Rule 1.13: Organization as Client

Share:

Client-Lawyer Relationship

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

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ABA American Bar Association |
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Rule 1.13 Organization As Client - Comment

Share:

Client-Lawyer Relationship

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then

only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government

or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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Supreme Court Rules

Subject:	Rule 4 - Rules Governing the Missouri Bar and the Judiciary - Rules of Professional Conduct	Section/Rule:	4- 1.13
		Publication / Adopted Date:	August 19, 1994
Topic:	Client-Lawyer Relationship - Organization as Client	Revised / Effective Date:	July 1, 2007

RULE 4-1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with Rule 4-1.13(b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 4-1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 4-1.7. If the organization's consent to the dual representation is required by Rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

(Adopted Aug 7, 1985, eff. Jan. 1, 1986. Amended March 1, 2007, eff. July 1, 2007.)

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 4-1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 4-1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule 4-1.13 is concurrent with the authority and responsibility provided in other Rules. In particular, this Rule 4-1.13 does not limit or expand the lawyer's responsibility under Rules 4-1.6, 4-1.8, 4-1.16, 4-3.3, or 4-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 4-1.2(f) can be applicable.

Government Agency

[6] The duty defined in this Rule 4-1.13 applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes

of this Rule 4-1.13. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule 4-1.13 does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Rule 4-1.13(e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[**History:** Am. (b) effective July 1, 2007.]

Comment

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[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

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[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular,

this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

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[7] The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

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[8] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity or interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

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other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Adopted 01/01/05

Amended 12/01/06: Paragraph (b) amended.

Defined Terms (see Rule 1.0):

"Believes"
"Information relating to the representation"
"Knows"
"Matter"
"Reasonable"
"Reasonably"
"Reasonably believes"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

SUPREME COURT OF MISSOURI
en banc

In re: AMBRY NICHOLE SCHUESSLER, Respondent.	)))	No. SC97376
consolidated with		*Opinion issued August 13, 2019*
In re: KATHERINE ANNE DIERDORF, Respondent.	)))	No. SC97377

ORIGINAL DISCIPLINARY PROCEEDING

The Office of Chief Disciplinary Counsel (OCDC) seeks to discipline the law licenses of Ambry Nichole Schuessler and Katherine Anne Dierdorf for multiple violations of the rules of professional conduct in relation to their dishonesty about and concealment of a brutal assault of a suspect in custody by a police detective and the charges resulting therefrom filed by their friend and co-assistant circuit attorney. At the time of the incidents, Ms. Schuessler and Ms. Dierdorf were serving as assistant circuit attorneys with the office of the circuit attorney of the city of St. Louis (OCA).

The preponderance of the evidence proves Ms. Dierdorf violated Rules 4-1.13, 4-8.4(c), and 4-8.4(d) by failing to disclose information regarding the co-assistant circuit attorney's knowledge of and conduct following the police detective's assault of the suspect in custody. The preponderance of the evidence further establishes Ms. Schuessler violated

Rule 4-8.4(g) by making a racist and homophobic comment about the suspect's assault and Rules 4-8.4(c) and 4-8.4(d) by failing to disclose her knowledge of the assault by the police detective and her repeated dishonesty during the investigation and prosecution of the police detective.

This Court finds the severity of Ms. Dierdorf's misconduct as a result of her dishonesty and instruction of others to conceal information about the incident justifies the imposition of an indefinite suspension with no leave to apply for reinstatement for three years. Similarly, Ms. Schuessler's repeated dishonesty during and interference with the federal prosecution of the police detective justify the imposition of an indefinite suspension with no leave to apply for reinstatement for two years.

Factual and Procedural History

In 2011, Ms. Dierdorf became licensed to practice law in Missouri. In February 2014, Ms. Dierdorf accepted a position as an assistant circuit attorney with OCA. Ms. Dierdorf was assigned to the misdemeanor division and was supervised by Philippa Barrett.

In 2013, Ms. Schuessler became licensed to practice law in Missouri and began working as an assistant circuit attorney with OCA. She was assigned to the misdemeanor division and was supervised by Ms. Barrett.

While working at OCA, Ms. Dierdorf and Ms. Schuessler became good friends with Bliss Worrell and Lauren Collins, who were also assistant circuit attorneys in the misdemeanor division, and a summer intern, Jane Doe. The group socialized outside the

office and texted frequently. The following events led to the disciplinary proceedings against Ms. Dierdorf and Ms. Schuessler.

Tuesday Night

On Tuesday, July 22, 2014, Ms. Dierdorf, Ms. Worrell, and Ms. Doe went to a St. Louis Cardinals baseball game. While there, Ms. Worrell received a telephone call from a detective with the St. Louis police department, Thomas "Tom" Carroll. Ms. Worrell and Det. Carroll had a close, personal relationship. They talked frequently on the telephone, socialized outside of work, and were training together for a marathon. Det. Carroll called because his daughter's vehicle had been broken into and her credit card stolen. Later that night, a suspect was apprehended with the daughter's credit card.

Wednesday

On the morning of July 23, 2014, Ms. Dierdorf was in her office with Ms. Doe. Ms. Worrell entered the office and stated, "Tom beat up that guy" who stole his daughter's credit card. Ms. Worrell left Ms. Dierdorf's office soon thereafter, but the following group text message later occurred between the three women:

Ms. Worrell:	Hah. I realized we shouldn't be talking about [T]om beating someone up in front of [another coworker.][1] That behavior is not on her "true public servant" list
Ms. Doe:	I think she's too dense to realize what we are talking about
Ms. Worrell:	That's probably true
Ms. Dierdorf:	Yeah she has no clue

[1] This coworker had recently joined OCA and shared an office with Ms. Dierdorf. She was nearby at the time Ms. Worrell disclosed Det. Carroll beat up the suspect.

Ms. Dierdorf did not report to her supervisors Det. Carroll's assault of the suspect immediately following Ms. Worrell's disclosure of it.

Later that morning, Ms. Dierdorf was in Ms. Schuessler's office. Ms. Worrell walked into the office talking on her cell phone with Det. Carroll. She put the cell phone on Ms. Schuessler's desk and said, "Tom, tell them what you told me." Ms. Dierdorf then left the office.

On speakerphone, Det. Carroll proceeded to describe how he beat up the suspect who stole his daughter's credit card. He explained that he punched the suspect in the face and kicked the suspect while he was in a holding cell. He further stated he hit the suspect in the back with a chair and stuck a gun in the suspect's mouth. Ms. Schuessler then made the comment, "I bet that's not the first big, black thing he's had in his mouth." Det. Carroll and Ms. Worrell laughed. After the conversation ended, Ms. Schuessler did not report Det. Carroll's assault of the suspect to her supervisors.

That afternoon, Ms. Worrell went to the warrant office even though she was not assigned to the warrant office that day. She issued charges against the suspect Det. Carroll assaulted, including a felony charge for fleeing custody.

Thursday

On the morning of July 24, 2014, Ms. Dierdorf was, again, in her office with Ms. Doe. Ms. Worrell entered the office and told them she had issued the case against the suspect Det. Carroll beat up for stealing his daughter's credit card. The group also discussed some details of the assault before Ms. Worrell left the office.

Ms. Dierdorf then went to Ms. Schuessler's office. Ms. Collins was also in Ms. Schuessler's office. Ms. Dierdorf came in and said, "Bliss really messed up." She then told Ms. Schuessler and Ms. Collins that Ms. Worrell went to the warrant office to intercept the warrant application for the suspect beat up by Det. Carroll. She further stated the suspect was falsely charged with fleeing custody to explain why the suspect was injured. In response, Ms. Schuessler stated, "We could get in trouble just for knowing this." Ms. Dierdorf responded, "How would they find out. I'm not going to say anything."

After Ms. Dierdorf left the office, Ms. Collins and Ms. Schuessler checked the OCA database to see if the suspect had been charged. Their check revealed the suspect had been charged with a felony for fleeing custody. Ms. Schuessler expressed concern that an innocent man could go to jail for a crime he did not commit. Ms. Schuessler was hesitant to report Ms. Worrell's conduct because Ms. Schuessler and Ms. Dierdorf were roommates. But when Ms. Collins indicated she was going to report the incident to their supervisor, Ms. Barrett, Ms. Schuessler went with her to Ms. Barrett's office. Ms. Collins informed Ms. Barrett that she believed Ms. Worrell had filed false charges against a suspect whom Det. Carroll had assaulted while in custody.

Ms. Dierdorf was then called to discuss the matter with her supervisors – Ms. Barrett, Ed Postawko, chief warrant officer, and Beth Orwick, chief trial assistant. She disclosed that she had learned something about Det. Carroll roughing up a suspect who stole something from his daughter and that Ms. Worrell had issued charges. She was adamant she had told no one else what she knew about the assault. She did not disclose

that Ms. Worrell had told her about the assault directly or that she had learned about the assault prior to Ms. Worrell issuing charges against the suspect on Wednesday.

Ms. Dierdorf then went to a courtroom where Ms. Schuessler was also present. Ms. Dierdorf said to her, "I told them I don't know anything. You don't tell them you know anything either." Ms. Schuessler perceived Ms. Dierdorf's statement as an instruction not to tell the supervisors anything.

Ms. Schuessler was then called to interview with Mr. Postawko and Ms. Orwick. She told them she had overheard a conversation between Ms. Worrell and Det. Carroll about the assault. She also said Ms. Dierdorf told her Ms. Worrell had issued false charges against the suspect to cover up the assault. She did not disclose that she had heard Det. Carroll describe the assault on speakerphone or that Det. Carroll used a gun during the incident.

That evening, Ms. Dierdorf drove Ms. Worrell home. During the drive, Ms. Worrell spoke with Det. Carroll on a cell phone about how people found out about the assault and the charges. After Ms. Dierdorf dropped off Ms. Worrell, Ms. Dierdorf and Ms. Doe exchanged text messages. During the text conversation, Ms. Doe asked, "If they determine Bliss knew it was a false police report can any charges be brought against bliss/the cops. I hope she understands if we distance ourselves." Ms. Dierdorf responded, "Yes they can."

Friday

On July 25, 2014, the internal affairs division (IAD) of the St. Louis police department became involved in the matter. That morning, IAD interviewed Ms. Schuessler

and Ms. Dierdorf separately. Ms. Barrett, Ms. Orwick, and Mr. Postawko were also present during the IAD interviews.

Ms. Schuessler explained to IAD that she had learned a charge of resisting arrest or fleeing custody had been brought against the suspect Det. Carroll assaulted. When asked how she found out about the charge or why she believed the charge was false, she said Ms. Dierdorf had told her about it Thursday morning after learning Ms. Worrell issued the case. IAD also asked Ms. Schuessler to explain how she knew Det. Carroll "beat the crap out of" the suspect. She told IAD Ms. Worrell had been in her office talking to Det. Carroll on the telephone. She did not tell IAD the conversation was on speakerphone. Instead, she said she could hear only Ms. Worrell's portion of the conversation and gleaned information about the assault from it.

Ms. Dierdorf was also interviewed by IAD that morning. Ms. Barrett began Ms. Dierdorf's interview by asking, "Is there anything more that you want to add to [yesterday's] conversation about your knowledge of the situation we talked about?" Ms. Dierdorf stated, "Not that I can think of . . . but I [don't] know any more that I didn't say yesterday." Ms. Barrett then expressly asked Ms. Dierdorf whether she had shared information with anyone. Ms. Dierdorf stated, besides Ms. Doe being in the room when Ms. Worrell told her about issuing the case, she "hadn't spoken with anybody about it." She admitted to knowing about Det. Carroll assaulting the suspect but stated she did not learn about it until Ms. Worrell told her in her office Thursday morning. She stated she did not question Ms. Worrell further about the charges or the assault because she "had to run upstairs for a plea." She also did not tell IAD about the telephone conversation between

Ms. Worrell and Det. Carroll Thursday evening when she drove Ms. Worrell home. Ms. Dierdorf was subsequently sent home from work that afternoon.

Over the weekend, Ms. Dierdorf called Ms. Barrett and left a voice message. She said she wished she had been more forthcoming and wanted to talk. On the following Monday, July 28, 2014, Ms. Dierdorf was informed she could either resign or be terminated. She chose to resign from OCA. Ms. Schuessler was not terminated or asked to resign.

The FBI Investigation

After Ms. Dierdorf resigned, the Federal Bureau of Investigation (FBI) and the United States attorney's office were brought into the investigation. On August 11, 2014, the FBI interviewed Ms. Dierdorf. Assistant United States Attorney (AUSA) Harold "Hal" Goldsmith was present for the interview.

Ms. Dierdorf told the FBI about the assault but stated she did not learn about it until Thursday morning when Ms. Worrell came into her office and told her about issuing the case. She also told the FBI about driving Ms. Worrell home and Ms. Worrell's telephone conversation on the ride home with Det. Carroll. She stated, however, that Ms. Worrell and Det. Carroll had not discussed the assault.[2]

[2] In her brief, Ms. Dierdorf disputes whether she lied during the FBI interviews. In doing so, she relies on testimony from her former attorney, Jeffrey Jensen, who is currently the United States attorney for the Eastern District of Missouri and was present during the FBI interviews. Mr. Jensen gave general testimony that he was unaware "of any information that Miss Dierdorf intentionally withheld from the FBI and Mr. Goldsmith during [the FBI] interview on August 11." He further stated that any "misstatement" by Ms. Dierdorf was not material. Such general testimony is inconsistent with Mr. Goldsmith's specific testimony that Ms. Dierdorf was dishonest as to when she found out about the assault and

It was not until her second interview with the FBI on September 9, 2014, that Ms. Dierdorf admitted she knew about the assault on Wednesday morning following her discussion with Ms. Worrell and Ms. Doe in her office. She also admitted to describing the assault to Ms. Schuessler and Ms. Collins on Thursday. She further admitted she had lied to her supervisors about when she learned about the assault. Finally, she told the FBI that the telephone conversation between Ms. Worrell and Det. Carroll on Thursday night was about the assault and the investigation.

On August 13, 2014, the FBI conducted its first interview with Ms. Schuessler. She told them Det. Carroll used a gun during the assault, but she attributed the racist and homophobic comment she made about the gun being in the suspect's mouth to Det. Carroll. She also did not tell the FBI the telephone was on speaker when Det. Carroll described assaulting the suspect. Following the interview, the FBI learned it was Ms. Schuessler who made the racist and homophobic comment.

On September 4, 2014, the FBI conducted its second interview with Ms. Schuessler. She admitted she heard Det. Carroll describe the assault on speakerphone. Additionally, when confronted, she admitted that she, not Det. Carroll, had made the racist and homophobic comment about the suspect having the gun in his mouth.

Federal Prosecution of Det. Carroll and Ms. Worrell

Det. Carroll and Ms. Worrell were subsequently indicted on federal criminal charges. Both Ms. Dierdorf and Ms. Schuessler testified during the grand jury proceedings.

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what Ms. Worrell discussed with Det. Carroll over the telephone. Ms. Dierdorf admitted to lying about such information in her second interview with the FBI.

Det. Carroll pleaded guilty to deprivation of rights under color of state law, 18 U.S.C. § 242. At his sentencing hearing, Det. Carroll disputed he used a gun during the assault of the suspect. Ms. Schuessler was called to testify. During her testimony, Ms. Schuessler was impeached because of her prior inconsistent statements to her supervisors, IAD, and the FBI. The sentencing judge determined Det. Carroll used a gun during the assault and enhanced Det. Carroll's sentence to 52 months in prison.

Ms. Worrell pleaded guilty to misprision of a felony, 18 U.S.C. § 4. She was sentenced to 18 months of probation. She was later disbarred by this Court.

Disciplinary Proceedings

On May 30, 2017, OCDC filed an information against Ms. Dierdorf and Ms. Schuessler. The information alleged Ms. Dierdorf violated Rule 4-1.13 by failing to disclose to her supervisors the potentially illegal conduct of Det. Carroll's assault and Ms. Worrell's involvement in filing charges against the suspect. The information also charged Ms. Dierdorf with violating Rules 4-1.13 and 4-8.4(c) by lying and failing to disclose relevant and important information to her supervisors, IAD, and the FBI regarding her knowledge of Det. Carroll's assault and Ms. Worrell's involvement in issuing charges and by instructing Ms. Schuessler not to cooperate with the OCA investigation. The information further alleged Ms. Dierdorf violated Rule 4-8.4(d) by engaging in conduct prejudicial to the administration of justice.

As to Ms. Schuessler, the information charged her with violating Rule 4-8.4(c) by: (1) failing to disclose information and lying to her supervisors, IAD, and the FBI regarding her knowledge of the assault by Det. Carroll; (2) making a racist and homophobic slur in

response to a report of possible illegal police conduct; and (3) falsely attributing the racist and homophobic slur to Det. Carroll during her FBI interview. OCDC also alleged Ms. Schuessler violated Rule 4-8.4(d) by engaging in conduct prejudicial to the administration of justice.

Ms. Dierdorf and Ms. Schuessler denied the allegations against them. A disciplinary hearing panel (DHP) conducted a hearing on the matter. At the hearing, AUSA Goldsmith testified Ms. Dierdorf was dishonest in her first interview with the FBI about when she learned about the assault from Ms. Worrell. He further testified her dishonesty hampered the investigation because she was an essential witness due to her proximity to the situation.

AUSA Goldsmith further testified Ms. Schuessler lied during her first interview with the FBI by attributing her racist and homophobic comment about the gun to Det. Carroll. He also testified Ms. Schuessler lied during the first FBI interview by failing to disclose that she heard the details of the assault from Det. Carroll while he was on speakerphone. He further testified Ms. Schuessler's dishonesty harmed the investigation and subjected her to impeachment during Det. Carroll's sentencing hearing.

The DHP determined Ms. Dierdorf violated Rule 4-8.4(c) by failing to disclose information to the FBI. It recommended a reprimand without conditions pursuant to Rule 5.16(d)(1). In doing so, the DHP found mitigating factors, including Ms. Dierdorf's lack of disciplinary history, her remorsefulness, and her continuing to practice law appropriately.

The DHP determined Ms. Schuessler was guilty of professional misconduct for violating Rule 4-8.4(c) by failing to fully disclose information to her supervisors and the

FBI regarding her knowledge of Det. Carroll's involvement in the assault. The DHP found her comment regarding Det. Carroll putting his gun in the suspect's mouth to be distasteful but not, in itself, a violation of Rule 4-8.4(g). The DHP further concluded Ms. Schuessler was a whistleblower because she reported the misconduct and, therefore, was not guilty of professional misconduct under Rule 4-8.4(d). The DHP recommended Ms. Schuessler receive a public reprimand pursuant to Rule 5.16(d)(1). The DHP also found Ms. Schuessler's misstatements did not materially affect the outcome of the criminal prosecutions against Det. Carroll and Ms. Worrell. Finally, the DHP found mitigating factors, including her lack of disciplinary history and her remorsefulness.

Ms. Dierdorf and Ms. Schuessler accepted the DHP's recommendation. OCDC, however, rejected the DHP's recommendation. Accordingly, this Court must determine whether the alleged violations occurred and, if so, the appropriate discipline. Rule 5.19(d)-(e). The two cases are consolidated for purposes of this opinion.

Standard of Review

Before this Court can impose discipline, "[p]rofessional misconduct must be proven by a preponderance of the evidence." *In re Farris*, 472 S.W.3d 549, 557 (Mo. banc 2015). "The DHP's findings of fact and conclusions of law are advisory." *In re Krigel*, 480 S.W.3d 294, 299 (Mo. banc 2016). In disciplinary proceedings, this Court "reviews the evidence de novo, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law." *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2000).

Ms. Dierdorf's Conduct

Rule 4-1.13

OCDC asserts Ms. Dierdorf should be disciplined because she violated Rule 4-1.13 by failing to report Ms. Worrell's misconduct. Rule 4-1.13(b) provides in relevant part:

> If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

This rule applies to government agencies. Rule 4-1.13, cmt. [6].

Here, Ms. Dierdorf – a lawyer for OCA – knew another assistant circuit attorney – Ms. Worrell – had violated the law by filing false charges against a suspect to cover up a police officer's brutal assault of the suspect. The failure to report such conduct was a violation of Ms. Dierdorf's legal obligation to the circuit attorney's organization and could have resulted in a civil rights violation or lawsuit against OCA. Accordingly, it was reasonably necessary in the best interest of OCA that Ms. Dierdorf report Ms. Worrell's conduct.[3]

Instead, Ms. Dierdorf chose to conceal her knowledge of Det. Carroll's misconduct and Ms. Worrell's filing of a false charge by lying to her supervisors, IAD, and the FBI.

[3] Throughout her brief, Ms. Dierdorf contends she never knew the charges were falsified at the time Ms. Worrell filed them. In support of this assertion, she relies on the fact that Ms. Worrell has always disputed whether she filed a false charge. The record shows that, at the time she spoke with Ms. Collins and Ms. Schuessler on Thursday, Ms. Dierdorf knew the charge of felony fleeing custody was false and filed to cover up Det. Carroll's assault of the suspect in custody.

Ms. Dierdorf's statements to her supervisors and IAD gave the impression that both she and Ms. Worrell did not know about the assault until after charges were filed against the suspect. She further instructed another attorney, Ms. Schuessler, not to give any information to her supervisors. Ms. Dierdorf then lied again during her first FBI interview regarding when she initially learned about the assault carried out by Det. Carroll. It was not until her second FBI interview – over a month after the incidents occurred – that Ms. Dierdorf finally admitted Ms. Worrell had told her about the assault on Wednesday prior to the filing of the charges.

As AUSA Goldsmith testified, Ms. Dierdorf "time shifted" to protect both herself and Ms. Worrell by making it appear they did not know about the assault until after Ms. Worrell filed charges. Furthermore, Ms. Dierdorf's lies and omissions interfered with and prolonged the FBI's investigation of Ms. Worrell. The record, therefore, reflects, by a preponderance of the evidence, that Ms. Dierdorf violated Rule 4-1.13 when she failed to report Ms. Worrell's misconduct.

Rule 4-8.4(c), (d)

OCDC further asserts Ms. Dierdorf violated Rules 4-8.4(c) and 4-8.4(d) by repeatedly lying to federal and state investigators and instructing Ms. Schuessler to lie to her supervisors about the assault and Ms. Worrell's misconduct. Rule 4-8.4(c) provides: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Rule 4-8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

Ms. Dierdorf exhibited a pattern of dishonesty over the course of the criminal investigations of Det. Carroll and Ms. Worrell. She admitted during her second FBI interview that she lied to her supervisors and IAD regarding when she discovered the assault occurred. Additionally, for over a month, she concealed from her supervisors, IAD, and the FBI that Ms. Worrell knew Wednesday morning, prior to the filing of the charges, not only that Det. Carroll assaulted the suspect but also the details of the severity of the assault. She further attempted to conceal her own knowledge of the assault and Ms. Worrell's filing of a false charge by telling her supervisors she did not learn of the assault until Thursday and had not discussed the matter with anyone at the office. She also omitted facts regarding the Thursday evening telephone call between Ms. Worrell and Det. Carroll about the investigation. She even instructed Ms. Schuessler not to tell her supervisors anything and implied to both Ms. Schuessler and Ms. Collins that, by not saying anything, their knowledge of the incident prior to the charges being filed would not be discovered.

Ms. Dierdorf's dishonesty, therefore, not only interfered with criminal investigations but also concealed the professional misconduct of another attorney, Ms. Worrell. It follows that Ms. Dierdorf's dishonesty and deceitfulness were prejudicial to the administration of justice. Accordingly, the record establishes, by a preponderance of the evidence, that Ms. Dierdorf violated Rules 4-8.4(c) and 4-8.4(d).

Appropriate Discipline

In determining the appropriate discipline, "this Court considers the ethical duty violated, the attorney's mental state, the extent of actual or potential injury caused by the

attorney's misconduct, and any aggravating or mitigating factors." *In re Ehler*, 319 S.W.3d 442, 451 (Mo. banc 2010). When imposing discipline, this Court must be guided by the principle that the purpose of attorney disciplinary proceedings "is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession." *In re Gardner*, 565 S.W.3d 670, 677 (Mo. banc 2019) (quoting *In re Kazanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003)). This Court also gleans guidance from the *American Bar Association Standards for Imposing Lawyer Sanctions* (ABA Standards) and prior disciplinary precedent. *Id.*

ABA Standard 5.22 provides: "Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." Furthermore, "[q]uestions of honesty go to the heart of fitness to practice law. Misconduct involving subterfuge, failing to keep promises, and untrustworthiness undermine public confidence in not only the individual but in the bar." *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996) (internal citation omitted).

Ms. Dierdorf, in her capacity as an assistant circuit attorney, knowingly failed to follow proper procedures when she discovered Det. Carroll's assault of a suspect in custody and Ms. Worrell's attempt to conceal that assault by filing false charges. When her supervisors discovered the incident, she lied to them to conceal both her and Ms. Worrell's misconduct in the matter. Such conduct undermines the public's confidence in not only OCA but also in Missouri prosecutors in general. Ms. Dierdorf's active dishonesty and

concealment in the matter, therefore, goes to her fitness to practice law and justifies a suspension.

Ms. Dierdorf argues a reprimand is appropriate because, while the case rests on the serious misconduct of police brutality and potentially false charges, Ms. Dierdorf was not the perpetrator of such misdeeds. She contends her misconduct is limited to two instances in which she failed to make full disclosures. But Ms. Dierdorf downplays the severity of her dishonesty over the course of the investigation into Ms. Worrell's misconduct.

A reprimand "is appropriate only where the attorney's breach of discipline is an isolated act and does not involve dishonest, fraudulent, or deceitful conduct on the part of the attorney." *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986) (internal citation omitted). As previously discussed, Ms. Dierdorf engaged in a pattern of dishonest conduct by concealing when she and Ms. Worrell discovered Det. Carroll's assault of the suspect. Her dishonest behavior was not limited to a single incident but, rather, continued for weeks.

Furthermore, Ms. Dierdorf committed such acts while serving in her capacity as an assistant circuit attorney. This Court has recognized that "the responsibility of a public prosecutor differs from that of the usual advocate." *State v. Harrington*, 534 S.W.2d 44, 50 (Mo. banc 1976). A prosecutor "is not an advocate in the ordinary sense of the word, but is the people's representative, and [the prosecutor's] primary duty is not to convict but to see that justice is done." *Id.* at 49. "The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain." *Id.* A "prosecutor is under a duty to consider the public interest in the

fair administration of criminal justice." *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 241 (Mo. banc 1985).

These principles are reflected in the OCA personnel manual, which Ms. Dierdorf signed and acknowledged she had read and understood. In pertinent part, the manual states circuit attorneys assume "two paramount obligations: to serve the public interest; and to perform public service with high personal integrity." The manual further instructs, "Integrity requires . . . the fortitude to refuse to go along with something that you believe is ethically wrong." The manual further states that "[b]eing a good public servant means knowing how to handle the demands of your work with character and discipline" and that "[t]he true public servant . . . does not succumb to peer or other pressure" and "[r]efuses to let official actions be influenced by personal relationships."

Ms. Dierdorf's repeated dishonesty in her interviews with her supervisors and IAD shows a pattern of protecting herself and her friends over the duties she assumed when she became an assistant circuit attorney. Moreover, she encouraged other assistant circuit attorneys to keep quiet about the matter in a further attempt to conceal both her and Ms. Worrell's misconduct. At the hearing, Ms. Dierdorf admitted she had no reason to be dishonest during the interviews. She further stated she did not correct her misstatement to her supervisors because she hoped she was not going to be further involved in the matter. Her misconduct and subsequent inaction, therefore, clearly violate the standards to which Missouri prosecutors and, in particular, St. Louis circuit attorneys are held.

Ms. Dierdorf presents several mitigating factors, such as the absence of a prior disciplinary record, cooperation with the disciplinary board and proceedings, and a good

reputation in her current practice. But such mitigating circumstances do not outweigh the severity of her dishonesty, her selfish motive, the multiple offenses, and the vulnerability of the victim being assaulted.

This Court has previously found a suspension is the appropriate discipline when an attorney makes false and misleading statements to the FBI during a criminal investigation. *In re Zink*, 278 S.W.3d 166, 169 (Mo. banc 2009). The attorney in *Zink* was suspended indefinitely with no leave to reapply for six months. *Id.* at 170. Such discipline, however, was imposed in light of the attorney's voluntary abstention from the practice of law for one year prior to the institution of the state disciplinary proceedings. *Id.* at 169.

Ms. Dierdorf made false and misleading statements to her supervisors at OCA and to law enforcement over the course of a criminal investigation. Importantly, her repeated dishonesty occurred while she was an assistant circuit attorney. As previously discussed, such attorneys are held to a higher standard given the nature of their work to protect the public. Additionally, unlike Mr. Zink, Ms. Dierdorf has not abstained from the practice of law. Accordingly, this Court concludes that an indefinite suspension with no leave to apply for reinstatement for three years is the appropriate discipline.

Ms. Schuessler's Conduct

Rule 4-8.4(c)

OCDC asserts Ms. Schuessler violated Rule 4-8.4(c) by repeatedly lying to and withholding information from criminal investigators about Det. Carroll's assault of a detained suspect, thereby prejudicing the prosecution of Det. Carroll. Ms. Schuessler's conduct following her discovery of the assault establishes a pattern of dishonest behavior.

Ms. Schuessler heard Det. Carroll describe, in detail, his assault of the suspect. Yet, in her interview with her supervisors and IAD, she did not reveal the speakerphone conversation. Instead, she told IAD she could hear only Ms. Worrell's side of the conversation. It was not until over a month later, in her first FBI interview, that she admitted Det. Carroll was on speakerphone and she heard the details of the assault directly from him, including that he put a gun in the suspect's mouth. But even then, she chose to lie by attributing her racist and homophobic comment to Det. Carroll. Again, such lies went uncorrected for nearly a month until her second FBI interview. Ms. Schuessler, therefore, engaged in dishonest and deceitful conduct in violation of Rule 4-8.4(c) during the criminal investigation of Det. Carroll.

Rule 4-8.4(g)

OCDC further asserts Ms. Schuessler's comment about the gun in the suspect's mouth was racist and homophobic, thereby violating Rule 4-8.4(g). Rule 4-8.4(g) provides a lawyer engages in professional misconduct by "manifest[ing] by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation." "Whether a lawyer's conduct constitutes professional misconduct in violation of Rule 4-8.4(g) can be determined only by a review of all of the circumstances." Rule 4-8.4(g), cmt. [4].

Ms. Schuessler contends the comment cannot constitute a Rule 4-8.4(g) violation because it was not made in the context of "representing a client." OCDC responds that, as a prosecuting attorney, Ms. Schuessler is always representing the people of Missouri.

Ms. Schuessler was in her office at OCA, during working hours, when she made the racist and homophobic comment. She was required, as an assistant circuit attorney, to act in the best interest of OCA and the citizens of the city of St. Louis. A prosecutor is not representing a client only when performing a specific act in a case. Ms. Schuessler's conduct, therefore, violated Rule 4-8.4(g). The violation was particularly egregious given the circumstances in which the racist and homophobic comment was made.

Rule 4-8.4(d)

Finally, OCDC asserts Ms. Schuessler's dishonesty during Det. Carroll's criminal investigation violates Rule 4-8.4(d). Again, Rule 4-8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

As previously noted, Ms. Schuessler made repeated lies and omissions over the course of the investigation into Det. Carroll's assault on the suspect in custody. Her repeated lies and omissions prolonged the criminal investigation of Det. Carroll. Her dishonesty further posed a potential risk to the prosecution of Det. Carroll by opening herself up to impeachment at the sentencing hearing. As a result, Ms. Schuessler engaged in conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d).

Appropriate Discipline

Again, "this Court considers the ethical duty violated, the attorney's mental state, the extent of actual or potential injury caused by the attorney's misconduct, and any aggravating or mitigating factors" when determining the appropriate attorney discipline. *Ehler*, 319 S.W.3d at 451. This Court also looks to discipline it has imposed in similar

cases and gleans guidance from the ABA Standards. *Gardner*, 565 S.W.3d at 677. ABA Standard 5.22 provides: "Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process."

Ms. Schuessler, in her role as assistant circuit attorney, violated the public trust when she learned, firsthand, about the assault of a suspect in custody by a police officer and failed to report the incident. She made light of the assault and joined in demeaning the victim by making a racist and homophobic slur about him. She then repeatedly lied about her knowledge of the assault to her supervisors, IAD, and the FBI for more than a month following the incident. Her dishonesty and failure to act interfered with and prolonged the criminal investigation of Det. Carroll. When asked why she did not initially report the assault after hearing Det. Carroll describe it, she stated she did not "want to be a part of it" so she "sat on it." She later indicated she was scared to report it because she was currently living with Ms. Dierdorf and did not want to expose her friends.

Ms. Schuessler contends that, at most, a reprimand is the appropriate discipline because she has already endured four and a half years of chaos, despair, and fear resulting from these incidents. But again, a reprimand is not appropriate given Ms. Schuessler's repeated dishonesty during the course of the Det. Carroll investigation. *See Littleton*, 719 S.W.2d at 777. Additionally, like Ms. Dierdorf, Ms. Schuessler was dishonest while serving in the role of prosecutor. Her dishonesty and failure to uphold the duties outlined for her as an assistant circuit attorney indicate a suspension is the appropriate discipline.

Ms. Schuessler's misconduct exhibits some of the same aggravating factors as Ms. Dierdorf's, namely the pattern of dishonesty and multiple offenses. A mitigating factor is that Ms. Schuessler accompanied Ms. Collins when Ms. Collins went to Ms. Barrett's office to report Ms. Worrell and Det. Carroll's conduct. Additionally, Ms. Schuessler has sought counseling of her own accord. These factors, in addition to her lack of prior disciplinary history, cooperation throughout the course of the disciplinary proceedings, and good reputation in her current practice lead this Court to find the appropriate discipline is an indefinite suspension with no leave to apply for reinstatement for two years.

Conclusion

This Court orders that Ms. Dierdorf be suspended indefinitely from the practice of law with no leave to apply for reinstatement for a period of three years from the date the mandate issues in this cause. This Court further orders that Ms. Schuessler be suspended indefinitely from the practice of law with no leave to apply for reinstatement for a period of two years from the date the mandate issues.

_____

PATRICIA BRECKENRIDGE, JUDGE

All concur.

No. 71,138

JOYCE H. CRANDON, *Appellant*, v. STATE OF KANSAS, KANSAS BANKING COMMISSION, and FRANKIE D. DUNNICK, *Appellees*.

(897 P.2d 92)

[redacted]

Opinion filed June 2, 1995.

Alan L. Rupe, of Rupe & Girard Law Offices, P.A., of Wichita, argued the cause, and *Thomas L. Steele*, of the same firm, was with him on the briefs for the appellant.

Carl A. Gallagher, of McAnany, Van Cleave & Phillips, P.A., of Kansas City, argued the cause, and *Nancy L. Ulrich*, assistant attorney general, and *Robert T. Stephan*, attorney general, were with him on the brief for the appellee.

Mark F. Anderson, of Topeka, was on the brief for *amicus curiae* The Disciplinary Administrator of Kansas.

Jim Lawing, of Wichita, was on the brief for *amicus curiae* American Civil Liberties Union of Kansas.

The opinion of the court was delivered by

ABBOTT, J.: Plaintiff Joyce Crandon brought this action after she was discharged from her position as general counsel for the Office of the State Banking Commissioner (OSBC). Plaintiff had reported to the FDIC alleged violations of federal and state law committed by the Deputy Commissioner, Judi Stork. Plaintiff alleged a common-law whistle-blowing retaliatory discharge claim, a claim for violation of K.S.A. 1994 Supp. 75-2973, and a 42 U.S.C. § 1983 (1988) claim for violation of her First Amendment right to free speech. Plaintiff later sought to amend her complaint to include a free speech retaliatory discharge claim. The trial court granted the defendants' motion for summary judgment. Plaintiff appealed, and the case was transferred to this court from the Court of Appeals.

The trial court found the following undisputed facts:

"Ms. Crandon carried the title of general counsel to the office of the state bank commissioner [defendant Dunnick] and had the status of an assistant attorney general. She began upon her duties on November 18, 1991. Her position was in the unclassified civil service. See, K.S.A. 75-3135; K.S.A. 75-2935(1)(j) and (m). As such, she had no tenure and was an 'at will' employee. Compare, *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 716-19 (1988), pet. rev. den., 243 Kan. 780 (1988).

". . . . [I]t is the state bank commissioner who has the principal authority under K.S.A. 9-1701 et seq. to execute the laws and to examine and regulate banks.

". . . . The state bank commissioner is appointed by the governor and confirmed by the State Senate. It is the bank commissioner's duty to administer the state's banking laws. . . . Further authorized is a deputy commissioner appointed by the commissioner. The Deputy Commissioner is in the unclassified civil service and enjoys no tenure, but serves at the pleasure of the state bank commissioner. See, K.S.A. 75-3135.

"The remaining staff of the agency, exclusive of clerical personnel, consists of individuals holding office and authority as 'examiners' whose duties involve actual performance of, or supervision of, examinations of state chartered banks. All these personnel, as well as clerical staff, hold positions in the state classified civil service

system, meaning they are not subject to dismissal without cause. See, K.S.A. 75-3135; 75-2935(2).

"It was the duty of Ms. Crandon to act as the legal advisor to, and attorney for, this agency. Beginning approximately April to May 1992, one of the review examiners, Erik Berggren, became aware that the Deputy Commissioner, Judi Stork, who had held appointment in the agency since 1981, first as an examiner and subsequently, at the time in question, in the position of deputy commissioner, could be considered to have existing loans from two state chartered banks, the State Bank of Baileyville, also a bank in which her financial disclosure statement filed pursuant to K.S.A. 46-247 et seq. disclosed she had a 'substantial interest', and from the Southwest Bank and Trust in Topeka.

"One loan from the State Bank of Baileyville consisted of a note signed only by her husband, but the resulting mortgage on her home was signed by both [her] and her husband. Other loans consisted of a series of overdrafts on a personal checking account she held with that bank. Another loan existed at the Southwest Bank and Trust upon which, although Mrs. Stork was not a signatory to the loan documents, the collateral, a car, was titled in the name of she and her husband, he being the sole signator on the loan. For the purposes here it is not necessary for the court to determine whether, in fact, Mrs. Stork was a loan recipient in each circumstance, however, for the purpose of defendants' motion the court shall presume in each instance she was a loan recipient.

". . . Mr. Berggren believed that such loans placed Mrs. Stork not only in violation of the agency's own internal written ethics code, but also constituted a violation of state and federal banking laws.

"In this regard, K.S.A. 9-1701(a) provides:

'The commissioner or the commissioner's assistant or examiners shall visit each bank and trust company at least once every 18 months, and may visit any bank or trust company if the commissioner deems it necessary, for the purpose of making a full and careful examination and inquiry into the condition of the affairs of such bank or trust company. For such purpose the commissioner, the commissioner's assistant and examiners are authorized to administer oaths and to examine under oath the directors, officers, employees and agents of any bank or trust company. Such examination shall be reduced to writing by the person making it and such person's reports shall contain a full, true and careful statement of the condition of such bank or trust company. The commissioner in lieu of making a direct examination and inquiry may accept the examination and report of an authorized federal agency. The commissioner shall provide to the board of directors of the bank or trust company a copy of the examination report written by the state examiners. Neither the commissioner, the commissioner's assistant nor any examiner shall examine any bank or trust company in which the person making such examination is a stockholder or is otherwise financially interested or to which bank or trust company or any officer thereof the person making the examination is indebted.' (Emphasis supplied.)

"Also noted is 18 U.S.C. 213 which provides:
'Whoever, being an examiner or assistant examiner of member banks of the Federal Reserve System, financial institutions the deposits of which are insured by the Federal Deposit Insurance Corporation, which are branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 USCS Sec. 3101(1), (3)]), or which are organizations operating under section 25 or section 25(a) of the Federal Reserve Act, or a farm credit examiner or examiner of National Agriculture Credit Corporations, or an examiner of small business investment companies, accepts a loan or gratuity from any bank, branch, agency, corporation, association or organization examined by him or from any person connected therewith, shall be fined no more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given, and shall be disqualified from holding office as such examiner.' (Emphasis supplied.)

"Further, to be noted, as it will be addressed subsequent, is 12 U.S.C. 1289, as amended, as here relevant:

'(a) Prohibition
(1) In general
Except with the prior written consent of the Corporation—
(A) any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not—
(i) become, or continue as, an institution-affiliated party with respect to any insured depository institution;
(ii) own or control, directly or indirectly, any insured depository institution; or
(iii) otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution';

"Further, in reference to the above statute, the phrase 'institution affiliated party' is defined in 12 U.S.C. 1813(u), as here relevant as follows:

'(1) any director, officer employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;

. . .

(3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution;

. . .'

"Subsequent, probably in April to May or June 1992, Mr. Berggren first brought his concerns to Ms. Crandon's attention. Further, this underlying factual situation concerning Mrs. Stork became a part of a civil service hearing in a termination

proceeding initiated by the Commissioner regarding an employee (not related to this case) that had been appealed by the employee examiner to the state civil service board at which Ms. Crandon appeared in defense of the agency action. The employee had been terminated based on her conviction for violating 18 U.S.C. 213. The issue at note arose from an apparent 'what's good for the goose is good for the gander' defense claiming that Mrs. Stork had loans with the state chartered banks and she was not terminated. The terminated employee was reinstated by the civil service board. This hearing was on July 6, 1992. Ms. Crandon had argued before the Kansas civil service board that Mrs. Stork was not in violation of any such laws and the circumstances were not comparable. . . . .

"Mrs. Stork's circumstance was also raised by state bank examiners as a part of the regular examination of the State Bank of Baileyville on going circa this same period. At one point in June 1992, and again the week of July 6, 1992, Ms. Crandon made, on each occasion, a phone inquiry to the Federal Deposit Insurance Corporation regional office in Kansas City, specifically, to Mr. Lamberti, its regional counsel, whether in his view Mrs. Stork's circumstances were in violation of federal law, specifically 18 U.S.C. 213. Mr. Lamberti subsequently has testified that he did not perceive a violation, but that such an issue was an internal one for the state agency. Admittedly, he said his response was ad hoc and without research. Notwithstanding, in considering defendants' motion the court will consider Mr. Lamberti's response as sufficiently ambivalent such that plaintiff might believe his response at least left a question raised as to the violation of federal law.

"Sometime during the week of July 6, 1992, Ms. Crandon advised Mr. Berggren to turn the matter over to the FDIC, which he did. Mr. Berggren has testified he would have done so in any manner notwithstanding any advice of Ms. Crandon.

"Subsequently, and for the purpose of the motion and taken as true, Commissioner Dunnick learned at a meeting with the FDIC on July 9, 1992, of Mr. Berggren's reporting to the FDIC, Ms. Crandon's advice to him to do so, and her inquiries to Mr. Lamberti.

"At no time prior to her termination, except during questioning at the civil service hearing on July 6, 1992, when Mrs. Stork and Mr. Dunnick were called as witnesses, had Ms. Crandon personally talked with Mr. Dunnick or Mrs. Stork about Mrs. Stork's status vis a vis the identified loans and whether Mrs. Stork's loan circumstances violated federal or state banking laws, state ethics statutes, or internal agency ethics policy.

"At no time prior to Ms. Crandon's termination did Ms. Crandon attempt, in any manner, to persuade Mr. Dunnick, as the agency's head, that he should affirmatively act in some fashion under his authority as Commissioner to remedy the situation she believed was presented arising from the fact of Mrs. Stork's loans.

"Ms. Crandon asserted through counsel at oral argument in this case that she made one phone call to the attorney general's office and was told they don't give opinions on criminal matters. The person called is not identified.

"There is no evidence Ms. Crandon contacted any member of the banking board or the Governor's office before her termination.

"For the purpose of the motion, it is assumed Mr. Berggren told Ms. Crandon that he had discussed the loans with Mrs. Stork and that he had brought them to the attention of Commissioner Dunnick who said he would look into it. The conversations between Berggren, Stork, and Dunnick probably occurred prior to May 27, 1992.

"Whether Ms. Crandon knew Mrs. Stork had told Mr. Berggren she had never had authority to examine the State Bank of Baileyville since she first came to the agency or that Mrs. Stork had closed her checking account at the State Bank of Baileyville is unclear. However, she did not know that Mrs. Stork had replied to the inquiries by memo to the commissioner. Notwithstanding, these facts could have been confirmed by agency documents or official inquiry to the bank. Ms. Crandon did not see these documents and the response of Mrs. Stork to inquiries posed to her as to her authority to examine the State Bank of Baileyville when she was a witness, under oath, in the Emery civil service hearing were that she had no such authority. Ms. Crandon knew from Mr. Berggren that Commissioner Dunnick had reviewed the matter by June 1, 1992, and had concluded Mrs. Stork's situation violated no state policy, but she did not know the basis for his decision except for what she may have learned at the civil service hearing.

"Further, no evidence has been proffered by the plaintiff that she had any other source of factual information to form any opinion that Mrs. Stork's loans were in violation of any law or policy other than by talking to Mr. Berggren or to Mr. Lamberti, except to confirm by inspection at the Record of Deeds' office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. and Mrs. Stork's name and to confirm title to the motor vehicle subject of the loan and lien of Southwest Bank and Trust was likewise in their names. Plaintiff is unable to say what, if any, case law she reviewed prior to any advice to Mr. Berggren or used in the formulation of any opinion of wrongdoing other than *St. Francis Hospital v. Browles*, 251 Kan. 334 (1992), which explains the doctrine of necessaries vis a vis one's spouse's liability for the debts incurred by the other. The statutes or regulations upon which she stated she relied were K.S.A. 9-1701, 12 U.S.C. 213, 12 U.S.C. 1289, and 12 C.F.R., part 215.

"Plaintiff proffers no evidence existing at the time of her report to support her assertion that Mrs. Stork had unlawfully examined the Southwest Bank and Trust or interfered with the examination of the State Bank of Baileyville. Ms. Crandon did state she believed Mrs. Stork had authority to examine any Kansas bank. Ms. Crandon states she investigated whether Mrs. Stork was in violation of 12 U.S.C. 1289 by examining Case 82 CR 234 in the Shawnee County District Court and Mrs. Stork's disclosure of substantial interest statements filed with the Secretary of State, but did not discuss with anyone, but Mr. Berggren, whether Mrs. Stork's prior diversion agreement placed her in violation of federal law because she had an ownership interest in the bank. She undertook no other investigation nor inquiry. There is no evidence the subject matter of her 12 U.S.C. 1289 inquiry was part of any 'whistleblowing' claim or that Mr. Dunnick knew of it, however, it is accepted by the court as advanced as one motivation by Ms. Crandon for her

'reporting' activity and procedure. Of course, factual information arising after her 'reporting' would not be a proper standard to test the reasonableness of her belief at the time of reporting.

"It seems substantially clear and not reasonably subject to material dispute what Ms. Crandon's 'whistleblowing' and/or 'free speech/public concern' communication claim is alleged to be. It consists of up to two inquiries to Mr. Lamberti of the FDIC concerning loans made to a spouse of what Ms. Crandon represented was a deputy commissioner or 'supervisory examiner' and, for the purpose of this matter, further inquiries and reporting of the circumstances concerning such loans to the FDIC by Erik Berggren which, though encouraged by Ms. Crandon, Mr. Berggren would have proceeded on in such manner in any fashion.

"The plaintiff's claim is that she was terminated by her employer, the state bank commissioner, for this collective 'reporting' to the FDIC."

Defendants moved for summary judgment on all of plaintiff's claims. The trial court granted the defendants' motion. Resolving disputed facts in plaintiff's favor, as the court was required to do, the court found that but for plaintiff's acts of communication to the FDIC, she would not have been terminated. The court also assumed that Commissioner Dunnick was aware of the communication. Central to plaintiff's claims, the court found, was the issue whether the communications were legally protected under the circumstances so as to insulate plaintiff from termination, an issue of law.

In evaluating the issue, the trial court found that the plaintiff had spoken on a matter of public concern. However, the court found that the flaw in plaintiff's claim was based on uncontroverted facts. First, she was the attorney for the agency whose employee was "reported" upon. The knowledge plaintiff had was derived from her position as the OSBC's attorney. She took no steps to present her concerns to the OSBC's head, Commissioner Dunnick, who had the authority to act against the employee alleged to be violating the law. The court found that plaintiff's reporting was contrary to the Model Rules of Professional Conduct (MRPC), adopted by this court in Supreme Court Rule 226 (1994 Kan. Ct. R. Annot. 286), and that there was no justification for plaintiff's failure, as the OSBC attorney, to approach, counsel, and advise Dunnick on the issue. Moreover, the court found that plaintiff proceeded on her course of conduct without more than a second-

hand knowledge of the facts rather than relying on her own independent investigation. She did not report the full facts to her FDIC contact, Mr. Lamberti, because she did not know the full facts, including whether Stork had ever examined the Southwest Bank and Trust or personally participated in the examination of the State Bank of Baileyville.

The trial court further found that the statutes thought to have been violated by Stork, 18 U.S.C. § 213 (1988) and K.S.A. 9-1701(a), were not applicable unless Stork had in fact examined either of the banks in question or had interfered in or passed upon a matter in the examination of the banks. The court also found that whether Stork had violated 12 U.S.C. § 1829 (1988), which prohibits a person who has entered into a diversion agreement from being involved in a financial institution without prior approval by the FDIC, was irrelevant because the prior diversion was not reported to the FDIC by plaintiff; the court further found that even if the claim was relevant, plaintiff never determined whether Stork had obtained written permission from the FDIC and there was a question whether the statute applied to Stork's minimal ownership interest (a 4.9% share of stock in a bank holding company that owned the State Bank of Baileyville).

The trial court held that to establish a whistle-blowing claim, plaintiff must establish that a reasonable person in her shoes, an attorney, would believe that a violation of law or matter of public concern existed and that the whistle-blowing was made in good faith and not for a corrupt or otherwise specious motive. The court found both a lack of good faith and a lack of good motive based on plaintiff's avoidance of a professional duty to her clients and her rush to judgment on supposition and surmise. Moreover, if the information was confidential when communicated because of the omission of a duty to a client or the lack of consultation with the client, the communication would grossly undermine the working relationship between the client and attorney and the balance of free speech and whistle-blower protection should not attach. The court pointed out that here the attorney-client relationship was not only neglected, but wholly abandoned.

The court pointed out that plaintiff's actions, taking the matter out of the hands of the OSBC, embarrassed Dunnick; how, after that, could the attorney-client or boss-employee relationship continue? Moreover, no exigency required plaintiff to avoid the procedures set forth in MRPC 1.13(b) (1994 Kan. Ct. R. Annot. 328) to counsel her clients. The court pointed out that plaintiff's actions were not the reasonable acts of an attorney toward her clients. Plaintiff's actions were those of an attorney representing herself rather than her clients.

The trial court did acknowledge that plaintiff's violations of the Model Rules of Professional Conduct did not present an absolute bar to her claims. However, where plaintiff's claims are based on public policy and the right to speak on matters of public concern, those rights must be balanced with responsibility. Because of plaintiff's noncompliance with the ethical rules of her profession, her claims were found to be significantly diminished. Citing various authority, the court found that where the asserted rights did not interfere with the employment position, termination was not permitted, but where the right asserted impaired or impeached the working relationship, termination was permitted. The court, in essence, found that plaintiff's exercise of her rights substantially interfered with her working relationship with her clients.

The court concluded:

"The balancing of Ms. Crandon's interests under the First Amendment when weighed with her non-compliance with the tenets of her profession and the interest of the State of Kansas in properly assuring the fulfillment of the proper duties of the general counsel for the agency as well as the duties of the state bank commissioner to administer his office in the first instance, require Ms. Crandon's claims to be dismissed under the principles of law announced in *Connick v. Myers*, [461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)], and *Pickering v. Board of Education*, [391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)].

"Mr. Dunnick was well within his discretion to end a public and professional relationship Ms. Crandon had completely and inappropriately destroyed without fear of legal recourse by Ms. Crandon."

Addressing plaintiff's claim under K.S.A. 1994 Supp. 75-2973, the court found that plaintiff disclosed information which was confidential pursuant to MRPC 1.6(a) (1994 Kan. Ct. R. Annot. 310) and MRPC 1.13(b) and until she satisfied those rules, plaintiff had

no duty or privilege to disclose the information. Some of the information (that obtained from the bank examination documents) was also confidential under K.S.A. 9-1712 without the Commissioner's approval. Moreover, the court found that no reasonable attorney would have perceived the conduct of the defendants as the basis for an out-of-agency report at the time it was made. The court specifically found that information which is confidential under the Model Rules of Professional Conduct is confidential "under any other provision of law" as that phrase is used in K.S.A. 1994 Supp. 75-2973(c)(4)(C), which permits discipline of an employee who releases confidential information. Additionally, the court found that plaintiff's knowledge that Stork had overdraft loans was confidential information.

Plaintiff appeals the trial court's ruling. This court permitted the ACLU and the Kansas Disciplinary Administrator to file briefs as *amici curiae*.

I. SUMMARY JUDGMENT

The plaintiff contends that the trial court erred in making certain findings of fact. She points out, correctly, that the trial court and this court must resolve all facts and inferences which may be drawn from the evidence in her favor as the party opposing summary judgment. See *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 268, 875 P.2d 949 (1994).

First, the plaintiff argues that the trial court erred in concluding that she had reported on the OSBC and Dunnick. She claims that she reported only on the actions of Stork in her individual capacity. However, nowhere does the trial court find that plaintiff reported on the OSBC and Dunnick. Plaintiff is correct in suggesting that she reported on the actions of Stork. It does not appear that the trial court found otherwise.

Second, plaintiff argues that the trial court erred by resolving state of mind and motivation against her. She contends the trial court wrongfully accuses her of "assumption of agency power and authority to herself" and "her rush to judgment on supposition and surmise." Plaintiff cites *Hein v. Lacy*, 228 Kan. 249, 616 P.2d 277 (1980). In *Hein*, this court cautioned against granting summary

judgment when resolution of the dispositive issue necessitates a determination of the state of mind of one or both of the parties. 228 Kan. at 256. The plaintiff is correct that there is no evidence she had a corrupt motive or was being vindictive. However, the quotes she points to from the trial court's journal entry concerning her actions do not show that the trial court determined her state of mind and motivation.

Third, the plaintiff argues that the trial court erred in concluding that she reported confidential information to the FDIC. Plaintiff suggests that the information concerning Stork's mortgages, car loans, and her diversion for theft of services were matters of public record. She also suggests that the trial court erred in relying on K.S.A. 9-1712, which provides that "[a]ll information the state bank commissioner generates in making an investigation or examination of a state bank or trust company shall be confidential information," because that statute must be strictly construed to mean documents generated only by the Commissioner. Plaintiff's construction, though not clearly argued, seems to be that documents prepared by other sources, including by OSBC employees other than the Commissioner, are not covered by that statute. That construction is incorrect because the term "generates" encompasses documents prepared at the Commissioner's direction, including documents prepared during the course of an OSBC investigation or examination of a bank or trust company. Plaintiff also argues that K.S.A. 9-1712(b) provides that confidential information may be disclosed upon written approval of the Commissioner. She reasons that the OSBC office policy of communicating information to the FDIC on a regular basis satisfies the approval necessary under subsection (b). It does appear that the OSBC had a policy of communicating information generated during bank examinations to the FDIC. However, the real issue concerning confidentiality relates to the fact she was attorney for OSBC. Simply stated, attorneys have a different relationship than other employees, and their conduct is measured by a different standard.

Finally, plaintiff argues that the trial court erred in determining that she did not make an adequate investigation of the facts. She suggests that this issue was not raised by the defendants and that

the trial court should not have resolved it without giving the parties the opportunity to supplement the record. Nothing in the record, however, shows that the plaintiff attempted to supplement the record concerning this issue after the trial court's entry of judgment. Without our determining whether the plaintiff's investigation was "adequate," the record reflects the trial court found that plaintiff did "confirm by inspection at the Record of Deeds' office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. and Mrs. Stork's name and . . . confirm title to the motor vehicle subject of the loan and lien of Southwest Bank and Trust was likewise in their names." The plaintiff also tells this court she reviewed federal and state statutes, case law, regulations, and internal ethics memoranda. The trial court did not ignore other aspects of investigation plaintiff claims to have done. The court merely found that plaintiff should have investigated whether Stork had actually examined or participated in examining the Southwest Bank and Trust and the State Bank of Baileyville. The plaintiff does not suggest she engaged in such investigation.

II. MODEL RULES OF PROFESSIONAL CONDUCT

The court held that plaintiff's actions were contrary to the Model Rules of Professional Conduct, citing MRPC 1.2 Scope of Representation (1994 Kan. Ct. R. Annot. 295), 1.4 Communication (1994 Kan. Ct. R. Annot. 302), 1.6 Confidentiality of Information (1994 Kan. Ct. R. Annot. 310), 1.13 Organization as a Client (1994 Kan. Ct. R. Annot. 328), and 1.16 Declining or Terminating Representation (1994 Kan. Ct. R. Annot. 338).

The plaintiff argues that her conduct did not violate the Model Rules. She focuses on MRPC 1.6 and MRPC 1.13 and argues that she did not violate the rule of confidentiality. She points out that she had no attorney-client relationship with Stork or her husband, the persons she reported on. Stork was merely a constituent of her organization client, the OSBC. See MRPC 1.13. Moreover, the plaintiff argues, Stork never asked for plaintiff's legal advice. The plaintiff also reiterates that the facts she conveyed were in the public domain, and she did not convey the information to entities

other than the FDIC, such as the press. The plaintiff insists that she did not breach the attorney-client relationship she had with the OSBC. She maintains that the information was conveyed in a manner consistent with the established policy of the OSBC to convey information to the FDIC; she contends this policy permitted her to convey information to the OSBC without obtaining prior approval from Commissioner Dunnick. Finally, the plaintiff contends that K.S.A. 1994 Supp. 75-2973(b)(2) exempts her from obtaining prior approval.

The defendants' response is that confidences arise even when the person involved does not approach the attorney. The defendants suggest that plaintiff had a duty to keep Dunnick reasonably informed on all matters related to the representation. Because, according to defendants, violations of state and federal banking laws were within the scope of plaintiff's representation, strict confidentiality attached regardless of the source of the information, and plaintiff had a duty to explain the matters to the client. Moreover, defendants argue, trust and confidentiality are at the core of an attorney-client relationship. The attorney's duty is to advise and counsel, not prosecute her client. The defendants also point out that the drafters of the MRPC rejected a rule which would have permitted an organizational attorney to reveal information otherwise protected if the attorney deemed it necessary in the best interest of the organization. The defendants conclude that plaintiff was Commissioner Dunnick's attorney and that she had a duty to advise him on legal matters in the operation and function of the OSBC. They point out that she obtained information during the course of her representation that Deputy Commissioner Stork may have violated state or federal banking laws, but the only comment Dunnick had heard plaintiff make was her argument during the Emery civil service hearing that Stork had not violated any laws. This followed plaintiff's presentation of evidence (largely by leading questions) from Stork that her conduct did not violate any laws, rules, regulations, or guidelines. Therefore, the defendants reason, the plaintiff had a duty to counsel Dunnick as to her belief that Stork may have in fact violated laws. Because plaintiff went to the FDIC rather than to Dunnick, the essence of confidentiality was

breached. Finally, the defendants reason that it is irrelevant that Stork did not seek plaintiff's advice because organizational attorneys have a duty to advise constituents of potential conflicts and because that did not excuse plaintiff's duty to inform the Commissioner about any actions he needed to take.

We believe the parties have become overly technical and argumentative about the trial court's language. The trial court in general held that an organization's general counsel has obligations different than those of other employees. In using the balancing test discussed below, an attorney's obligation (as general counsel) is first and foremost to the organization. The balancing test as applied here includes the factors that general counsel reported a suspected violation or violations to an outside agency without first consulting with the head of the organization and that had she done so she would have learned that no violations had occurred. Whether plaintiff violated the Model Rules of Professional Conduct is not the determinative factor, and in fact a finding of no violation can be of no comfort to her.

The balancing test is set forth in *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and weighs an employee's First Amendment rights against the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.

In *Connick*, an assistant district attorney was involved and the United States Supreme Court said: "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52. The Supreme Court held the discharge of the assistant district attorney did not offend the First Amendment.

The *Connick* Court also held that whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a question of law and is subject to de novo review. See 461 U.S. at 150 n.10.

In *Goffer v. Marbury*, 956 F.2d 1045 (11th Cir. 1992), an attorney claimed wrongful discharge for exercising First Amendment rights. The court used language we deem applicable to our case:

"The existence or not of attorney-client relations also bears on whether there was present the 'close working relationshi[p]' referred to in *Connick* that gives rise to a 'wide degree of deference' to the employer's judgment. *Connick*, 461 U.S. at 151-52, 103 S. Ct. at 1692. Moreover, definition of Goffer's role with relation to defendants is prerequisite to addressing whether her speech so destroyed her effectiveness in that role that the government interest must prevail over her speech interest." 956 F.2d at 1051.

The Alabama Rules of Professional Conduct at issue in *Goffer*, as do the Kansas Model Rules of Professional Conduct, describe the role of an organization's attorney in the attorney's responsibilities owed to the organization and to the officers and employees of the organization.

As we view the matter, plaintiff was discharged because she was general counsel for the OSBC. The head of the OSBC had been advised of Stork's possible violations, at least as to the bank audit, and had determined there was no violation. He then attended a civil service hearing in which plaintiff put Stork on the witness stand to establish that she had not violated any federal or state laws and that no rules, regulations, or internal policies had been violated. Plaintiff argued to the hearing panel that Stork's testimony was that no violation had occurred.

The OSBC head then attended a meeting with FDIC officials involving other matters and he learned for the first time that plaintiff had twice reported possible violations (once prior to the civil service hearing and a second time either immediately preceding or immediately after the panel hearing, based on largely different facts) to the FDIC without checking facts that were available to her which would have changed a reasonable attorney's mind. Whether the second reporting by plaintiff to the FDIC occurred before or after the panel hearing is not clear. The panel hearing was held on July 6, and the second telephone call reporting the alleged violations occurred (according to plaintiff's testimony) the first week in July.

Plaintiff's position as chief counsel for the organization required a close working relationship with Dunnick. Dunnick relied on plaintiff for legal advice for his guidance and for the guidance of the organization and its employees. The organization's attorney has

a responsibility to give advice when necessary to prevent or rectify unlawful or improper acts of the organization and its employees. This advice must be given by presenting the attorney's opinion to the proper person or persons in the organization who have the authority to correct the problems. A close relationship and need for trust are essential in an attorney's relationship with the organization. Thus, a wide degree of deference to Dunnick's decision to terminate plaintiff is appropriate when something occurs to disrupt that relationship and trust.

We conclude that, although plaintiff may have acted in the utmost good faith, she used poor judgment and did not take steps available to her that a reasonably prudent attorney would have taken prior to reporting what she suspected to be violations to the FDIC, thus destroying her effectiveness as counsel for the OSBC and its employees and especially with the organization's head, Frankie Dunnick. Her acts destroyed any effectiveness she could have with the organization in the future. The governmental interest here must prevail over any First Amendment rights that might be involved. Thus, the trial court did not err in granting summary judgment to the defendants on plaintiff's First Amendment claim.

III. K.S.A. 1994 SUPP. 75-2973

K.S.A. 1994 Supp. 75-2973 provides in pertinent part as follows:

"(b) No supervisor or appointing authority of any state agency shall:

(1) Prohibit any employee of the agency from reporting any violation of state or federal law or rules and regulations to any person, agency or organization; or

(2) require any such employee to give notice to the supervisor or appointing authority prior to making any such report.

"(c) This section shall not be construed as:

. . . .

(4) prohibiting disciplinary action of an employee who discloses information which: (A) The employee knows to be false or which the employee discloses with reckless disregard for its truth or falsity, (B) the employee knows to be exempt from required disclosure under the open records act or (C) is confidential under any other provision of law."

The trial court found that no reasonable attorney in plaintiff's shoes could perceive the conduct of the defendants as the basis for an out-of-agency report at the time it was made. The court found

that plaintiff's report was made with reckless disregard for its truth or falsity and that she released information which was confidential under the Model Rules of Professional Conduct.

The trial court pointed out that plaintiff had only a second-hand knowledge of facts and did not conduct her own independent investigation of the facts and consideration of the law. For example, plaintiff never knew whether Stork had personally participated in the ongoing examination of the State Bank of Baileyville and did not know whether Stork had compromised that examination. She also did not know that Stork had closed her checking account with the State Bank of Baileyville. Moreover, the court stated, even by a cursory review of 18 U.S.C. § 213, the principle statute thought to be violated, there was no violation under *U.S. v. Napier*, 861 F.2d 547 (9th Cir. 1988), nor was the state statute, K.S.A. 9-1701(a), violated because Stork was not personally involved in examining a bank in which she had a financial interest. The trial court stated:

> "Accordingly, as a matter of law, unless Mrs. Stork had in fact proximately examined any bank at which she or her husband had loans, or subsequently and proximately obtained loans, or had interfered in, or aided and abetted in such interference, or passed upon a matter in the examination of such a bank on a material matter as Deputy Commissioner, Mrs. Stork's position as Deputy Commissioner would not place her in violation of, or within the sanction of, any criminal or ethics statute cited by Ms. Crandon as a basis for her 'report'."

The trial court correctly determined that unless Stork had personally examined or been involved in any way in an examination of the two banks, Stork would not have violated the law. See *Napier*, 861 F.2d at 548. Stork's financial interest in the State Bank of Baileyville following her pretrial diversion would likewise not be in violation of law if she received prior approval. Plaintiff could have conducted a further investigation before making her report to the FDIC to determine whether Stork had in fact been involved in the examinations of the State Bank of Baileyville and the Southwest Bank and Trust, and she could have obtained information whether Stork had obtained approval for her financial interest in the State Bank of Baileyville despite her pretrial diversion.

K.S.A. 1994 Supp. 75-2973(c)(4)(A) does not require a person to make sure the conclusions to be drawn from information are true before making a disclosure. However, a person receives no statutory protection when he or she makes a disclosure with a reckless disregard for the truth or falsity of the disclosure made. An attorney, and especially the chief counsel, is held to a higher standard for the reasons set forth in section II. We affirm the trial court on this issue.

IV. OTHER ISSUES

For the reasons stated in sections II and III, plaintiff's common-law claims cannot be sustained.

Other issues raised by the parties need not be addressed.

Affirmed.

No. 103,195

In The Matter of DAVID J. HARDING, *Respondent.*

(223 P.3d 303)

Opinion filed January 22, 2010.

Stanton A. Hazlett, disciplinary administrator, argued the cause, and was on the formal complaint for petitioner.

John J. Ambrosio, of Ambrosio & Ambrosio Chtd., of Topeka, argued the cause, and *David J. Harding*, respondent, argued the cause pro se.

Per Curiam: This is an original proceeding in discipline filed by the office of the Disciplinary Administrator against David J. Harding, of WaKeeney, an attorney admitted to the practice of law in Kansas in 1974.

On March 23, 2009, the office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). On April 8, 2009, the respondent filed an answer to the formal complaint. On May 7, 2009, a hearing was held before a panel of the Kansas Board for Discipline of Attorneys, where the respondent appeared in person and was represented by counsel. The hearing panel determined that the respondent violated KRPC 1.6 (2009 Kan. Ct. R. Annot. 468) (confidentiality) and KRPC 1.13 (2009 Kan. Ct. R. Annot. 501) (organization as client). Upon conclusion of the hearing, the panel made the following findings of fact and conclusions of law, together with its recommendation to this court:

"FINDINGS OF FACT

. . . .

"2. From 1978, until February 6, 2007, the Respondent was the City Attorney for the City of WaKeeney, Kansas (hereinafter 'the City'). Additionally, the Respondent has served as County Attorney for Trego County, Kansas (hereinafter 'the County') for much of that time.

"3. In 1978, the Respondent requested that he be allowed to participate in the Kansas Public Employees Retirement System (hereinafter 'KPERS') by virtue of his employment with the City. The City Council considered and approved the Respondent's request.

[redacted]

"4. In addition to the City, beginning in 1978, the Respondent also participated in the KPERS program *via* his employment with the County.

"5. The Respondent's fee agreement with the City required the City to pay the Respondent a monthly retainer of $610. On pages 69-70 of Disciplinary Administrator's Exhibit 5, the Respondent explained what the City received for payment of the retainer. In addition to the retainer, the Respondent charged the City on an hourly basis for items not included in the retainer.

"6. In 2006, the Respondent requested that the City pay his hourly fees through payroll so that the hourly fees could be considered KPERS income.

"7. As a result of his request, Charlene Neish, a City Councilwoman, 'began to do research on the subject.' Ms. Neish believed 'that the City had been contributing to KPERS for [the Respondent] for over twenty-seven years even though he was not eligible.'

"8. At the September 5, 2006, City Council meeting, a City Council member made a motion to leave the Respondent on KPERS with the City. The motion died for a lack of a second. The City Council agreed, however, to request additional information from KPERS.

"9. At some point, the Respondent discovered that certain City Officials were using City property or allowing their associates to use City property for their personal benefit.

"10. On September 20, 2006, the Respondent called Tom Drees, County Attorney for Ellis County, Kansas. The Respondent disclosed information to Mr. Drees regarding his clients which he had obtained by virtue of his attorney/client relationship. The Respondent discussed whether the City Officials had violated the law. Mr. Drees instructed the Respondent to call the Disciplinary Administrator's office to discuss the Respondent's obligations to the City and City Officials.

"11. On October 3, 2006, the Respondent called Alexander Walczak, Deputy Disciplinary Administrator. Mr. Walczak advised the Respondent to start by discussing the issues regarding illegal conduct with the Mayor and the City Administrator.

"12. That same day, the Respondent arranged to meet with the Mayor and the City Administrator. At that meeting, the Respondent confronted the Mayor with some of the allegations of illegal conduct that concerned him. Specifically, the Respondent discussed whether the Mayor had allowed his family and friends to use City equipment.

"13. The Respondent's allegations upset the Mayor. During the meeting, the Mayor offered to pay $50 for the use of the City equipment. The Respondent refused to accept the $50 and informed the Mayor that there was going to be an inquisition to investigate possible criminal charges.

"14. As a result of Ms. Neish's research, prior to the October 3, 2006, City Council meeting, the City removed the Respondent from participation in KPERS.

"15. According to Laurie McKinnon of KPERS, in order to be eligible for participation in KPERS, a public employee must work 1,000 hours or more per year. Ultimately, Ms. McKinnon concluded that the Respondent was eligible to

participate in KPERS in all but the following years: 1978, 1988, 1989, 1990, 1991, and 1992.

"16. At the October 3, 2006, City Council meeting, the City Council held a discussion regarding the usage of cell phones provided by the City to City Officials. Apparently, the Mayor and the Chief of Police had exceeded their allotted minutes and, as a result, the City incurred additional charges. The Respondent did not participate in the discussion but obtained a copy of the cell phone records at the conclusion of the meeting.

"17. Following the October 3, 2006, City Council meeting but sometime before November 13, 2006, the Respondent met with Mr. Drees because the Respondent had concluded that someone should look into purported wrongdoing by the City Officials, including Ms. Neish, the Mayor and the Chief of Police. Mr. Drees agreed to investigate the purported wrongdoing.

"18. During that meeting, the Respondent provided Mr. Drees with information and documents relevant to Mr. Drees' investigation. In so doing, the Respondent provided Mr. Drees with confidential information that he obtained through his attorney/client relationship with the City and the City Officials. The Respondent provided Mr. Drees with a copy of the cell phone records the Respondent obtained at the conclusion of the October 3, 2006, City Council meeting.

"19. During the November 13, 2006, Trego County Commission meeting, the County Commissioners voted to appoint Mr. Drees as a Special Prosecuting Attorney.

"20. On January 19, 2007, Mr. Drees filed an inquisition investigating the actions of Ms. Neish, the Mayor, and the Chief of Police.

"21. At the January 29, 2007, City Council meeting, the City Council voted to cease paying the Respondent the monthly retainer. Instead, the City Council agreed to pay the Respondent $100 per hour. Additionally, at that meeting the Mayor and the Chief of Police presented the City Council with letters requesting that the City pay their costs associated with defending themselves in the inquisition.

"22. On January 31, 2007, Ms. Neish sent a letter to the City Administrator asking the City to pay her costs associated with defending herself in the inquisition. The Respondent obtained a copy of Ms. Neish's letter and immediately forwarded the letter to Mr. Drees and Mike Corn of the Hays Daily News.

"23. At the February 6, 2007, City Council meeting, Ms. Neish 'discussed with the Governing Body having an audit performed for any potential liability concerning the City's withholding on past KPERS for non-qualified individuals.' The City Council voted to have an audit performed. The Mayor discussed the Respondent's conflict of interest and the Respondent's failure to provide legal advice on matters the Respondent was investigating. Thereafter, the City Council voted to appoint a Special City Attorney and a Special City Prosecutor for an interim period.

"24. On March 8, 2007, the Western Kansas World published a letter the Respondent wrote. The confidential information included in his letter to the editor

was obtained by the Respondent through his attorney/client relationship. The Respondent's letter provided, in pertinent part, as follows:

. . . .

'3. Ms. Neish states to Mr. Millard that KPERS for the City Attorney is not 'allowed' or is 'illegal.' FACT: In 1979 the City of WaKeeney deemed the City Attorney position to be a KPERS covered position. In September of 2006, after 27 years, MS. [*sic*] Neish determined that it was not a KPERS covered position. The City Attorney position is a LEGAL covered KPERS position, and if you doubt this, please feel free to call Laurie McKinnon, General [Counsel] for KPERS at . . . . I also have a copy of her letter and the statute cited. To my knowledge Mr. Millard has never contacted KPERS for an unbiased ruling.

. . . .

'5. Originally the use of the city truck by an employee of Ms. Neish for approximately three weeks and use of a city truck by the Mayor for his son-in-law were the only known transgressions. The Mayor, at a meeting with the City Administrator and myself, was advised to stop such actions. The Mayor did not deny the use of the trucks and the only reason he gave was that it was owed because of the numerous hours of donated time to the city by this individual. At no time did the Mayor state that city council had given prior approval. The Mayor did slap down a $50 bill on the table. Neither the city [*sic*] Administrator nor myself have the authority to accept the money as a settlement.

'6. Ms. Neish did try to rewrite the city minutes six months after the fact. The City Administrator and myself talked to one council member who knew that the truck was being used, but she could not remember whether the conversation took place before, during, or after the meeting. She did not know a city employee would be used to dump the truck. The City Administrator Hardy Howard, Council member Bob Funk and myself do not recall a discussion concerning the use of a truck by Ms. Neish's employee at a City Council meeting. The city minutes DO NOT reflect any action by council. The City Administrator ordered the truck to be returned.

'7. The Chief of Police did pay $60 in 2002 for some city rock. In 2006, on a Saturday evening, the Chief of Police loaded city rock on private equipment and dumped it on the alley beside the Methodist Church and in a roadway behind the trees north of the Church. The alley is also adjacent to the Chief of Police's home. The Mayor at a city council meeting admitted giving the Chief of Police permission to do this. It would be worthwhile to drive the alley and roadway adjacent to his home and behind the Methodist Church.

'8. The Mayor did give away a usable fire hydrant. When asked about the fire hydrant by the City Administrator, he denied knowledge. Once the location of the fire hydrant was discovered, the City Administrator told him to return it to the possession of the City. The Mayor did as he was told and returned the fire hydrant to the City or as Mr. Millard states, he corrected his actions.

'9. City cell phones were issued to the Mayor, Police Chief, City Administrator and City Superintendent. I admit that I did not tell them that the cell phones could not be used for private use. I asked for all cell phone records. The city has those records for your inspection and I would also make those records available. The times and number of calls to Ms. Neish are of special significance.

'10. On August 23, 2006, the Mayor pled guilty to giving alcohol to a work-release prisoner under his supervision. By the reasoning in Mr. Millard's editorial, since I, in my capacity as City Attorney, did not advise Mayor Deutscher that he should not give alcohol to a prisoner, I would be responsible for the Mayor's action! Some things just go without saying and common sense should prevail.

'Special privileges have been given to some, but not to all. No citizen should stand above another.

"25. Shortly before the election in 2007, the Respondent received a letter and 'reviewed it for accuracy.' After receiving and reviewing it, the Respondent sent the letter to the residents of WaKeeney, Kansas. The letter provided, in pertinent part, as follows:

. . . .

'. . . At this point, the "open public City Council Meeting" is a joke. It will remain a joke until the irresponsible officials are removed that believe that two or three of them can make better decisions in private for the citizens of WaKeeney than the Council as a whole could make in an open, honest public meeting. These irresponsible public officials have made a mockery of "public" City Council Meetings. They have stacked the deck against ever having an honest, open City Council meeting by allowing themselves the right to "rig" the issues and the outcome in private. . . .

'How many of us could keep our jobs if we provided alcohol to a work release prisoner in our custody and allowed them to drink it at the City Building? Mayor Kenneth Deutscher did and he's still here!! This past winter, during the ice storms, Mayor Deutscher and Council Member Neish made the decision to purchase meals for Deutscher' [*sic*] son-in-law, Kenny Nowlin, and the rest of his Western Coop Electric Crew **OUT OF CITY FUNDS!!** The meals were delivered to Ransom with a city vehicle. It wasn't like Western Coop Electric left them high and dry with nothing to eat. During those storms, Western provided food for all of their crews, every day. If the food Western provided wasn't quite what Mr. Nowlin wanted to eat, and if Mayor Deutscher and Ms. Neish wanted to treat them to something else, that's fine, but the money should have come out of their personal pockets and not City funds. These are just two examples of poor judgment and BAD decisions.

'Other bad decisions already in the Western Kansas World: (1) The disputed use of a city truck [*sic*] Ms. Neish's employee; (2) The admitted use of city equipment by the Mayor and his son-in-law; (3) Giving permission to the Chief of Police Terry Eberle to load city rock onto private equipment to rock the

alley around the Eberle property; (4) The Mayor giving away a city owned, usable fire hydrant making it necessary for the city to purchase another one; (5) Unauthorized private use of city cell phones by Mayor Deutscher and Chief of Police Terry Eberle.

'No one is trying to take away Mayor Deutscher's good accomplishments during his tenure as Mayor of WaKeeney, however, the good from the past cannot outweigh the really bad, irresponsible decisions he is making NOW. Accountability is part of making decisions, whether good or bad. Mayor Deutscher has readily accepted credit for the good but, so far, accountability for his poor judgment and bad decisions has not happened.

. . . .

'On Tuesday April, [*sic*] 3, 2007, we have the opportunity to go to the polls. If you are OK with bad decisions and backroom politics then keep what we've got and don't complain. If you think it's time to bring OUR city business back into an open public forum, take advantage of your right to vote and vote for CHANGE. Vote to elect responsible public officials that want to serve, and believe they should serve, in full view of the public, like it was always meant to be. At this point, changing public officials is the only way to stop the irresponsible behavior, poor judgment, and backroom politics that is currently common practice in the City of WaKeeney.'

"26. In the election, the Mayor was defeated.

"27. On April 27, 2007, the Mayor filed a complaint against the Respondent with the Disciplinary Administrator's office. On May 2, 2007, Ms. Neish filed a complaint against the Respondent with the Disciplinary Administrator's office. On May 18, 2007, the Chief of Police filed a complaint against the Respondent with the Disciplinary Administrator's office.

"CONCLUSIONS OF LAW

"1. Based upon the Respondent's stipulations and the above findings of fact, the Hearing Panel concludes as a matter of law that the Respondent violated KRPC 1.6 and KRPC 1.13, as detailed below.

"2. KRPC 1.6 provides:

'(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

'(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) to comply with requirements of law or orders of any tribunal; or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.'

The Respondent violated KRPC 1.6 when he repeatedly disclosed confidential information that he obtained *via* his attorney/client relationship with the City and City Officials. Thus, the Hearing Panel concludes that the Respondent violated KRPC 1.6.

"3. The Kansas Supreme Court has adopted a rule to specifically address the situation where an attorney has an organization for a client. That special rule [KRPC 1.13] provides:

'(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

'(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

'(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16.

'(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

'(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official

of the organization other than the individual who is to be represented, or by the shareholders. KRPC 1.13.'

The Respondent failed to take measures which would minimize disruption of the City and reduce the risk of revealing confidential information when he disclosed confidential information to Mr. Drees, to Mr. Corn, and to the newspaper in his letter to the editor. The Respondent's conduct resulted in substantial injury to the City. The Respondent failed to proceed in a manner that was in the best interest of the City. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.13(b). Further, the Respondent violated KRPC 1.13(b)(3) when he failed to try to rectify the misconduct within the City by referring the matter to the highest authority in the City. Finally, the Respondent violated KRPC 1.13(d) when he failed to advise Ms. Neish, the Mayor, and the Chief of Police that his representation of the City might be adverse to them. Accordingly, the Hearing Panel concludes that the Respondent repeatedly violated KRPC 1.13.

"AMERICAN BAR ASSOCIATION
STANDARDS FOR IMPOSING LAWYER SANCTIONS

"In making this recommendation for discipline, the Hearing Panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"*Duty Violated.* The Respondent violated his duty to his client.

"*Mental State.* The Respondent knowingly violated his duty.

"*Injury.* As a result of the Respondent's misconduct, the Respondent caused actual injury to his client.

"*Aggravating or Mitigating Factors.* Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following aggravating factor present:

"*Selfish Motive.* The Respondent's conduct was motivated by selfishness. The Respondent viewed Ms. Neish's investigation into his KPERS eligibility as a personal attack. The Respondent selfishly acted in response to the perceived attack.

"*A Pattern of Misconduct.* The Respondent engaged in a pattern of misconduct by revealing confidential information on more than one occasion.

"*Vulnerability of Victim.* Ms. Neish, the Mayor, and the Chief of Police were vulnerable to the Respondent's misconduct as they relied on the Respondent to act as their lawyer.

"*Substantial Experience in the Practice of Law.* The Kansas Supreme Court admitted the Respondent to the practice of law in the state of Kansas in 1974. At the time the misconduct began, the Respondent had been practicing law for more than 32 years. As such, the Hearing Panel concludes that the Respondent had substantial experience in the practice of law.

"Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following mitigating circumstances present:

"*Absence of a Prior Disciplinary Record.* The Respondent has not previously been disciplined.

"*The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* At the hearing on this matter, the Respondent freely acknowledged that he violated KRPC 1.6 and KRPC 1.13.

"*Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney.* The Respondent enjoys the respect of his peers as evidenced by a number of letters received by the Hearing Panel.

"In addition to the above-cited factors, the Hearing Panel has thoroughly examined and considered the following Standards:

> '4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
>
> '4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.'

"RECOMMENDATION

"The Disciplinary Administrator recommended that the Respondent be censured and that the censure be published in the Kansas Reports. The Respondent joined in the recommendation made by the Disciplinary Administrator.

"Notwithstanding the mitigating factors, it appears that the appropriate recommendation in this case would be for a suspension from the practice of law for a period of 90 days. However, the mitigating factors are considerable and, as a result, the Hearing Panel accepts the recommendation made by the parties and unanimously recommends that the Respondent be censured by the Kansas Supreme Court. The Hearing Panel further recommends that the censure be published in the Kansas Reports.

"Costs are assessed against the Respondent in an amount to be certified by the office of the Disciplinary Administrator."

DISCUSSION

In a disciplinary proceeding, this court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of KRPC exist and, if

they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009) (citing *In re Dennis*, 286 Kan. 708, 725, 188 P.3d 1 [2008]); see Supreme Court Rule 211(f) (2009 Kan. Ct. R. Annot. 321).

The respondent filed no exceptions to the panel's final hearing report. Thus, the hearing panel's final report is deemed admitted. Supreme Court Rule 212(c) (2009 Kan. Ct. R. Annot. 337). Upon our review of the entire record we conclude that the panel's findings of fact are supported by clear and convincing evidence and support the panel's conclusions of law. We therefore adopt those findings and conclusions. With respect to the discipline to be imposed, the panel's recommendation is advisory only and shall not prevent the court from imposing a different discipline. *In re Cline*, 289 Kan. 834, 217 P.3d 455 (2009); Supreme Court Rule 212(f) (2009 Kan. Ct. R. Annot. 337).

The respondent knowingly violated his duty to his client causing actual injury. His conduct was motivated by anger and selfishness. On more than one occasion he publicly revealed confidential information obtained while representing his client. Through his efforts some of this information surfaced in the local newspaper. The respondent through the special prosecuting attorney was able to initiate an inquisition concerning activities of certain city officials. The inquisition was subsequently dismissed by the district court. Within the community of Wakeeney, respondent's client suffered injury and certainly the reputations of some council members were damaged by the misconduct of the respondent.

The respondent engaged in his misconduct because the City made inquiries as to whether he qualified for participation in KPERS. The inquiry threatened his KPERS benefits, and respondent set out to undermine the reputation of certain city officials responsible for the KPERS inquiry. There is no doubt that his conduct injured his client.

The Disciplinary Administrator recommends a published censure. Respondent joins in that recommendation. However, the panel correctly concludes that, based upon ABA Standard 4.22, suspension from the practice of law is a more appropriate discipline

based upon the intentional misconduct of the respondent. We agree with this determination but disagree with the ultimate recommendation of the panel that the discipline be a published censure because of the considerable mitigating circumstances.

We acknowledge that numerous letters of support from attorneys demonstrate that respondent enjoys the respect of his peers, that he has practiced law for 32 years without any disciplinary action, and that he acknowledged his wrongful conduct and apologized to his client for his misconduct. We are not convinced that the mitigating circumstances warrant published censure where the activity of respondent calls for suspension from the practice of law. We are concerned about the harm done, the respondent's disclosure of confidential information, and the damage caused to the reputations of some of the city officials. We may not ignore respondent's angry and selfish response. A minority of the court would impose a greater discipline.

Conclusion and Discipline

It Is Therefore Ordered that David J. Harding be suspended for a period of 90 days from the practice of law in the state of Kansas, effective the date of this opinion in accordance with Supreme Court Rule 203(a)(2) (2009 Kan. Ct. R. Annot. 272).

It Is Further Ordered that the respondent shall comply with Rule 218 (2009 Kan. Ct. R. Annot. 361).

It Is Further Ordered that this opinion be published in the official Kansas Reports and that the costs herein be assessed to the respondent.