distributed and had others distribute to voters and the local news media a packet of information ("voter information packet") regarding Circuit Court Judge John Moody. (Tr. 32-33); (Tr. 181-82).An advertisement was also placed in the local newspapers advising readers that they could receive a copy of Respondent's "voter information packet." (Ex. 19). The packet contained, among other things, a handwritten affidavit by Ron Jarrett. Inf. App. 201.

The top of the affidavit provided: "I witnessed the following two acts while Tom Cline's son-in-law." Ten lines of writing were then blacked out and the bottom half of the affidavit provided:

> "Second act; every summer Judge Jacobs + Tom Cline go fishing. I believe this event to be more sinister. App 2003 or 2004 summer I helped Tom Cline clean his boat for the trip with the judge. We were running late and the Judge showed up with something to drink, a couple of poles and a medium sized paper bag. I thought it was sandwiches but as John tossed it to Tom + said this is for you. Tom opened it and I saw quite a large amount of money. Tom raised his head + winked at me + and placed the bag in the cooler. I will attest to say Judge Jacobs passing Tom Cline a large quantity of money. What it was for or why I did not ask."

Having been informed by Ron Jarrett that he mistakenly inserted Judge Jacobs's name and that Jarrett meant to refer only to Judge Moody, Respondent crossed out Judge Jacobs' name and wrote in Judge Moody's name in two different places. (Informant's Appendix ("Inf. App.") 165; 184).

On July 17, 2006, Respondent sent a letter to the Douglas County Fair Board in which he advised that Judge Moody had filed a complaint with the Missouri Bar seeking to have Respondent's law license taken away from him because he had disseminated his "voter information packet." Respondent included the "voter information packet" with his letter. Inf. (App. 202)**.**Respondent stated: "I believe it is my Christian duty, not a choice, especially as an officer of the court system, to make aware to the voters who elect those who control the administration of justice of the same facts of which we in the system are

privy. I have obeyed this duty with many repercussions the most recent of which is this attempt to silence me." (Inf. App. 202).

4. Motion to Disqualify Jason MacPherson

In May 2006, a nursing home employee reported to law enforcement that Mr. Jarrett had sexually assaulted her while she was at work. (Tr. 454-58). Respondent, representing Mr. Jarrett, conducted his own investigation into the matter and began communicating with the Wright County Prosecutor, Larry Tyrell, in an attempt to prevent Mr. Tyrell from filing charges. (Tr. 454-58). This is reflective of a common practice between prosecutors and defense attorneys, to discuss cases prior to filing. (Tr. 455). After his investigation, Mr. Tyrell declined to file charges against Mr. Jarrett. (Tr. 456); (Tr. 320).

Jason MacPherson took office as the Wright County Prosecutor in January 2007. (Tr. 319).Shortly thereafter, he found approximately two to three boxes of files in which no charges had been filed or the former prosecutor, Mr. Larry Tyrell, had declined to file charges. (Tr. 319-20).Mr. MacPherson immediately began to review the files at home each night. (Tr. 320).On February 5, 2007, he charged Mr. Jarrett with one count of felony deviate sexual assault, three counts of misdemeanor sexual misconduct, and one count of misdemeanor third degree sexual assault. (Ex. 33, pp. 11-14). These cases were recently dismissed.[2]

[2]Respondent requests this Court take judicial notice of the dismissal of Wright County case numbers 07W1-CR00017 and 07W1-CR00018.

On March 22, 2007, Respondent filed a motion to disqualify Jason MacPherson as the prosecutor. (Inf. App. 203-11).The motion alleged that Mr. MacPherson should be disqualified due to a conflict of interest resulting from his close personal relationship with Ozark County Prosecutor Tom Cline, Barbara Cline and Mr. Jarrett. (Inf. App. 203-11). Based on Jarrett's Affidavit, the Motion asserted:

1. Mr. MacPherson believed Mr. Jarrett may have previously been involved in a relationship with Mr. MacPherson's wife;
2. Mr. MacPherson had observed Mr. Jarrett having sex with Cynthia MacPherson (Jason's mother) at a Blues Festival;
3. Mr. Jarrett had information concerning Mr. MacPherson, Ms. MacPherson, Mr. Cline and Judge Moody's actions and Mr. MacPherson was trying to silence Mr. Jarrett by bringing criminal charges against him;
4. Mr. MacPherson and Barbara Cline were lifelong friends; and
5. Mr. Jarrett had witnessed Tom Cline and his adopted daughter, Rose Pursell, having sexual intercourse.

(Inf. App. 203-11).

On July 26, 2007, Judge Henry, sitting under special appointment, held a hearing on the Motion to Disqualify Jason MacPherson in Douglas County. (Ex. 64, p. 427).

At the hearing, Mr. Jarrett testified:

1. He was at the Blues Festival in Mountain Home, Arkansas in late summer of 2003 and it was very hot. Inf. App. 830-31;

2. Tom Cline and Jason MacPherson's band was the warm up band for Anthony Gomes. Inf. App. 830;
3. After talking with Lori MacPherson, Jason's wife, Jason told me to stay away from his wife. Inf. App. 830;
4. He and Cynthia MacPherson went outside to cool off. Inf. App. 831;
5. He had sex with Cynthia MacPherson in her Cadillac Escalade and Jason came to the vehicle and discovered what had occurred. Inf. App. 831; and
6. Mr. Jarrett observed Tom Cline and his adopted daughter, Rose Pursell, having sex upstairs in view of Rose Pursell's daughter/Tom Cline's granddaughter while Rose Pursell's husband was asleep in another room. Inf. App. 832-33.

At the hearing, Cynthia MacPherson testified that:

1. The Blues Festival in Mountain Home, Arkansas occurred each year in January and was called the Winter Blast of Blues. Inf. App. 843;
2. She had not seen Barbara Cline in over a decade and she had never "laid eyes" on Mr. Jarrett prior to seeing him at the defense table beside Mr. Smith. Inf. App. 843; and
3. She did not believe Lori MacPherson, Jason's wife, had ever attended the Blues Festival in Mountain Home, except possibly once in 2001 for a few minutes when her two year old son performed on stage. Inf. App. 843.

At the hearing, Tom Cline:

1. denied receiving a bag of money from Judge Moody while on a fishing trip;
2. denied having sexual intercourse with his daughter Rose; and
3. played an August 16, 2006, taped conversation with Mr. Jarrett in which Mr. Jarrett admitted the allegations were false. Inf. App. 846.

After Jarrett testified at the hearing, Ms. MacPherson was very upset about Mr. Jarrett's testimony. (Tr. 211-12).She, along with Tom Cline, contacted the Douglas County Prosecutor Chris Wade and urged him to bring perjury charges against Mr. Jarrett. (Tr. 212); (Tr. 252).Ms. MacPherson also called the Highway Patrol and requested that the Highway Patrol investigate the matter. (Tr. 212).A Highway Patrol officer came to the area, interviewed several people, and wrote up a probable cause statement, which the patrol officer submitted to Mr. Wade. (Tr. 211-12).

On September 27, 2007, Chris Wade charged Mr. Jarrett with three counts of perjury. (Inf. App. 170-71; 194). Jason MacPherson knew that he was a potential witness in Mr. Jarrett's perjury case. (Tr. 334-35). Knowing that he therefore had a conflict of interest regarding the Jarrett sexual assault charges, Mr. MacPherson withdrew from the sexual assault case and requested the appointment of a special prosecutor. (Tr. 334-35).

5. Motion to Disqualify Chris Wade

On April 3, 2008, Respondent filed a Motion to Disqualify Prosecuting Attorney Chris Wade in the perjury case. (Inf. App. 212-61)**.** Respondent alleged that Mr. Wade should be disqualified because he had committed criminal offenses prior to and after

beginning his tenure as the Douglas County Prosecutor and he had a personal interest in the matter. As part of the motion, Respondent alleged (a) Chris Wade was arrested for driving while intoxicated; (b) Chris Wade had at least one administrative alcohol suspension; (c) Dan Wade, (Chris' father and a former Douglas County prosecutor) purchased marijuana over the phone and had Chris Wade pick up the marijuana for him; and (d) Chris Wade had violated the Federal Gun Control Act of 1968. (Inf. App. 212-61).

Attached to the motion and incorporated by reference were affidavits from Pam Brayfield and Janice Calvert. (Inf. App. 212-61). Ms. Brayfield's affidavit provided:

> "1. In 1995 I went to the Branding Iron in Mtn. Grove to sell methamphetamine. Ernie Speakes set up the meeting. Ernie is currently selling meth in Cabool with Paula Friend (Dunbar). Paula brings the meth to Ernie by weekly [sic] to Cabool (saw transfer of 25 lbs marijuana, 10 lbs. mixed cocaine and meth in September 2006). Paula lives in Texas.
>
> 2. At [sic] Branding Iron was Cynthia MacPherson, John Moody, Janelle Calvert House, Tom Cline, Dan Wade and many other people from Shieks Land & Cattle were there having a private party. I saw Janelle & Cynthia snorting meth off the bathroom counter. Ernie had the dope and made the deal.

3. In 1995 I went with Ernie to sell meth to Tom Cline at Cline's Law Office in Gainesville. Tom brought five glass vials of powdered meth.

4. Dan Wade came to my house in January 2002 to get back the CD's Jeff Wade traded Mike Johnson (my son) for a $40 bag of marijuana.

5. Dan Wade offered (1981) to send me to Brazil like he did for Herman Prock and Barry Barnes for $25,000. Fly on private plane at sea level like he did for them. All to avoid state sentence for distribution of meth."

(Inf. App. 212-61; 262-64)**.**The affidavit is in Respondent's handwriting and is dated May 21, 2007. (Tr. 411). Respondent notarized the affidavit. Inf. App. 212-61**.**Ms. Brayfield asked Respondent to write out the affidavit for her because her arm was injured as a result of a shooting. (Tr. 411).

Ms. Calvert's affidavit provided:

"1. Dan Wade and Chris Wade currently get their marijuana from Guindia Marino (aka Sandy Baker) and Carl Watson.

2. Sandy Baker's daughter, Patty Wallace, sends LSD through the mail from Corvalis, OR to Ava, MO. I have their addresses and one of the letters.

3. Carl Watson's son, Mark Watson, is currently cooking meth.

4. Dennis Porter's marijuana sales in 2006 was $80,000; this was his ½ share; grows it on other peoples' property.

5. David Porter and Mark Watson are currently cooking meth at David's house on P and N Hwy.

6. Dan Wade has currently called Sandy Baker's house in late 2006 on at least 3 occasions trying to buy marijuana. Wade wanted "popcorn buds" not "spears." Dan said he would send his son Chris to pick it up and Chris would come and pick it up.

7. When Tom Cline does a line of meth it's a thin line, but Cynthia MacPherson sucks it up like a vacuum.

8. I was at Danita Porter's in 2004 and David Porte showed up, looked bad, scared. David states that he and 'Dobbs', had been forced to wrap a female body in a rug and dumped over a near hill or they would be killed too. The girl kept demanding dope or 'I'll go to the cops.' Fred (Burgesss Perry) shot her 1x in the face with a revolver, handed the gun to Doy Porter who shot her in the head 2x, then gun back to Fred who shot her in the head 2 more times.

9. Roger Wall has been the closest of friends with all the Porters. Danita says she 'does lines' and drinks moonshine with him 'all the time.'

10. Valerie Hire (Moody) in 2005 sold an '8 ball' of meth to Judge John Moody who lives 2 doors down from Valerie.
11. I met Roger Wall through Pete Metroplis in 1995. I sold 7.5 lbs. total to him in 1995 (last sale November 1995), a lb at a time. I quit him because I became convinced he was a child molester because I saw Roger Wall give 13-15 girls coconut flavored moonshine while they were already drunk. Occurred at Vera Cruz."

Inf. App. 212-61; 262-64**.**The affidavit is in Respondent's handwriting and does not appear to be dated or notarized. Inf. App. 212-61.

There were four other attachments to the motion. One attachment was a 1996 Arrest Report for Chris Wade from Howell County. The second was a Missouri Driver's Record for Chris Wade. The third attachment was a report Respondent made to Informant regarding Chris Wade's handling of drug charges brought against criminal defendant Carl Watson. Inf. App. 212-61. The report alleges that because Chris Wade and Dan Wade buy their drugs from Carl Watson, Chris Wade reduced the charges against Mr. Watson and consented to the return of a confiscated firearm to Mr. Watson in violation of the Federal Gun Control Act of 1968. Inf. App. 212-61**.** The fourth attachment is a Report to Informant and the Commission on Judicial Ethics and Retirement ("Judicial Commission") which alleges that Judge Moody, Dan Wade, Jay Nixon, Assistant Attorney General Ted Bruce, Veronica Casper (Judge Moody's secretary), Roger Wall, and Informant's staff had formed a criminal enterprise and had

violated the criminal racketeering act concerning John Bruffett and Roger Wall's criminal prosecutions. Inf. App. 212-61.

At the perjury trial, during which Mr. Jarrett was represented by other counsel, Judge Moody and Tom Cline both testified that Judge Moody had never given Tom Cline a bag of money on a fishing trip. (Ex. 55, p. 25)**.**Judge Moody also testified that he did not believe he had ever met Ron Jarrett before. (Ex. 55, pp. 16, 25). Ron Jarrett testified that he wanted to apologize to Judge Moody. (Ex. 55, p. 30). He stated what he had actually observed was Judge Moody handing Tom Cline a twelve pack of beer and the change from the purchase on the top of the sack. (Ex. 55, p. 30). However, he also testified that he did believe the other two statements, regarding the alleged sexual relationships, to be true. (Ex. 55, p.30).

Sara Rittman, legal ethics counsel, advised Respondent on June 13, 2007, that when he included affidavits with pleadings he should verify the information if possible before filing the affidavits with the court to ensure the information was accurate. (Tr. 514).

Respondent admits that he did virtually nothing to verify the factual allegations in the Affidavits. (Tr. 504-05); *(Tr. 510). In a letter to counsel for Informant dated April 10, 2008, Respondent took the position that any person who executes a sworn affidavit is to be reasonably believed*[3]*, as the affiant is subject to perjury charges. (Ex. 47).*

[3]Emphasis is added because Informant's Statement of Facts misstates what Respondent actually said. Informant states in its brief that "*It is Respondent's position that any person*

6. Petition for Writ of Prohibition

This Court is well-acquainted with the facts surrounding Respondent's Petition for Writ of Prohibition ("Petition"). On May 11, 2010, this Court decided *In re Smith v. Pace*, 313 S.W.3d 124 (Mo. banc 2010), vacating Respondent's conviction for indirect criminal contempt which arose out of the words Respondent included in the Petition.

7. Disciplinary Hearing

On December 24, 2009, Informant filed a Five Count Information charging Mr. Smith with violating Rules 4-1.4(a)(communication), 4-1.7(b)(conflict of interest), 4-3.3(a)(knowingly making a false statement to tribunal), and 4-8.2(a)(making statement regarding judges that a lawyer knows to be false or with reckless disregard of the truth or falsity of the statement). Inf. App. 159-78.

On February 26, 2010, Mr. Smith filed his Answer to the Information. Inf. App. 179-200.The Advisory Committee then appointed a Disciplinary Hearing Panel ("DHP") to hear the matter. The DHP conducted a hearing on November 15 through 19, 2010. Nancy Ripperger represented Informant. Mr. Smith was present and appeared by counsel Bruce Galloway and Daniel Brogdon. The following exhibits were admitted into evidence at the request of Informant: Exhibits 1-7, 9-10, 14, 16-19, 21-33, 35-36, 38, 42, 44-51, 53, 55-70. The following Exhibits were admitted into evidence at the request of Mr. Smith: A-B and G, I, and J.

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who executes a sworn affidavit should be believed, as the affiant is subject to perjury charges." (Inf. Br. at 11)(citation omitted)(emphasis added)

Informant put on live testimony from Judge John Moody, Judge Lynette Veenstra, Thomas Cline, Cynthia MacPherson, Daniel Wade, Rose Cline-Pursell, Christopher Wade, Jason MacPherson, Judge Craig Carter and Jeffrey Loeberg.

Judge Moody testified that he had only been to the Branding Iron two times in his life. (Tr. 46).One time he had lunch with Cynthia MacPherson and the other time he and his wife went with another couple but he was never there with Tom Cline, Dan Wade or Janelle Calvert House. (Tr. 46-47).He further testified that he did not even know what Sheiks Land & Cattle Company was and that he had never seen anyone snort meth before. (Tr. 47-48).

As far as the allegations in Janice Calvert's affidavit, Judge Moody stated that he does not use or purchase illegal drugs. (Tr. 47-48). He further testified that Ms. Valerie Hire does live in a house on the way to his house, but she has never lived two doors down from his house, and to his knowledge she does not sell drugs. (Tr. 47-48).

Tom Cline testified that he did not know Pam Brayfield, Janice Calvert, or Ernie Speaks and that he has never used or purchased drugs (except when doing undercover work as law enforcement) or seen Cynthia MacPherson use drugs. (Tr. 194). Mr. Cline further testified that the Branding Iron burned and after the building was rebuilt it was used as a Christian Academy. (Tr. 194).He believed it burned around 1986, the year he left town to attend law school, and the restaurant did not exist in 1995. (Tr. 194).

Cynthia MacPherson testified that she did not know either Pam Brayfield or Janice Calvert, and she did not use drugs. (Tr. 213, 215); (Tr. 217). Ms. MacPherson testified that she went to the Branding Iron one-time years ago with Tom Cline but had not been

there with any of the other people set forth in Pam Brayfield's affidavit. (Tr. 214).She also testified that the Branding Iron burned in the 1980s. (Tr. 214). Ms. MacPherson states that her only dealings with Janelle Calvert House were in a murder case in which she was the appointed special prosecutor and Ms. House was defense counsel. (Tr. 214).

Dan Wade testified that he has never seen Cynthia MacPherson use drugs. (Tr. 223).Mr. Wade did testify that there was one instance in 1999, not 2002, where he went to Michael Johnson's house and saw Pam Brayfield. (Tr. 233-34). At that time Mr. Wade's youngest son, Jeff Wade, was in high school and did use drugs. (Tr. 234).One day Mr. Wade received a phone call from someone that his youngest son's truck was parked at Michael Johnson's house, a known drug dealer. (Tr. 234). Mr. Wade immediately went to Mr. Johnson's trailer and walked in the front door. (Tr. 234).His son was sitting on the couch with a friend. (Tr. 234). He told his son and friend to leave and then told Mr. Johnson that if he ever had any dealings with his son, he would "stomp his ass." (Tr. 234).As he turned to leave, he saw Pam Brayfield standing in the door to the expanding room of the trailer. (Tr. 234). He did not speak to Ms. Brayfield and Ms. Brayfield did not speak to him. (Tr. 234).

Mr. Dan Wade testified that he never offered to send Ms. Brayfield anywhere to avoid criminal charges. (Tr. 235). He further testified that in 1981 Mr. Prock was on the lam after Mr. Prock stole $50,000 of uninsured cattle from Mr. Wade and that he wouldn't have helped Mr. Prock get out of the country. (Tr. 235). Mr. Prock was apprehended in 1983 or 1984 in Las Vegas, not outside the country. (Tr. 235).

Mr. Dan Wade does not know Janice Calvert. (Tr. 234).He testified that that he has never used or purchased marijuana and that he does not even know what "popcorn buds" are. (Tr. 237).

Chris Wade testified that he did not have a DWI conviction or multiple DWI's. (Tr. 254).Rather, when he was 22 years old he was arrested for DWI but received a suspended imposition of sentence. (Tr. 254-57).The Department of Revenue Driver's Record shows a suspension of his license as the same incident as his July 1996 arrest in Howell County. He further testified that he had never purchased or hauled marijuana for anyone and that neither he nor his father used drugs. (Tr. 258).

Mr. Wade also testified to his handling of the Carl Watson's drug case and his alleged violation of the Federal Gun Control Act. Mr. Wade did reduce the charges against Mr. Watson from a Class B felony to a Class C felony. (Tr. 260). He frequently reduces charges in drug-related cases. (Tr. 260). Mr. Wade did so for two reasons. First, Mr. Watson was in his late 50's with no criminal record. (Tr. 260).Second, theinformationMr. Wade received from the police indicated that Ms. Guidana, not Mr. Watson, had planted and cultivated the marijuana. (Tr. 260).

Mr. Wade asserted that neither he nor the court returned a confiscated firearm to Mr. Watson. He stated that he did consent to the firearm being returned to Mr. Watson's sister. (Tr. 264).Mr. Wade has consented in other cases to releasing firearms or other property to family members of the defendant. (Tr. 264).

Mr. Smith called Pamela Brayfield to testify and also testified on his own behalf.

Pam Brayfield testified that she sold methamphetamine and cocaine to Cynthia MacPherson and Judge Moody at a 1995 Christmas party at the Branding Iron. (Tr. 395).She states that she went into the bathroom with Cynthia MacPherson and Janelle Calvert House and she put a line of cocaine on the back of the stool and let them snort it. (Tr. 395). She states that she saw Tom Cline and believes she saw Dan Wade at the party but did not testify to seeing them buy or use drugs. (Tr. 395).

She testified that she went with her boyfriend, Ernie Speaks, to sell cocaine to Tom Cline and she saw Ernie take the drugs to Tom Cline's office but did not see the actual transaction. (Tr. 398).

She testified that she had family members that were hiding in Brazil or the Bahamas and they told her to contact Mr. Wade about getting her out of the country. (Tr. 400-01). She stated that her conversation with Mr. Wade occurred after she had been convicted of the drug charges but before she was sentenced. (Tr. 400-01). She stated that Mr. Wade told her that if she stayed away for seven years she could come back to Ava and forgo prison time, as the statute of limitations would have already run. (Tr. 400-01).

Respondent also testified, noting that he advised each affiant that they could go to jail if they were lying. (Tr. 444). Respondent further testified that he specifically told Ron Jarrett that Jarrett could go to jail for swearing to false statements in an affidavit. (Tr. 458).

8. DHP's Findings and Recommendations

The Chair of the Advisory Committee served a copy of the Panel's decision on the parties on or about February 14, 2010.

The Panel found that the allegations set forth in the Jarrett, Brayfield and Calvert affidavits were false; that it could not conclude Mr. Smith knew the allegations were false, but that Mr. Smith acted in reckless disregard as to their truth or falsity. The Panel then found that Mr. Smith violated Rule 4-8.2(a) when he:

1. Distributed the "voter information packet" with Mr. Jarrett's affidavit attached;
2. Filed the Motion to Disqualify Jason MacPherson with the Jarrett Affidavit attached;
3. Filed the Motion to Disqualify Chris Wade with the Pam Brayfield and Janice Calvert affidavits attached; 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.

The Panel recommended that this Court disbar Mr. Smith.

POINTS RELIED ON

I.

RESPONDENT SHOULD NOT BE DISCIPLINED AS TO COUNT II BECAUSE THE FIRST AMENDMENT AS APPLIED TO RULE 4-8.2 PROHIBITED THE SANCTIONING THE ATTORNEY FOR POLITICAL SPEECH WHEN THE ATTORNEY CRITICIZED JUDGES, PROSECUTORS AND CANDIDATES FOR ELECTION OR APPOINTMENT TO JUDICIAL OR LEGAL OFFICE, WHERE THE ATTORNEY PUBLISHED FACTS IN THE COURSE OF A POLITICAL CAMPAIGN WHILE SUBJECTIVELY OR, IN THE ALTERNATIVE, OBJECTIVELY BELIEVING THOSE FACTS ARE TRUE.

Brown v. Hartlage, 456 U.S. 45, 60 (1982)

Bugg v. VanhooserHolsen&Eftink P.C., 152 S.W.3d 373 (Mo.App.W.D. 2005)

DiBella v. Hopkins, 403 F.3d 102 (2d Cir. 2005)

Doe v. TCI Cablevision, ED78785 (Mo.App.E.D. 2002)

First Nat. Bank of St. Louis, 311 S.W.3d 857 (Mo.App.E.D. 2010)

Gertz v. Robert Welch, Inc., 418 U.S. 323(1974)

Glover v. Herald Co., 549 S.W.2d 858 (Mo.banc 1977)

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

In Re Ehler, 319 S.W.3d 442 (Mo.banc 2010)

In the Matter of Green, 11 P.3d 1078 (Colo. 2000)

In re Smith v. Pace, 313 S.W.3d 124 (Mo. Banc 2010)

In Re Westfall, 808 S.W.2d 829 (Mo.banc 1991)

Nebraska State Bar Assoc. v. Michaelis, 316 N.W.2d 46 (Neb. 1982)

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Republican Party of Minn. v. White,536 U.S. 765 (2002)

Rowden v. Amick, 446 S.W.2d 849, 857 (Mo.Ct.App. 1969)

State v. Ard, 11 S.W.3d 820, 828 (Mo.App. 2000)

State v. Bowen, 927 S.W.2d 463 (Mo.App.W.D. 1996)

State v. Gatewood, 965 S.W.2d 852, 856 (Mo.App. W.D. 1998)

State v. Graham, 906 S.W.2d 771(Mo.App.W.D. 1995)

State v. Marley, 257 S.W.3d 198 (Mo.App.W.D. 2008)

State v. Marlow, 888 S.W.2d 417 (Mo.App.W.D. 1994)

St. Amant v. Thompson, 390 U.S. 727, 731 (1968)

State v. Sprinkle, 122 S.W.3d 652, 666 (Mo.App.W.D. 2003)

State ex rel. Oklahoma Bar Assn. v. Porter, 766 P.2d 958 (Ok. 1988)

Williams v. Pulitzer Prize Broadcasting Co., 706 S.W.2d 508 (Mo.App.E.D. 1986)

81 Am.Jur.2d *Witnesses* § 682 (2004)

Rule 4.82

II.

RESPONDENT SHOULD NOT BE DISCIPLINED FOR VIOLATING RULE 4-8(a) AS ALLEGED IN COUNTS III, IV, AND V BECAUSE THE FIRST AMENDMENT PROHIBITS REGULATION OF ATTORNEY CRITICISM OF JUDGES WHERE THE REGULATOR DOES NOT PLEAD OR PROVE SUCH THOUGH REQUIRED TO DO SO BY COURT RULES AND THE "DUE PROCESS" CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS.

Colyer v. State Bd. of Registration for Healing Arts, 257 S.W.3d 139(Mo.App.W.D.2008)

Conseco Fin. Servicing Corp. v. Mo. Dep'tof Revenue, 195 S.W.3d 410 (Mo. banc 2006)

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

In Re Coe, 903 S.W.2d 916 (Mo.banc 1995)

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

In re Sawyer, 360 U.S. 622 (1959)

Marler v. Mo. State Bd. of Optometry, 102 F.3d 1453, 1456 (8th Cir. 1996)

Mathews v. Eldridge, 424 U.S. 319(1976)

Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976)

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)

Standing Committee v. Yagman, 55 F.3d 1430 (9th Cir. 1995)

Rule 4-3.6

Rule 4-8.2

Rule 4-8.4

Rule 5-1.3

Rule 5-8.11

III.

RESPONDENT SHOULD NOT BE DISCIPLINED VIOLATING RULE 4-3.3(A)(1) AS TO COUNTS III AND IV NOR FOR VIOLATING RULE 4-8.2(A) AS TO COUNTS II AND V BECAUSE THE FIRST AMENDMENT PROTECTED HIS SPEECH BECAUSE RULE 4-8.2(A) IS VOID FOR VAGUENESS, OR IN THAT ALTERNATIVE, UNCONSTITUTIONALLY OVERBROAD BECAUSE IT DOES NOT SPECIFY THAT THE FACTS REFERRED TO BY A LAWYER CANNOT BE DISCIPLINED FOR TRUTHFUL SPEECH.

Inre Chmura, 608 N.W.2d 31 (Mich. 2000)

United States v. Williams, 539 U.S. 113(2003)

Rule 4-8.2

IV.

RESPONDENT SHOULD NOT BE DISBARRED BECAUSE DESPITE THE FACT THAT HE FAILED TO RECOGNIZE A CONFLICT OF INTEREST AND LOST PERSPECTIVE REGARDING PLEADINGS, HIS CONDUCT DOES NOT WARRANT DISBARMENT AND RESPONDENT CAN BE REHABILITATED WITH A TERM OF PROBATION UNDER ANY CONDITIONS DEEMED APPROPRIATE BY THIS COURT.

Austin v. Mehlville R-9 School District, 564 S.W.2d 884 (Mo. Banc 1980)

Clinton v. Jones, 520 U.S. 681(1997)

In re Belz, 258 S.W.3d 38, 39 (Mo. Banc 2008)

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

In re McBride, 938 S.W.2d 905 (Mo. banc 1997)

In re Weier, 994 S.W.2d 554, 560 (Mo. Banc 1999)

In re Wiles, 107 S.W.3d 228 (Mo. Banc 2003)(*per curiam*)

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998)

*United Pharmacal v. Bd. of Pharmacy*208 S.W.3d 907 (Mo. 2006)

State v. Furne, 642 S.W.2d 614, 615 (Mo. Banc 1982)

State v. Self, 155 S.W.3d 756, 761 (Mo. 2005)

ABA Standards for Imposing Lawyer Sanctions

Rule 4-3.3

Rule 5.15

ARGUMENT

I.

RESPONDENT SHOULD NOT BE DISCIPLINED AS TO COUNT II BECAUSE THE FIRST AMENDMENT AS APPLIED TO RULE 4-8.2 PROHIBITED THE SANCTIONING THE ATTORNEY FOR POLITICAL SPEECH WHEN THE ATTORNEY CRITICIZED JUDGES, PROSECUTORS AND CANDIDATES FOR ELECTION OR APPOINTMENT TO JUDICIAL OR LEGAL OFFICE, WHERE THE ATTORNEY PUBLISHED FACTS IN THE COURSE OF A POLITICAL CAMPAIGN WHILE SUBJECTIVELY OR, IN THE ALTERNATIVE, OBJECTIVELY BELIEVING THOSE FACTS ARE TRUE.

Rule 4.82(a) states: "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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Informant broadly asserts that an attorney may be disciplined for political speech. Inf. Br. 49. In support of its position, the Informant cited one case: *Nebraska State Bar Assoc. v. Michaelis*, 316 N.W.2d 46 (Neb. 1982). In that case, the Respondent attorney indeed took out a political ad that accused members of the bar in his community of engaging in criminal conduct.

That state affords members of the bar greater procedural protections than do the regulations governing Missouri attorneys. The attorney is presumed innocent. "The

findings must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal case." *Id.* at 545.

The standard falls between clear and convincing and beyond a reasonable doubt a standard much higher in Missouri. Missouri follows a preponderance of the evidence standard or review. *In Re Ehler*, 319 S.W.3d 442 (Mo.banc 2010). The Nebraska Court decided *Michaelis* well before the Supreme Court's latest ruling and before later decisional law refined First Amendment freedom of speech analysis in the context of the regulation by courts of attorney speech.

The Constitution requires courts to protect lawyer's political speech. In *In Re Chmura (after remand)*, 464 Mich. 58 (2001); 626 N.W.2d 876, the Michigan Supreme Court distinguished political speech and declined to discipline a judge for statements made in the course of a campaign. It cited Supreme Court precedent. In *Republican Party of Minn. v. White*,536 U.S. 765 (2002), the Supreme Court invalidated the Minnesota judicial canon that addressed political speech of judges and restricted them from announcing their position on the law. The *White* Court noted that the announce clause addressed political speech and described the regulation as one that: "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms--speech about the *qualifications* of candidates for public office. *Id*. at 775. (internal citations omitted, emphasis added).

Such prohibitions on speech trigger strict scrutiny, requiring the state to overcome the presumption of invalidity by showing a restriction upon speech 1) narrowly tailored,

to serve (2) a compelling state interest. *Id.* at 776. Striking the restrictive regulation, the court concluded, "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." *CitingBrown v. Hartlage,* 456 U.S. 45, 60 (1982).When courts apply strict scrutiny addressing the application of a regulation upon an attorney's speech, they apply the tests developed in determining the constitutionality of defamation suits against the New York Times. *New York Times Co. v. Sullivan,* 376 U.S. 254, 285-286. See, *In the Matter of Green,* 11 P.3d 1078 (Colo. 2000) ("Because neither we nor the Supreme Court has addressed the First Amendment implications of disciplining attorneys for their criticism of the judiciary, we look by analogy to *New York Times Co. v. Sullivan,*"). *See also, State ex rel. Oklahoma Bar Assn. v. Porter,* 1988 Ok. 114, 766 P.2d 958; *In Re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn. 1990).

For speech to be regulated, defamation analysis requires a finding of whether the statement is an opinion or fact. See *Green, supra,* 11 P.3d 1078 (Colo. 2000) (Analyzing the *Sullivan* decision in context of regulation of attorney speech. First Amendment absolutely protects opinions. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea.").However in this case, Respondent caused to be distributed his "voter information packet" which contained allegations of facts in the form of Mr. Jarrett's affidavit and at least some of Ms. Culvert's and Ms. Brayfield's affidavits.

After passing that threshold test, defamation analysis requires the facts at issue be false. *Sullivan* at 288. Respondent conceded in his answer that the affidavit of Mr.

Jarrett was false as a matter of law. As to the Brayfield and Culvert affidavits, even if disproven in testimony by Missouri's preponderance or, consistent with First Amendment analysis, clear and convincing evidence, "…proof of falsity is not also proof of malice. *Williams v. Pulitzer Prize Broadcasting Co.*, 706 S.W.2d 508 (Mo.App.E.D. 1986) (holding as matter of law that political bias of a source not establish actual malice where no evidence showed the accuser of not having serious doubts about the statement when uttering it). With falsity as to the Jarrett subpoena not at issue, the next step of defamation analysis is to determine whether the speaker uttered the statements with malice. *Sullivan, supra,* at 286-287. Two standards arguably apply in finding malice. The *Sullivan* Court left open the use of an objective standard in determining malice by requiring courts to determine whether the speaker uttered the communication with objectively reckless disregard for truth or falsity. *Sullivan* at 279-280. The reckless disregard for truth or falsity is the legal definition of the objective standard to which Informant refers. Inf. Br. 55.

The subjective approach developed well after the *Sullivan* Court issued the decision. The United States Supreme Court decided in favor of free speech by in its ruling in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968): "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." The "serious doubts as to truth" is the subjective standard that Informant attempted to define. Inf. Br. 55. Under the subjective test, once all other tests are met, the bottom line determination for actual malice as to

communication critical of public figures is whether the speaker in fact entertained serious doubts as to the truth of the facts asserted when communicated.

The burden of proof is upon the OCDC to establish actual malice by clear and convincing evidence. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286. (observing that a public official must prove actual malice with "convincing clarity"); *First Nat. Bank of St. Louis,* 311 S.W.3d 857 (Mo.App.E.D. 2010; *Bugg v. VanhooserHolsen&Eftink P.C.,* 152 S.W.3d 373 (Mo.App.W.D. 2005); *Doe v. TCI Cablevision*, ED78785 (Mo.App.E.D. 2002). *But seeRowden v. Amick,* 446 S.W.2d 849, 857 (Mo.Ct.App. 1969) (concluding that public official's burden of proof as to falsity and actual malice is by a "preponderance of the evidence" standard) *DiBella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005)(states there is a split in authority on the standard of proof but notes that it preferred the majority rule of clear and convincing evidence, but opted for clear and convincing standard.)

Missouri follows the *New York Times/St. Amant* standard when deciding libel and slander cases where the litigant is a public official. *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo.banc 1977). “Actual malice is about whether the statements were false and were made either (1) with knowledge that they were false or (2) with reckless disregard for whether they were true or false, at a time when the defendant had serious doubts as to whether they were true.” *Bugg, supra*, 152 S.W.3d at 378 (Mo.App.W.D. 2005) (employing defamation of public figure analysis in holding that the accused failed to establish malice and thus did not overcome the qualified First Amendment protection protecting a complaint to the OCDC.)

At this point in the analysis, as the Respondent correctly points out, the jurisdictions addressing constitutionality of sanctioning attorney speech directed at public officials are split as to whether a subjective or objective test for actual malice must be employed. See, e.g., *Green*, *supra*, 11 P.3d 1078 (Colo. 2000)(Applying subjective test), *Porter*, *supra*, 766 P.2d 958 (Applying subjective test); *Graham*, *supra*, 453 N.W.2d 313 (Minn. 1990)(Applying objective test).

Two decades ago, the Court employed the objective rule in deciding *In Re Westfall*, 808 S.W.2d 829 (Mo.banc 1991). The result of that case serves as a lesson about the dangers of employing the objective rule. The *Westfall* decision serves as a lesson about the importance of deciding matters in favor of freedom of speech. Mr. Westfall lost a case in the court of appeals that arguably ran afoul of double jeopardy jurisprudence concerning armed criminal action. *Id*. at 833. Mr. Westfall immediately called a press conference and, after naming the decision's author, essentially derided the reasoning as intellectually dishonest and outcome oriented. *Id*. The *Westfall* court determined Mr. Westfall uttered facts, not opinions. The characterizations of statements about intellectual dishonesty and outcome oriented decisions as fact formed a critical basis for the decision to sanction Mr. Westfall. By denominating his statements as verifiable fact, the Missouri Supreme Court allowed itself to find the speech subject to regulation. By employing the objective test, the court avoided Mr. Westfall's argument that he uttered a subjectively reasonable statement. The characterization of Mr. Westfall's comments as facts, itself, may naturally draw a criticism comparable to that uttered by Mr. Westbrook, in style if not content, about *In Re Westfall*.

Such observations may occasionally find its way to pleadings or other documents filed by subjectively and objectively reasonably minded attorneys or judges reviewing appellate decisions. See *In re Smith v. Pace,* 313 S.W.3d 124, 135 (Mo. Banc 2010)(fn. 15). A subjective standard serves as a safety restraint that may prevent similar outcomes and also mitigate the chill of courthouse air, if the decision caused a chill. Certainly, had the court employed a subjective standard, Mr. Westfall would not have been disciplined.

Under the subjective standard, the Informant failed to establish actual malice. As to the gravitas of the affidavits, allegations of illegal conduct, Respondent could not use of reasonable efforts to discover the information from alternative sources because no other reasonable means for discovering it are available. Only an unreasonable person would expect a judge, a lawyer or a juvenile officer to admit criminal conduct to Respondent. What educated citizen with direct knowledge of the consequences of criminal conduct would tell Respondent that in truth, the individual committed incest, bribed an official, engaged in major drug trafficking or transported drug traffickers out of the country? Should the duty of investigation, assuming that exists in the context of a subjective standard of actual malice, include the duty of futile exercise? Besides investigating the year the Branding Iron--the location of drug distribution identified by Ms. Brayfield—burnt, Respondent could not have verified the story. As to that issue, the Informant presented no evidence that Respondent knew of its destruction or that its destruction preceded the date of the purported drug distribution. Besides, Informant accused Respondent of malice, not negligence. Moreover, the Informant ignores the efforts Respondent undertook to assure, at least in his mind, the credibility of his sources.

He placed the sources under oath. As a lawyer and former police officer he understood the value of an oath. "The object of requiring an oath is to instill in the witness an awareness of the seriousness of the obligation to tell the truth, or to affect the conscience of the witness and thus compel the witness to speak the truth, and also to lay the witness open to punishment for perjury in case the witness willfully falsifies." 81 Am.Jur.2d *Witnesses* § 682 (2004). Informant conceded that most of the information Respondent received referenced well known, close relationships between the accused with whom he dealt with routinely.

The statement of facts submitted by Informants briefs describes well known relationships. Respondent's personal knowledge and his understanding of well-known relationships between people in charge of the coercive aspects of power objectively corroborated parts of the stories presented in Informant's Brief, 8-14. For example, Respondent would likely know that the accused would enjoy fishing, and knowing each other, fish together. In fact, the accused admitted they fished together on one or more occasions.

Through representation in the divorce matter, Respondent would have known particular information about Mr. Jarrett's familiarity with the MacPherson, Wade and Cline families. Inf. Br. 13-14. Respondent would know that Mr. Jarrett would have access to Mr. Cline's family secrets because he was married to his daughter. Respondent knew that because he represented Mr. Jarrett in the divorce.

Mr. Jarrett would likely have been in contact with Cynthia MacPherson, given that her son played in a band with her friend Mr. Cline weekly.

As her former prosecutor and, at the time, present client, objectively Respondent would have been aware of Pamela Brayfield's criminal history. In that context she would be known to him as a reliable informant as to criminal activity. A police officer would routinely use a person of her caliber as a confidential informant. Ms. Culvert, introduced as an associate of Ms. Brayfield, would be positioned to know the information she provided. That he believed her, Ms. Culvert and Mr. Jarrett finds support in the files of the Informant. He complained of the alleged conduct discussed in their affidavits to the OCDC with tenacity and repetition.

The weight of the evidence, under the constitutionally mandated clear and convincing standard or Missouri's weaker preponderance standard favors the proposition that Respondent held no serious doubts about the sworn accusations he relayed. Without proof of actual malice, the Informant failed to prove its case.

Even employing the objective test of reckless disregard for truth or falsity, the Informant's case fails. Respondent relied upon no anonymous informant. He knew of no inconsistencies precluding presentation of the material in a criminal matter. The informant presented no evidence that at the time of presenting the material in either count, that Respondent reviewed statements of the affiant's inconsistent with the physical evidence to a degree as to require a finding of falsity. Even in criminal cases, where the standard of proof, the burden of proof and presumption are the highest of any body of law, the rules of process would not prevent Respondent from presenting as testimony, seeking substantial conditions of pretrial release or even seeking conviction upon testimony as to at least some of the statements found in the affidavits. For example,

a single witness's testimony is sufficient to convict in cases where the defendants face conviction where costly penalties and social opprobrium exist: "Generally, in sexual offense cases the victim's testimony alone is sufficient to sustain a conviction, even if uncorroborated." *State v. Sprinkle*, 122 S.W.3d 652, 666 (Mo.App.W.D. 2003). Such is true even if the complainant misidentified the situs of the event. Missouri courts allow lawyers to present such testimony for consideration by a jury with only one exception: "The exception is that corroboration is required "when the victim's testimony is so contradictory and in conflict with physical facts, surrounding circumstances, and common experiences that its validity is doubtful." *Id.* The corroboration requirement "is triggered only by contradictions in the victim's trial testimony, and not by inconsistencies with his out-of-court statements or the testimony of other witnesses." *State v. Graham*, 906 S.W.2d 771, 778 (Mo.App.W.D. 1995). "The discrepancies must amount to `gross inconsistencies and contradictions' and must relate directly to an essential element of the case." *State v. Gatewood*, 965 S.W.2d 852, 856 (Mo.App. W.D. 1998) (quoting *State v. Marlow*, 888 S.W.2d 417, 422 (Mo.App.W.D. 1994)); *State v. Marley*, 257 S.W.3d 198 (Mo.App.W.D. 2008).

Missouri should not have one rule that allows prosecution to be submitted upon conflicting and uncorroborated evidence falling short of gross inconsistencies, and sanction defense lawyers from presenting the same quality of evidence before the same tribunal. That Ms. Culvert and Ms. Brayfield have criminal convictions qualifies their character little differently from the kinds of witnesses called by the state at trials and preliminary hearings, or relied upon by police officers for search warrant applications.

Moreover, Ms. Brayfield identified herself as an eyewitness. "A witness to or victim of a crime is a reliable informant for establishing probable cause, even if such an individual's reliability is not previously established." *State v. Ard*, 11 S.W.3d 820, 828 (Mo.App. 2000).

That Ms. Culvert may not have witnessed events first hand would not preclude Respondent from relying upon it or publishing it. *See, e.g., State v. Bowen*, 927 S.W.2d 463, 467 (Mo.App.W.D. 1996)(Upholding search warrant based on hearsay statement of lay witness where description specific as to the type of drug, the date, the amount, the packaging and the location such as to bear the marks of first hand observation.)

That the doctrine of staleness would invalidate a hypothetical search warrant based upon the affidavits of Ms. Culvert and Ms. Brayfield is of no moment to Informant. The issue is whether a lawyer should face discipline for presenting arguments or facts based upon affidavits later determined to be false. Even in the context of prosecution based on stale testimony, no attorney could survive the strict scrutiny sought by the Informant, especially in prosecutions of crimes with lengthy limitation upon the time to prosecute.

Despite the pleading, the Informant presented no reliable evidence the Respondent offered consideration for the statements. Mr. Jarrett variously said that Respondent did so, but at his perjury trial stated in large part that the conduct described in the affidavit occurred. The lack of discussion in the Informant's brief as to this issue spotlights the weakness of the facts underlying this argument, if not opinion. Informant presented little credible evidence that Ms. Brayfield and Ms. Culvert provided statements in exchange for consideration from Respondent sufficient to withstand either the clear and convincing

standard or the preponderance standard. Assuming such proof, Informant, under an objective standard applied to all lawyers, attempts an unhandy precedent. The state routinely offers value, in the form of leniency, to witnesses in exchange for "truthful testimony." Yet the value of such witnesses is recognized by decisional law across the land. Would Missouri's communities be safer should prosecutors who present such offers face sanction because a jury found the witness committed perjury later? The criminal histories of witnesses are relevant to credibility; the plausibility of such witnesses are worthy of cross examination; yet the Informant cannot claim that lawyers should be disciplined for the presentation of testimony from witnesses of objectively doubtful credibility. Rather, the juries and judges consider the background in ascertaining credibility along with other factors in determination of their credibility--not the credibility of the lawyer presenting the testimony.

Scrutiny and cross examination occurred with Ron Jarrett, during the twin pursuits to disqualify his prosecutors. Such scrutiny occurred with Ms. Brayfield, during the disciplinary tribunal. Such could have occurred with Ms. Culvert had she been subpoenaed by the party carrying the burden to establish the falsity of her information and Respondent's actual malice in using it under any standard.

Under an objective standard of proof for malice, given that it must be applied to every lawyer equally, the Informant's failed to establish actual malice. The Informant failed to prove its case.

II.

RESPONDENT SHOULD NOT BE DISCIPLINED FOR VIOLATING RULE 4-8(a) AS ALLEGED IN COUNTS III, IV, AND V BECAUSE THE FIRST AMENDMENT PROHIBITS REGULATION OF ATTORNEY CRITICISM OF JUDGES WHERE THE REGULATOR DOES NOT PLEAD OR PROVE SUCH THOUGH REQUIRED TO DO SO BY COURT RULES AND THE "DUE PROCESS" CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS.

The Informant alleged that Respondent violated Rule 4-8.2(a) which reads as follows: 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. (July 1, 2007.)

The Informant elected to avoid establishing any impact on the administration of justice by declining plead it; in so doing the Informant constrained this Court to rule in favor of Respondent as to whether the First Amendment prohibited sanction for his speech.

Rule 5-8.11(c) required the Informant to file an information in a manner providing notice to the accused: "An information shall be styled "In re: (Name of Respondent)", shall set forth in brief form the specific acts of misconduct charged, and shall state briefly the grounds upon which the proceedings are based."

The information creates a substantive obligation upon the accused to respond. Failure to file an answer places the accused in default. Rule 5-1.3. In that setting the allegations are taken as true, exposing the lawyer to sanctions as to the conduct alleged. Rule 5-1.3.

The Informant avoided directly pleading misconduct that affected the administration of justice even though such conduct or speech is prohibited by a specific rule. In relevant part, Rule 4-8.4(d) states a lawyer shall not: "engage in conduct or speech that is prejudicial to the administration of justice."

The informant avoided alleging that Respondent engaged in pretrial publicity in violation of Rule 4-3.6. The Informant failed to allege that any of Respondent's actions or speech prejudiced or even impacted the administration of justice.

The informant avoided pleading specific examples of processes impacted or substantially likely to have been impacted. Nowhere in Counts III & IV did the informant plead that Respondent attempted to use the statements in the public arena to influence litigation.

As to Count V, the informant pled the attempt to broadcast the statements; in that count the informant never alleged that Respondent intended to influence the litigation by inflaming passions of the public, or members of the grand jury.

The informant also avoided pleading a general statement that Respondent speech degraded, created an immediate risk of degrading, or a substantial likelihood of degrading the judiciary.

The Informant brought to the committee, and this Court, a pleading that scrupulously avoided allegations of any attempt by Respondent to influence pending litigation by engaging in conduct or speech tending to endanger the selection of a fair jury panel for criminal defendants or speech of a designedly public nature calculated to influence the judges in charge of pending litigation.The Informant must specifically allege the violation to meet a bar member's basic right to substantive and procedural due process when subjected to the disciplinary process. The failure to plead the effect of speech on the administrative of justice is fatal.

The Court's de novo review in no way deprived Respondent of his right to rely upon the processes required by the regulations drawn by the Court. The thrust of constitutional due process is to impose "constraints on governmental decisions which deprive individuals of `liberty' or `property' interests. . . ." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). As a professional, Respondent may lose a protected property interest in his license to practice for speech that is protected by the First Amendment. *Marler v. Mo. State Bd. of Optometry*, 102 F.3d 1453, 1456 (8th Cir. 1996). "Procedural due process encompasses a number of rights, from the basic entitlement to notice and a hearing, to the specifics of what constitutes adequate notice and what manner of hearing is proper in the circumstances." *Colyer v. State Bd. of Registration for Healing Arts*, 257 S.W.3d 139, 145 (Mo. App. W.D. 2008). " "[D]ue process requires notice `reasonably calculated, under all the circumstances'[,] . . . `to inform parties of proceedings which may directly and adversely affect their legally protected interests.'" *Conseco Fin. Servicing Corp. v. Mo. Dep'tof Revenue*, 195 S.W.3d 410, 416-17 (Mo. banc 2006). Respondent may insist

that the Informant follow Rules that branch from the very same body of regulations that the Informant accuses Respondent of violating.The Informant chose to pursue narrow allegations of Supreme Court Rule violations.

The informant never amended the pleadings, a product of a careful plan of prosecution. Seeking to avoid First Amendment scrutiny, the Informant's brief described its theory thusly: "First, this case is about conduct instead of speech." Inf. Br. 45. Only alternatively, did the Informant allege that it sought regulation of speech. Inf. Br. 49.

The Information and the argument are the heart of the Informant's strategy to avoid the application of Gentile's requirement of substantial likelihood of adverse impact upon the administration of justice in disciplinary matters addressing an attorney's speech. The informant instead argued that the Gentile court's requirement of adverse impact upon the administration of justice is limited to Rule 8.4(d), (pretrial publicity) violations the informant decided not to plead. Informant's Brief p. 63. Two pages later, the informant seeks to have it both ways: "It is appropriate in a disciplinary context to find that Respondent's actions interfered with the administration of justice, as his actions undermined the public's confidence in the Judiciary." A fact not pled, not invited for proof, not wholly litigated and not wholly proven.

The Informant's pleadings, strategy and argument all point to goal: avoid accusation, proof or argument as to some sort of impact, imminent or substantially likely, upon the administration of justice. This is the law of the land for regulations governing the speech uttered by participants in pending litigation.

The Informant mistakenly believes that it may change the lens of constitutional scrutiny when examining regulated speech by choosing among different regulations, finding one with wording varying from the regulation found subject to scrutiny by the *Gentile* Court. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The attempt was misguided. The First Amendment protects speech, not regulations. The First Amendment requires courts to scrutinize laws abridging speech first by analyzing the kind of speech sought to be regulated, and second by determining the level of protection required. The *Gentile* Court analyzed speech of a lawyer uttered directly to the news media with the intent to influence a venire panel for a trial that took place six months later. Id. at 1064-1065. In reaching a determination as to whether the speech benefited from First Amendment protection, the *Gentile* court analyzed the nature of the circumstances in which Mr. Gentile spoke. *Id*. at 1067-1077. First the court noted its public context, given that he essentially collaborated with the press. *Id*. at 1067. The court noted that it treated the speech of participants in litigation with lesser care than observers. *Id*. at 1073. "This distinction between participants in the litigation and strangers to it is brought into sharp relief by our holding in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)." *Id*. The court noted it treated speech differently during the pendency of litigation. *Id*. at 1075. "In [the *Rhinehart*] case we said that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting.'" *Id*. (brackets added). The court noted that it treated the speech of lawyers differently: "We think that he quoted statements from our opinions in *In re Sawyer*, 360 U.S. 622 (1959) and

Sheppard v. Maxwell, supra, rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) and the cases which preceded it." *Id.* at 1076. Those four qualities of the circumstances surrounding the speech at issue, the public nature, the profession of the speaker, the speaker's participation in litigation and the pendency of the litigation made the speech susceptible to sanction under strict scrutiny, albeit with less stringency than applied to citizens without bar licenses. That said, the Gentile Court imposed a difficult burden upon parties enforcing such a regulation: the regulation must be substantially likely to prevent a materially prejudicial effect upon the administration of justice. *Id*. at 1076.

The decision to pursue Respondent's speech as alleged in counts III, IV and V pursuant to a different regulation than the one before the Gentile Court in no way changed the nature of the speech at issue, nor the constitutionally imposed prohibition of limiting such speech without proving a substantially likely material prejudicial effect upon the administration of justice. However, by abandoning, or more accurately, never undertaking to establish the extrajudicial undertaking of litigation pursued by Respondent, the Informant presses a case against kinds of speech weaker in their theoretically destructive quality than Mr. Gentile's speech because the Informant never alleged any intent by Respondent to adversely impact the administration of justice.

Carl Smith did not disrupt the administration of justice, nor was that substantially likely.

The Informant candidly admitted that it did not allege speech intended to derail adjudication such that the Gentile Court considered problematic enough to justify a restriction upon an attorney's right to free speech as compared to other citizens: "Rule 4-8.2(a) does not contain any such requirement." Inf. Br. 63.

Thus with misguided deliberation, the Informant presented no showing of interference with administration of Justice. The Informant presented no evidence presented that any person lost an election. The Informant presented no evidence Respondent's statements damaged any business. Finally, the Informant presented no evidence by the constitutionally mandated clear and convincing standard or Missouri's preponderance standard that the allegations played any role in the denial of Judge Moody's selection to the appellate bench.

The Informant only gratuitously presented evidence of impact upon children of the juvenile officer identified in the Jarrett affidavit. That said, the Informant presented no evidence that Respondent's publication of Mr. Jarrett's statements impacted the juvenile officer's decisions or otherwise interfered with the administration of juvenile justice, e.g., by her losing her job. The Informant must concede that Respondent presented information in a manner that did not disrupt the proceedings in which he participated.

As to Counts III, IV and V, the Informant presented no evidence that Carl Smith: conducted himself in a manner that embarrassed the tribunal in which he presented the testimony; conducted himself in a manner that prevented the tribunal from ruling on the issues he presented; and conducted himself in a disruptive manner by cursing, yelling or directing invectives to the tribunal before which he stood.

As to Count III and IV, the Informant presented no evidence that at the time of the litigations at issue in counts III and IV, he published the motions with intent to disrupt the tribunals. *See Graham, supra*, 453 N.W.2d 313 (Minn. 1990) ("We also note that the facts of this case indicate a somewhat less compelling government interest in disciplining Green than existed in other cases dealing with attorney discipline for criticism of judges, all of which involved disparaging comments about judges made to a public audience.")

As to Count V, the Informant raised no allegation that Respondent used an improper process of conveying information, such as by ex parte communication or letter sent to Judge Carter following his ruling against the motion to quash the subpoena in the grand jury proceedings. Rather, the Informant proved Respondent used the permissible format of the Petition for Writ of Prohibition. When the petition failed, he complied with the subpoena.

As to Count V, the Informant is left with one argument, found on page 48: "Respondent's statements regarding Judge Carter were obviously done to avoid an unfavorable ruling or as a vindictive action against Judge Carter." The Informant presented no evidence and provided no explanation as to how the statement filed in the petition for the writ, of which the media was not notified, could have caused Judge Carter to rule differently. No evidence suggests Respondent deployed the writ as a means of intimidation; Respondent never pursued a motion to reconsider or wrote a letter to the judge or quarreled with the judge after the judge told him he would allow him time to file a petition for writ; when the court of appeals decided the matter of the subpoena by dismissing the petition for the writ, Respondent complied with the subpoena.

The Informant characterized Respondents reference to Judge Carter as an allegation of fact, and not opinion. Certainly, nothing in the materials supported the proposition that Judge Carter acted with an appearance of impropriety or engaged in a criminal conspiracy, in fact little if any of the attachments referenced him by name. Respondent presented the proposition in the argument section of the petition for writ, using the word Respondent, the generic name for the traditional opponent of a writ. Nothing else in the petition for writ made the case for Judge Carter's culpability. The relator presented no other evidence of Respondent's animosity toward Judge Carter, even though Judge Carter authorized Respondent's prosecution for contempt. The statement appears to be drafting error in a poorly worded written argument. Negligence is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 286-88 (1964); *Glover v. Herald Co.*, 549 S.W.2d 858, 861 (Mo.banc 1977). Judges are understood to be thick skinned. See, e.g. *Wood v. Georgia*, 370 U.S. 375 (1962)(local sheriff's criticism of judge regarding charge to grand jury protected).

The cases relied upon by the informant do not address the circumstances or the qualities of the speech at issue. *In Re Coe*, 903 S.W.2d 916 (Mo.banc 1995): The Chief Disciplinary Counsel charges attorney Carol Coe with "conduct intended to disrupt a tribunal." *Rules of ProfessionalConduct, Rule 3.5 (c).* After reviewing the evidence de novo, this Court concludes that Coe violated Rule 3.5 (c), and orders a public reprimand.

Disrupting the course of trial, Ms. Coe during trial bickered with the judge and accused the court's employee of telling a subpoenaed witness to not attend.

The disciplinary counsel sought to discipline the conduct of direct contempt, which has long been considered subject to sanction.

In Re Madison, 282 S.W.3d 350 (Mo.banc 2009), is distinguishable because it involved conduct. Madison engaged in conduct not necessary to affect an appeal by writing three letters to the judge after an adverse ruling. Id. at 354-359. The receipt of the writing caused one judge to recuse. Id. at 356. Sending letters with the intention to cause a judge to recuse is disciplinable as disruptive of the administration of justice. *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (Reversing discipline for attorney who described judge as anti-Semitic, noting a different result possible had evidence established attorney interfered with administration of justice by causing recusals).

In the presence of a second judge the attorney committed directly contemptuous conduct. He greatly raised his volume. Id. at 358. His facial expressions and body language communicated derision to the court such that it shocked the court's audience. Id. He was directly contemptuous when, after choosing to forgo an appeal, he sent a letter to the judge complaining about the judge's ethics and abuse of power in handling of the case. Id.

Justice Wolff concurred in the opinion, correctly observing that the court disciplined the lawyer for conduct, not speech. By contrast, and notwithstanding the central arguments in the brief that the Informant merely sought discipline of conduct, the Informant urges this Court to find the content of the motions to disqualify offensive. Rather than the arguments and supporting documents actually filed by Respondent as to each motion, the Informant would have preferred a motion based on different arguments

and facts. Perhaps the Informant correctly identified more persuasive arguments. The observation proves too much of the Informant's position by revealing the basic quality of the motions that the Informant considers obnoxious – their content.

In Re Westfall, 808 S.W.2d 829 (Mo.banc 1991), is distinguishable from Counts III, IV and V of the instant case because Westfall was charged with concurrent counts which included interference with the administration of justice in accordance with Rule 8.4(d) which specifically prohibits such a count. Id. at 832. Informant elected not to plead a violation Rule 8.4(d). The 8.4(d) violation formed a critical part of the *Westfall* court's rationale. The court made consistent and specific references to the impact that Mr. Westfall's statements had upon the perception of the fairness and impartiality of the appellate courts and equated that effect upon the public's perception with interfering in the administration of justice. In the instant, the Informant never pled interference with the administration of justice.

To the extent the holding in that case equates criticisms of judges as a *per se* impact upon the administration of justice, the ruling should not be followed. Such a rule ignores the *Gentile* Court's requirement of a substantial likelihood of a material impact on the administration of justice. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The Gentile court addressed an attorney who intended his remarks to be reached by members of a future venire panel. *Id*. Such statements risked materially impacting the future trial. *Id*. The Gentile Court never referenced the notion that a regulation of content based speech imposed solely upon attorneys passed constitutional scrutiny absent

proof that such statements created a substantial likelihood of material interference with a judicial process. *Id.*

III.

RESPONDENT SHOULD NOT BE DISCIPLINED VIOLATING RULE 4-3.3(A)(1) AS TO COUNTS III AND IV NOR FOR VIOLATING RULE 4-8.2(A) AS TO COUNTS II AND V BECAUSE THE FIRST AMENDMENT PROTECTED HIS SPEECH BECAUSE RULE 4-8.2(A) IS VOID FOR VAGUENESS, OR IN THAT ALTERNATIVE, UNCONSTITUTIONALLY OVERBROAD BECAUSE IT DOES NOT SPECIFY THAT THE FACTS REFERRED TO BY A LAWYER CANNOT BE DISCIPLINED FOR TRUTHFUL SPEECH.

A law is facially invalid if it "prohibits a substantial amount of protected speech." *United States v. Williams*, 539 U.S. 113, 119-120 (2003). Regulations that address the content of speech presumptively violate of the First Amendment. *Id.* Rule 4-8.2 states: "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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Irrespective of the Informants' apparent request for additional wording to the rule, Rule 4-8.2 does not require the attorney's statement to be false. Inf. Br. 51. No decisional law from this court expressly stated that the regulation of attorney speech stops with false speech. The Rule goes further by sanctioning lawyers for speaking the truth if their state of mind is such that they spoke it with reckless disregard for truth or falsity.

Moreover Rule 4-8.2 punishes truthful speech of a lawyer when the lawyer criticizes lawyers in positions of power or aspiring to wield such power.

The mere assertion by the Respondent that this Court should begin interpreting Rule 4-8.2 in a constitutional manner does not void this Court's responsibility to invalidate it. The *Gentile* court, in viewing a "safe harbor" provision for otherwise prohibited speech found it void for vagueness. The *Gentile* Court found the regulation a trap for the unwary and wary alike. In this case, the better observation would be that the regulation at issue chills protected speech. Moreover, just like the regulation before the *Gentile* Court, the regulation in the instant matter is "absent any clarifying interpretation." Adding to the infirmity is that the Missouri Rules, unlike many if not most of the regulations of other states, employs a preponderance of the evidence standard when adjudicating the conduct of attorneys, *In Re Ehler, supra,* 319 S.W.3d 442 (Mo.banc 2010), doubling the risk of punishing protected speech and exacerbating the regulation's chilling effect.

The Michigan Supreme Court invalidated a similarly worded regulation. *Inre Chmura*, 461 Mich. 517; 608 N.W.2d 31 (2000) (*Chmura I*). In that matter, a judicial candidate found himself addressing a disciplinary complaint based upon a regulation stating that candidates for judicial office: "...should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results

the candidate can achieve." *Id* at 527. Although the candidate raised an allegation of error based on the lower tribunal's uncertainty as to whether to use actual malice, the court declined to address that issue and struck down the Canon as overbroad. *Id*. at 530. In so doing, the *Chmura (I)* Court noted: "A candidate for judicial office faces adverse consequences for statements that are not false, but, rather, are found misleading or deceptive." *Id*. at 540 The Court revised the code for judicial conduct and required that such statements be false. *Id*. at 542. Although that Rule also applied to omissions, which the court found offensive, the Court essentially determined, as does the Informant, Inf. Br. 51, that falsity must be a requirement when regulating the political speech of lawyers. *Id*. at 540.

The United States reviewed Minnesota's judicial canon's in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). The Supreme Court invalidated the Minnesota's judicial canons that addressed political speech of judges that restricted them from announcing their position on the law. The *White* Court noted that the announce clause addressed political speech and described the regulation as one that: "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms--speech about the *qualifications* of candidates for public office. *Id*. at 775. (internal citations omitted, emphasis added.) Such prohibitions on speech trigger strict scrutiny, requiring the state to overcome the presumption of invalidity by showing a restriction upon speech 1) narrowly tailored, to serve (2) a compelling state interest. *Id*. at 776. Striking the restrictive regulation, the court concluded, "It is simply not the function of government to select which issues are worth

discussing or debating in the course of a political campaign." *citing Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

Like the regulation before the *White* Court and the *Chmura I* court, Missouri bans speech by lawyers at the core of the First Amendment protection, by its broad language that addressing speech directed to the qualifications of candidates for judicial office. For this reason, Rule 4-8.2(a) must be struck down.

IV.

RESPONDENT SHOULD NOT BE DISBARRED BECAUSE DESPITE THE FACT THAT HE FAILED TO RECOGNIZE A CONFLICT OF INTEREST AND LOST PERSPECTIVE REGARDING PLEADINGS, HIS CONDUCT DOES NOT WARRANT DISBARMENT AND RESPONDENT CAN BE REHABILITATED WITH A TERM OF PROBATION UNDER ANY CONDITIONS DEEMED APPROPRIATE BY THIS COURT.

This Court need not reach the First Amendment issues raised in order to resolve this case, because the only violation actually committed was Respondent's failure to recognize a conflict of interest. In other words, Informant did not allege or prove that Respondent interfered with the administration of justice. Respondent does not challenge Rule 4-3.3 as overbroad, because Rule 4-3.3imposes a subjective standard and in no way impedes freedom of speech. Rule 4-3.3, comment 8.

In the federal judiciary, the doctrine of avoidance states that courts should avoid the premature adjudication of constitutional questions. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 690 (1997); *Peter v. Wedl*, 155 F.3d 992, 1002 (8th Cir. 1998). Missouri courts generally will not decide constitutional issues where cases may be decided on other grounds. *See, e.g., United Pharmacal v. Bd. of Pharmacy*208 S.W.3d 907, 909 (Mo. 2006)(void for vagueness challenge to statute not considered despite ambiguity in statute because application of canons of construction resolved issue); *State v. Self*, 155 S.W.3d 756, 761 (Mo. 2005)(declining to issue "advisory opinion" as to constitutional issue

despite being urged to reach issue by both State and defendant); *State v. Furne*, 642 S.W.2d 614, 615 (Mo. Banc 1982)(challenge to constitutionality of criminal statute not considered because reversal warranted based on insufficiency of evidence); *Austin v. Mehlville R-9 School District*, 564 S.W.2d 884, 887 (Mo. Banc 1980)(free speech issue raised by school board not considered because reversal was warranted based on finding of fact being against the weight of the evidence).

Thus, the issue for this Court's determination is the appropriate sanction for a lawyer who absorbed his client's interests into his own – a lawyer who failed to recognize a conflict of interest until it was too late.

"The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession." *In re Wiles*, 107 S.W.3d 228, 228-29 (Mo. Banc 2003)(*per curiam*). The appropriate determination of attorney sanctions requires this Court to assess the gravity of the misconduct as well as "…any mitigating or aggravating factors that tend to shed light on [the attorney's] moral and intellectual fitness as an attorney." *Id.* at 229. In determining the appropriate sanction, this Court refers to the American Bar Association ("ABA") Standards for Imposing Lawyer Sanctions ("ABA Standards").

Under the ABA Standard 3.0, the Court should initially consider the following:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

The Duty Violated

Informant characterizes this case as a violation of duties owed to the legal profession. Inf. Br. 66 (citing ABA Standard 6.2). Informant argues that Respondent should be disbarred under ABA Standard 6.21, which states that, absent aggravating or mitigating circumstances:

> Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, andcauses serious injury or potentially serious injury to a party or cause serious or potentially serious interference with a legal proceeding.

Informant mischaracterizes the nature of this case, and misstates the correct baseline discipline even if ABA Standard 6.2 were the correct standard, because again, Informant did not prove Respondent knew the statements were false.

This case is about a conflict of interest, specifically, about a lawyer who absorbed his client's interests into his own. Not only is this the reality, but it also explains Respondent's actions. Respondent acknowledges that the DHP found no violation of Rule 4-1.7, which prohibits a lawyer from representing a client if "…there is a significant risk that the representation of one or more clients will be materially limited by…a personal interest of the lawyer." However, this is unfortunately what happened.

Informant's own arguments support this view. Informant paints a picture of a judicial circuit in relative harmony until it received a grant for a drug court. Inf. Br. 12. Disputes over the allocation of resources led to the forming of factions, with Respondent

and his friends on one side and Judge Moody and the Wades, etc. on another. Inf. Br. 12. Informant charges in her Statement of Facts that Respondent developed animosity toward his budding enemies and began to show signs of losing perspective, such as calling the newly appointed Judge Carter to warn him about those he should not trust. Inf. Br. 12-13.

Respondent's distribution of the voter information packet, his filing of the motions to disqualify, and the language in his Petition follow from his loss of perspective resulting from allowing Ron Jarrett's interests to be absorbed into his own. He failed to recognize that this was a conflict of interest, in that his ability to represent Jarrett was materially limited by his personal interest. This is Respondent's misconduct.

The Lawyer's Mental State

The ABA Standards define applicable mental states as follows:

"Intent" is the conscious objective or purpose to accomplish a particular result;

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result;

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation;

Respondent acted negligently in this case. Informant initially alleged that Respondent knew the information was false. When faced at the Hearing with the fact that Informant failed to prove this mental state, Informant's case became about reckless disregard.

Informant's attempt to solve its dilemma, however, is twofold.

First, Informant asserts that, at the disciplinary hearing that took place over seven (7) months ago, Respondent had a burden of proof that no one, including Informant, Respondent, or this Court, ever knew about. Inf. Br. 51-52. Informant accomplishes this objective by pointing out that Missouri courts have not addressed the burden of persuasion regarding the falsity of statements. Inf. Br. 51. Informant then argues that, nonetheless, such a burden exists, Informant met its burden of proof on the issue, the burden then shifted to Respondent, and Respondent failed to meet his burden. Inf. Br. 52.

As Respondent argues above, this Court should refrain from deciding constitutional issues in a case such as this that can be decided on other grounds. This Court should, in the same vein, be loath to create the serious due process problem that Informant apparently requests that this Court create. Professional misconduct must be proven by a preponderance of the evidence. *In re Coleman*, 295 S.W.3d 857, 863 (Mo. banc 2009). The burden of proof is carried by Informant. Rule 5.15(c).

To create this burden now and apply it to a hearing that took place in November of last year, however, raises serious issues and creates unnecessary problems. Much for the same reason this Court should not pass on the First Amendment issue, this Court should not create a potentially major due process issue where the case can be resolved without doing so.

Failing that, Informant then attempts to convince this Court to ignore the fact that Respondent did not know the statements were false by arguing that Respondent did act "knowingly" in that he "knowingly" filed his motions and "knowingly" disseminated the

voter information packets. Inf. Br. 67. This is clearly an attempt to supply a false state of mind in order to increase the discipline imposed. It is also inconsistent with Informant's principal charge, which is that Respondent failed to independently verify information contained in his pleadings, the absurdity of which is discussed above.

Further, Informant candidly admits that it now proceeds under the theory that Respondent acted with "reckless disregard" of the truth or falsity of the subject statements. Inf. Br. 58. Informant now, after filing its Information alleging exactly eleven (11) Rules violations, narrows their case to four (4) violations of Rule 4-8.2, all involving "reckless disregard." Inf. Br. 73. Thus, to reach for a higher culpable mental state warranting a more severe discipline, Informant now argues that that Respondent committed the "knowing" acts of filing motions and distributing the voter information packets.

This argument is a reach. Of course Respondent knowingly disseminated or caused to be disseminated the information and knowingly filed the motions. No one suggests that he did so accidentally. The fact that Informant still did not prove is that Respondent *knew the facts were false*. Informant clearly wants this Court to take its eye off of this failure of proof. This Court should decline such an invitation, however, because the culpable mental state attributable to Respondent's actions is such an important factor in determining the appropriate discipline.

Here, Respondent absorbed his client's interests into his own. Clearly, Ron Jarrett, going through an acrimonious divorce, held animosity for Tom Cline, the MacPhersons, and perhaps for other members of the Forty-Fourth Circuit. The evidence before the DHP

suggests that Respondent clearly tried to take steps to reverse the course of what he perceived to be a political machine. The evidence, we concede, demonstrates that Respondent went too far in doing so.

Objectively, it was unreasonable to include some of the allegations included in Respondent's motions to disqualify. For instance, as to Respondent's Motion to Disqualify Jason MacPherson, the allegation regarding Tom Cline and Rose Pursell was not relevant to the issue of whether Jason MacPherson either 1) had a bias against Ron Jarrett; or 2) was faced with the appearance of impropriety regarding his prosecution of Ron Jarrett. Further irrelevant to this issue is Jarrett's allegation regarding the "exchange" between Tom Cline and Judge Moody on the fishing trip.

Regarding Respondent's Motion to Disqualify Chris Wade in Ron Jarrett's perjury prosecution, Respondent should not have included the assertions regarding Chris Wade's DWI. This case, apparently concluded with a suspended imposition of sentence, is irrelevant to whether Chris Wade had a personal interest in the prosecution of Ron Jarrett. The allegations contained in the Brayfield Affidavit and Calvert Affidavit are not relevant to whether Chris Wade had a personal interest in the prosecution of Ron Jarrett. *See* Inf. App. 221-224. Whether Jason MacPherson had a personal interest in the prosecution of Ron Jarrett was relevant, because the evidence did establish that Mr. MacPherson works for Mr. Wade as an assistant prosecutor. Tr. 250. Nonetheless, the allegations concerning the Wades' alleged drug activities is not relevant and should not have been included in a motion to disqualify.

The allegations contained in the Voter Information Packet and the Petition certainly suggest that Respondent allowed his personal feelings regarding the political structure of the Forty-Fourth Circuit to interfere with his better judgment. Some of the same figures in that structure, such as Tom Cline, knew Ron Jarrett better than others, and for whatever reason, Jarrett carried animosity for them. Respondent certainly acted negligently, but he did not act knowingly.

The Injury

The ABA Standards also define injuries as follows:

"Injury" is harm to a client, the public, the legal system, or the profession which results from the lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates a level of injury greater than "little or no" injury.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

Respondent lost perspective. However, Informant misses the mark by arguing to this Court that Ron Jarrett was convicted of perjury because of Respondent's actions. Inf. Br. 68. No one, and no evidence was presented to suggest otherwise, forced Ron Jarrett to make false statements, nor to sign an affidavit swearing to his false statements. Respondent did not, and no credible evidence suggests otherwise, encourage Jarrett to lie in his affidavit. The only credible evidence on the point is Respondent's testimony that he

advised all affiants, including Jarrett, that false statements made in the affidavits could lead to jail time. Tr. 444, 458. Ron Jarrett signed the affidavit. Ron Jarrett lied on the stand. Ron Jarrett got Ron Jarrett convicted. To hold Respondent accountable for Ron Jarrett's lies is not fair and not supported by the record. Again, we concede that Respondent took his interests too far. We do not concede, however, that anyone but Ron Jarrett did the lying.

Further, in attempting to shift the blame for Ron Jarrett's actions to Respondent, Informant forgets that Larry Tyrell may well have charged Jarrett with sexual offenses had Respondent not convinced him to decline charges. Tr. 455-56; Inf. Br. 60, fn. 20. Two conclusions objectively follow from the facts. First, Larry Tyrell did not charge Jarrett with sexual misconduct, at least in part, because Respondent convinced him not to. Second, while Jason MacPherson did charge Jarrett, it was not because Respondent failed to do his job. Yet, Informant argues that Respondent harmed Jarrett, which does not follow from any evidence before this Court.

Once these four issues are determined, the ABA Standards provide baseline disciplines based on the conduct. In this case, Respondent violated a duty owed to a client: the duty to avoid a conflict of interest. ABA Standard 4.33 provides that, absent aggravating or mitigating factors, "[r]eprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests…and causes injury or potential injury to a client.

This is where Respondent failed. Respondent failed to correctly and swiftly determine that he had a conflict of interest in representing Jarrett, and continued to fail to

recognize this, apparently until he filed his Motion to Quash leading up to his filing of the Petition. *See* Inf. App. A293-95.

For reasons discussed above, however, it is difficult to say that Jarrett suffered injury. Again, Jarrett alone committed perjury. Jarrett escaped prosecution for alleged sexual misconduct for a time based on Respondent's work. Informant's only argument, that Respondent caused Jarrett to be convicted of perjury, is not supported by the record.

Aggravating or Mitigating Factors

The Court always considers both aggravating and mitigating factors, no matter how serious the misconduct. *In re Belz*, 258 S.W.3d 38, 39 (Mo. Banc 2008). Both aggravating and mitigating factors exist in this case.

Aggravating Factors

The aggravating factors cited by Informant serve to illustrate that this case is best characterized as one of a lawyer who lost perspective. The fact that Respondent acted with a selfish motive certainly illustrates that. Respondent is not a selfish or dishonest man, but in absorbing Ron Jarrett's interests into his, he acted selfishly.

The allegations certainly affected the accused, although the degree to which that is true is not clear. As Informant points out, Judge Moody, Tom Cline, Dan Wade, and Cynthia MacPherson all testified that the accusations affected them in one way or another. Tr. 212; Tr. 196; 211-12; Tr. 239

Over Two Decades With No Disciplinary Record

One strong mitigating factor is that Respondent has no prior disciplinary actions. ABA Standard 9.32(a). The fact that he has practiced law for over twenty years without a

disciplinary action runs straight into an aggravating factor: substantial experience in the practice of law. ABA Standard 9.22(i). Of course, this Court may consider that a certain factor can be both mitigating and aggravating. *See, e.g.*, *In re Weier*, 994 S.W.2d 554, 560 (Mo. Banc 1999)(Lowenstein, S.J., concurring in part and dissenting in part). Certainly also, this Court may assess varying degrees of weight to mitigating and aggravating factors. *See, e.g.*, *Belz, supra* (finding significant mitigating factors justified suspension even in case of misappropriation); *Wiles*, *supra*, at 229 (suspension with probation of attorney with extensive career in law but with several admonitions in Missouri and Kansas); *In re McBride*, 938 S.W.2d 905, 908 (Mo. banc 1997)(considering attorney's long career without prior disciplinary action as a mitigating factor).

In this case, the fact is that Respondent has practiced for over two decades without a disciplinary action. Under these facts, it cannot seriously be argued that Respondent's experience in the practice of law is an aggravating factor.

Remorse

Informant argues that Respondent has shown no remorse. Inf. Br. 70.

It is true that Respondent has not expressed regret for the statements that are the subject of this proceeding. As stated above, this case is about a lawyer who lost perspective. Stated in other words, this case is about a lawyer who failed to recognize that he had absorbed his client's interests into his own. Respondent's testimony indicates that he perceived an improper political structure in the Forty-Fourth Circuit and admits that "…the law applies equally to everybody, [those named in the affidavits] and me, too." Tr. 449.

Further, Respondent did finally attempt to cure the conflict of interest. In his Motion to Quash the grand jury subpoena, Respondent requested a continuance noting that Ron Jarrett had a right to independent counsel. Inf. App. A294.

Respondent Did Time For a Wrongful Conviction

As this Court is well aware, Respondent spent approximately thirty (30) days in jail based on the statements in his Petition. *Smith*, *supra*, 313 S.W.3d at 129. While Informant glosses over the fact that Respondent actually served jail time after being convicted based on a defective jury instruction, it is very significant for at least two reasons. First, it is jail time, which is not arguably pleasant, especially for a man over sixty years of age. Had this Court not intervened, Respondent would have served 120 days in jail. Second, Respondent served this time under a wrongful conviction, set aside by this Court over one year ago. *Id.* at 137. Serving time is certainly difficult enough; serving time without legal justification is another level of difficult altogether. Respondent served time in jail for something that he said.

Suspension, stayed for a period of probation at the discretion of this Court, is appropriate. An attorney is eligible for probation if the following three conditions are met: 1) The attorney is unlikely to harm the public during the period of probation and can be adequately supervised; 2) The attorney is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; 3) The attorney has not committed acts warranting disbarment. Rule 5.225(a).

Respondent is Unlikely to Harm the Public and Can Be Supervised

Respondent, over the last few years, committed errors in judgment resulting in the statements being made that are the subject of this proceeding, the effects of which have been fully debated. However, before that period, and since, Respondent has done no harm to the public, in fact having served the public in his capacity as a Los Angeles police officer, school board member, and Douglas County Prosecutor. Should this Court choose, based on Respondent's long history of public service and short period of misguided objectives, to place Respondent on probation, there is little if any evidence to suggest he is likely to harm the public.

Further, supervision will not be a problem. First, Informant's office is certainly capable of administering any probation conditions this Court deems appropriate, and Respondent is certainly willing to abide by any such conditions. Second, this Court can review the testimony of Informant's witnesses and know that Respondent will be watched closely by those who testified against him. Respondent also will know that Judge Moody, the Wades, the MacPhersons, and Tom Cline, among others, will not allow Respondent to lose perspective again.

Respondent Can Practice Law Without Bringing Courts Into Disrepute

For over twenty years, Respondent has practiced law with dignity. Again, for a period of time, he lost perspective, if not impugning the reputation of others, certainly impugning, to a degree, his own reputation. This does not, however, warrant disbarment. Respondent has, and no evidence suggests otherwise, returned to the dignified practice of law in which he engaged before these issues arose. Thus, the two clean decades

Respondent has enjoyed in the practice of law are a far better predictor of his future behavior than a few years tarnished by politics.

Respondent Did Not Commit Acts Warranting Disbarment

Respondent failed to realize he had a conflict of interest. He failed to understand that his interests, misguided though they may have been, merged with Ron Jarrett's. Whether this resulted from animosity or a genuine belief in the corruption of the system is an issue on which testimony before the DHP differed. Perhaps it was both. Nonetheless, Respondent's misconduct was his negligent failure to see the conflict of interest. Under ABA Standard 4.33, absent aggravating or mitigating factors, this misconduct warrants reprimand.

Having met the three elements set forth in Rule 5.225, this Court may consider probation. While reprimand is the baseline standard where an attorney negligently fails to recognize a conflict of interest, aggravating factors do exist in this case, as discussed above. Thus, this case likely calls for discipline stronger than a reprimand. However, strong mitigating factors exist as well. Those mitigating factors demand that something short of the most severe discipline be imposed. The fair resolution is a suspension, stayed for a period of probation.

CONCLUSION

Forests have been felled litigating this case, from an order of contempt, to a trial by jury, to arguments before this Court, a four-day disciplinary hearing, and eventually, more arguments before this Court. At the end, we have a case about a lawyer who, faced with problems with the same people disliked by one of his clients, failed to recognize his conflict of interest, and lost perspective. This Court should not condone Respondent's actions. But this Court should not disbar Respondent for negligence.

Respondent prays this Court find that Respondent violated Rule 4-1.7, and impose a suspension. This Court should stay the suspension for a period of probation and under such conditions of probation that this Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Respondent's Brief and a CD containing Respondent's Brief were sent on _____ via _____ to:

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Bruce Galloway

CERTIFICATION PURSUANT TO RULE 84.06(c)

The undersigned hereby certifies that to the best of his knowledge, Respondent's Brief:

1. Includes the information required by Rule 55.03;

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

3. Contains 16,877 words, according to the word count function of the word processor used to generate this brief, Microsoft Word;

4. That the disks have been scanned and are virus free.

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