

App. 1

[SEAL]

Supreme Court of Missouri
en banc

May 22, 2018

In re: Eric G. Zahnd,) Supreme Court No.
) SC96939
Respondent.) MBE # 47196

ORDER

Now at this day, the Court being sufficiently advised of and concerning the premises and said cause having been fully briefed and argued;

The Court finds that Respondent, Eric G. Zahnd, Missouri Bar No. 47196, violated Rules 4-4.4(a), 4-8.4(a), and 4-8.4(d) of the Rules of Professional Conduct and, therefore, Respondent should be disciplined.

Upon consideration of these findings, previous decisions of this Court, ABA Standards for Imposing Lawyer Discipline, and aggravating and mitigating circumstances, the Court orders that Respondent, Eric G. Zahnd, is hereby reprimanded.

Fee ordered pursuant to Rule 5.19(h) in the amount of \$750.00 payable to the Clerk of this Court to the credit of the Advisory Committee.

App. 2

Costs taxed to Respondent.

Day – to – Day

/s/ Zel M. Fischer

Zel M. Fischer
Chief Justice

Powell, J., not participating.

**IN THE SUPREME COURT OF
THE STATE OF MISSOURI**

In re:) DHP-17-023
ERIC G. ZAHND,)
Missouri Bar No. 47196)
Respondent.)

DISCIPLINARY HEARING PANEL DECISION

(Filed Dec. 7, 2017)

INTRODUCTION

A hearing was held in the captioned matter on November 6-7, 2017 at the Platte City City Hall in Platte City, Missouri. The hearing was held before a Disciplinary Hearing Panel comprised of Keith A. Cutler, Presiding Officer; Thomas P. Schult, Attorney Member; and Robert M. Ford, Public Member.

Informant was present through Staff Counsel Nancy Ripperger. Respondent was present in person, and by and through his counsel, R. Todd Ehlert and Edwin H. Smith.

In addition to briefs submitted by the parties, briefs were received by the Panel from the following *amici curiae*: The Missouri Press Association, Jean H. Maneke, Esq.; Missouri Association of Prosecuting Attorneys, Stephen P. Sokoloff, Esq.; and Synergy Services, Inc., Timothy Laycock, Esq.

App. 4

After considering the evidence presented, and the submissions of the parties, the Disciplinary Hearing Panel finds, concludes, and recommends as follows:

FINDINGS OF FACT

1. Informant is the Chief Disciplinary Counsel appointed by this Court pursuant to Rule 5.06.

2. Informant determined, pursuant to Rule 5.11, that probable cause existed to believe that Respondent was guilty of professional misconduct and thereafter filed an Information charging Respondent with violations of specified Rules of Professional Conduct.

3. Respondent was licensed as an attorney in the State of Missouri on October 4, 1996. His bar number is 47196.

4. Respondent's license is currently in good standing.

5. The address Respondent designated in his most recent registration with The Missouri Bar is 415 Third Street, Suite 60, Platte City, Missouri 64079.

Platte County Prosecuting Attorney's Office

6. Respondent has served as the Platte County Prosecuting Attorney since 2003.

7. Respondent has general supervisory authority over all employees of the Platte County Prosecuting Attorney's Office.

8. Respondent has direct supervisory authority over the First Assistant Prosecuting Attorney, Mark Gibson. Mark Gibson has direct supervisory authority over Assistant Prosecuting Attorneys Myles Perry and Chris Seufert.

Underlying Crime/Guilty Plea

9. Darren Paden was a resident of Dearborn, Missouri. His family was well-known and well-respected in the Dearborn community.

10. On August 17, 2015, Darren Paden pled guilty to two counts of statutory sodomy in the first degree. The original date for Mr. Paden's sentencing was scheduled for October 9, 2015, to be presided over by Platte County, Missouri Circuit Court Judge James Van Amburg.

The Letter-Writers

11. Mr. Jerry Hagg was the President of Platte Valley Bank for 32 years, retiring in June 2011. He has lived in Dearborn, Missouri since 1968, and knew Darren Paden's father for 40 years until the senior Mr. Paden's death in 2016.

12. At the request of Darren Paden's father, Mr. Hagg wrote a letter to Judge Van Amburg. Mr. Hagg's letter, filed with the Platte County Circuit Court on September 25, 2015, states that Darren Paden had been involved in community activities with his church, school and volunteer fire department, and Darren

App. 6

Paden along with his family had contributed greatly over the years to the Dearborn Community. Mr. Hagg's letter did not refer to the guilt or innocence of Darren Paden, nor to the veracity or character of the victim of Darren Paden's crime.

13. At the time he wrote the letter, Mr. Hagg believed that the letter would only be seen by Judge Van Amburg; he did not know that his letter would be open to the public. At the time he wrote his letter, Mr. Hagg did not know that he might have to testify at the sentencing hearing.

14. Mrs. Donna Nash was the Platte County Collector for 30 years, retiring in 2011. She has known the Paden family since 1962.

15. Mr. Karlton Nash, husband of Donna Nash, is the owner of Nash Gas Company, which services Platte County and several other counties in northwest Missouri. Mr. Karlton Nash was a schoolmate of Darren Paden's father prior to 1962 and has known the Paden family since that time.

16. At the request of Darren Paden's father, Mr. and Mrs. Nash wrote a letter to Judge Van Amburg seeking leniency in the sentencing of Darren Paden. The Nashes' letter, filed with the Platte County Circuit Court on October 6, 2015, states that they have watched Darren Paden and his sister grow into well respected caring adults, that Darren Paden has been an active productive member of his church and the Dearborn community, and that Darren Paden had received and was still receiving "unlimited love and

support from all of us.” The Nashes’ letter does not refer to the guilt or innocence of Darren Paden, nor to the veracity or character of the victim of Darren Paden’s crime.

17. At the time the Nashes wrote their letter, Mrs. Nash assumed that the letter would be seen by the Prosecutor’s Office; she did not know that their letter would be made public record.

18. In addition to Mr. Hagg and the Nashes, approximately 14 other individuals wrote letters to Judge Van Amburg that were supportive of Darren Nash. While some letters only requested leniency for Darren Paden, other letters questioned whether Darren Paden had actually committed the acts he pled guilty to, while other letters questioned the veracity and character of Darren Paden’s victim.

The Swanepoel Case

19. Prior to the Darren Paden case, the Platte County Prosecuting Attorney’s Office had prosecuted another high-profile sexual assault case involving a minor.

20. In 2013, Jacobus Swanepoel pled guilty in Platte County, Missouri to two counts of statutory rape and two counts of statutory sodomy. A sentencing hearing was scheduled in front of Platte County Circuit Court Judge Owens Lee Hull.

21. Leading up to the sentencing hearing, between 70 and 100 letters were submitted seeking

App. 8

leniency for Mr. Swanepoel. Because of the guilty plea and the specific facts of the case, Respondent felt that the support letters would not have a major impact on the ultimate sentence. Therefore, he did not object to their admission at the sentencing hearing.

22. Judge Hull sentenced Mr. Swanepoel to 9 years on each count, to run concurrently. However, Judge Hull suspended execution of the sentence and ordered Mr. Swanepoel to spend 100 days in the county jail and placed him on 5 years' probation. Shortly thereafter, Mr. Swanepoel was deported to his native South Africa. A bench warrant for his arrest is outstanding should he return to the United States. At the time of the sentencing, Judge Hull did not explain his rationale for the sentence to Respondent or to the defense.

23. Respondent was extremely disappointed with the sentence imposed by Judge Hull. Respondent characterized it as "the most disappointed he has ever been in a sentence in Platte County. We asked for decades in prison and we only got 100 days."

24. At the hearing in the instant case, Judge Hull testified that the letters in support of the defendant in the *Swanepoel* case had no effect on the sentence he handed down. Respondent offered no evidence at the hearing that the sentence in the *Swanepoel* case was influenced by the letters written on behalf of Mr. Swanepoel.

Response to the Paden Support Letters

25. According to Respondent, the normal practice and protocol in Platte County was that letters in support of a criminal defendant were submitted to the Prosecutor's Office prior to being presented to the Judge or filed with the Court. Because such letters are hearsay, the Prosecutor's Office would have an opportunity to object to the letters or waive any such objections.

26. Judge Hull testified that, during his time on the bench, he received support letters in a number of different ways, such as from defense counsel, addressed directly to the Court, and addressed to the Clerk's Office. He also testified it was not really unusual for reference letters to be filed directly with the Court.

27. Former Platte County Circuit Court Judge Abe Shafer, IV testified that he could not say, during his time on the bench, that he never read or saw a reference letter that was addressed directly to the Court.

28. The letters in support of Darren Paden from Mr. Hagg, the Nashes, and the approximately 14 other letter-writers were sent to Judge Van Amburg and/or filed with the Court without first being submitted to Prosecutor's Office. The Prosecutor's Office first learned of the letters after notice of their filing had already been posted on Case.net.

29. In light of his decision not to respond to the support letters in the *Swanepoel* case, Respondent, and

Assistant Prosecuting Attorneys Mark Gibson, Chris Seufert, and Myles Perry, met to discuss the best manner in which to address the fact that letters in support of Darren Paden had been sent to and filed with the Court.

30. During this meeting, Mark Gibson suggested that the letter-writers be subpoenaed to testify at the sentencing hearing, which is something the Platte County Prosecutor's Office had never done before. The decision was also made to inform/remind the letter-writers before the hearing that Darren Paden had pled guilty to his crimes and admitted that he had been lying to everyone, to see if they would withdraw their letters.¹

31. The subpoenas issued to the letter-writers stated: "You are commanded to contact Chris Seufert at 816-858-3476 who will advise of time and place appearance is required."

32. Chris Seufert individually met with a large number of the letter-writers prior to the sentencing hearing, in an effort to get them to withdraw their letters. He explained to each of them specifically what Darren Paden had been charged with, that Darren

¹ Inasmuch as the letters had already been filed with the Court and made part of the Court record, the evidence was unclear as to whether the letter-writers actually *could* withdraw their letters. Nevertheless, that the letters could be withdrawn was what Respondent and Mr. Seufert communicated to Mrs. Nash and Mr. Hagg, respectively, and such was the understanding that Mrs. Nash and Mr. Hagg had as a result of their respective conversations with Respondent and Mr. Seufert.

Paden had admitted his guilt, and that Darren Paden admitted he had been lying to everyone about his innocence. Mr. Seufert offered to show each of them Darren Paden's videotaped confession and apology letters.

33. None of the letter-writers agreed to withdraw the letters they wrote on behalf of Darren Paden. Three of the letter-writers did, however, either write letters for Darren Paden's victim or showed sympathy for her.

34. Members of the Prosecutor's Office, including Respondent and Mr. Seufert, could not wrap their minds around their belief that an entire community, and prominent members of the community, would be in support of a child molester.

35. On October 8, 2015, the day before the original sentencing hearing date, Respondent was preparing a press release to be issued by the Prosecutor's Office following the hearing the next day. Respondent had decided that the press release would include the names and occupations (*current or former*) of the letter-writers, and would indicate that they were supporting a child molester.

Meeting with Mr. Hagg

36. On October 8, 2015, the day before the original sentencing hearing date, Mr. Hagg went to the Prosecutor's Office upon the suggestion of Mr. Abe

Shafer, IV² to discuss with someone the subpoena that had been served on Mr. Hagg. Mr. Shafer accompanied Mr. Hagg as his legal representative.

37. On his way to the conference room to meet with Messrs. Hagg and Shafer, Mr. Seufert “stuck his head in” Respondent’s office and asked whether he could advise Mr. Hagg that Mr. Hagg’s name would be included in the press release that would be going out the next day. Respondent replied, “yeah.”

38. Chris Seufert met with Messrs. Hagg and Shafer to discuss the subpoena, and the fact that Mr. Hagg did not want to testify at the sentencing hearing. Mr. Seufert inquired of Mr. Hagg about his familiarity with the details of the case, to which Mr. Hagg responded that he really did not know the specifics; he wrote the letter because he was asked to do so by Darren Paden’s father.

39. Mr. Seufert explained to Mr. Hagg specifically what Darren Paden had been charged with, that Darren Paden had admitted his guilt, and that Darren Paden admitted he had been lying to everyone about his innocence. Mr. Seufert offered to show Mr. Hagg Darren Paden’s videotaped confession, but Mr. Hagg declined. Mr. Seufert offered to show Mr. Hagg the

² Abe Shafer, IV is a former Platte County Circuit Court Judge. No disrespect is meant by referring to him hereinafter in this decision as “Mr. Shafer” instead of “Judge Shafer.” This is done, however, to avoid any confusion with current Platte County Circuit Court Judge Abe Shafer, V.

transcript of the guilty plea, but Mr. Hagg declined to look at it as well.

40. Mr. Seufert asked Mr. Hagg if he would withdraw his letter in light of the information he had now just learned about Darren Paden. Mr. Hagg said he would not withdraw his letter, adding, “What kind of friend would I be to [Darren Paden’s father] if I did that?”

41. Mr. Seufert asked Mr. Hagg why he did not write a letter on behalf of the victim. Mr. Hagg responded that the victim had not asked him to do so, and that he did not know the victim.

42. Mr. Seufert expressed that he was offended that Mr. Hagg would be in support of child molestation. Mr. Hagg replied that he was offended that Mr. Seufert would suggest that he was a supporter of child molestation.

43. As the meeting became more tense, Mr. Seufert explained that, unless Mr. Hagg withdrew his letter, he would be called as a witness, placed on the witness stand, and asked very difficult questions – with the videotaped confession of Darren Paden playing, and the media present.

44. As Messrs. Hagg and Shafer prepared to leave, Mr. Seufert stated words to the effect of “We’ve already prepared a press release that is going out tomorrow, we just have to fill in the names; so unless you withdraw your letter, your name is going to be included

in the press release as being in support of child molestation.” At that point, Messrs. Hagg and Shafer left.

Phone Conference with Mrs. Nash

45. The Prosecutor’s Office was unable to serve Mr. and Mrs. Nash with a subpoena because they were out of town. Upon learning that the Nashes had not been served, Respondent called Mrs. Nash on her cell phone on October 8, 2015, the evening before the original scheduled sentencing hearing.

46. Mrs. Nash was still in Washington, D.C., and was attending a social function, but she took Respondent’s phone call and stepped away from her event briefly to talk. Although not social friends, Respondent and Mrs. Nash were very acquainted with each other, having contemporaneously served as elected Platte County officials for approximately 10 years.

47. Respondent inquired of Mrs. Nash about her familiarity with the details of the Darren Paden case, to which Mrs. Nash responded that she really did not know the specifics; she and her husband wrote their letter because they were asked to do so by Darren Paden’s father.

48. Respondent explained to Mrs. Nash specifically what Darren Paden had been charged with; that Darren Paden had admitted his guilt; that he admitted he had been lying to everyone about his innocence; and that he had been clinically diagnosed as a child molester.

49. Respondent asked Mrs. Nash if she and her husband would withdraw their letter in light of the information she had now just learned about Darren Paden. Mrs. Nash stated that she was unsure; they probably would not withdraw their letter, but she would have to talk to her husband about it.

50. Respondent informed Mrs. Nash that, if she and her husband did not withdraw the letter, they would be called as witnesses and would be subject to vigorous cross-examination about why they were supporting a child molester, their names were going to be included in a press release as being in support of child molestation, and their reputations would be at stake.

51. Mrs. Nash felt bullied and intimidated, and reiterated to Respondent that she would need to talk to her husband about it. She then advised Respondent that she needed to end the phone call and re-join her group.

The Sentencing Hearing

52. On the morning of October 9, 2015, prior to the start of the scheduled sentencing hearing, the issue of the letter-writers being subpoenaed to testify, and being contacted to withdraw their letters, was raised with the sentencing judge, Judge Van Amburg. Judge Van Amburg continued the sentencing hearing to November 13, 2015.

53. Later during the month of October, the Prosecutor's Office and defense counsel agreed that the

scheduling of the sentencing hearing would be expedited, and set for October 30, 2015. The Prosecutor's Office withdrew its subpoenas of the letter-writers.

54. The sentencing hearing was conducted on October 30, 2015. Despite what was explained at the Disciplinary Hearing as lessons having been learned from the *Swanepoel* case, the Prosecutor's Office did not object at or leading up to the October 30th hearing to the Court's consideration of the letters written in support of Darren Paden. Darren Paden was sentenced to a total of 50 years in prison.

Facebook Post and Press Release

55. On October 8, 2015, the Prosecutor's Office posted the following statement on its Facebook page regarding the upcoming sentencing hearing of Darren Paden:

Darren Paden will be sentenced on October 9 on 2 counts of statutory sodomy in the first degree. Over 15 people have submitted letters to the Court in support of this child molester, including a former bank president, a church trustee and multiple current and former teachers. The sentencing hearing begins at 11:00 am in division 2 at the Platte County courthouse, if you would like to attend the hearing to show support for the victim.

56. On October 30, 2015, the Prosecutor's Office issued a press release regarding the outcome of the

App. 17

sentencing hearing of Darren Paden, which in pertinent part read as follows:

Nevertheless, many members of the Dearborn community wrote letters on Paden's behalf following his guilty plea. Prosecutors met with most of them to make sure they understood that Paden had fully confessed to his crimes, yet many of those community leaders continued to stand behind Paden.

Those writing letters or testifying on behalf of Paden included:

Michele Paden-Livengood, Member, North Platte School Board

Donna Nash, former Platte County Collector

Karlton Nash, Nash Gas

Jerry Hagg, former president, Platte Valley Bank

Sheila S. Goodlet, former teacher, North Platte School District

Paige Newby, former teacher, North Platte School District

Diana Blankenship, secretary to the superintendent, North Platte School District and elder, New Market Christian Church

Sherri Ambler, employee, North Platte School District

Missy Stephenson, employee, North Platte School District

Gene Blankenship, trustee, New Market Christian Church

Beckie Moore, Nurse Practitioner, St. Luke's Health System

Darla Hall Emmendorfer, Construction Engineer

Peggy Bloss

Jim Anderson

Francisco Escobar

Dixie Wilson

Zahnd said, "It is said that we can be judged by how we treat the least of those among us. It breaks my heart to see pillars of this community – a former county official, a bank president, church leaders, a school board member, current and former school employees – appear to choose the side of a child molester over the child he repeatedly abused."

INFORMATION FILED AGAINST RESPONDENT

Informant alleges that Respondent is guilty of professional misconduct because he violated several Rules of Professional Misconduct – to wit:

Meeting with Mr. Hagg

4-3.4(f), by directing an assistant prosecutor to use intimidation tactics against Mr. Hagg to get him to withdraw his reference letter;

4-5.1, by failing to take corrective action when he knew an assistant prosecutor was using intimidation tactics against Mr. Hagg to get him to withdraw his reference letter;

4-8.4(d), by instructing an assistant prosecutor to advise Mr. Hagg that his name would be included in a press release as a supporter of child molestation if he did not withdraw his letter, or failing to take corrective

action when he knew that an assistant prosecutor was advising Mr. Hagg that his name would be included in a press release as a supporter of child molestation if he did not withdraw his letter.

Phone Conference with Mrs. Nash

4-3.4(f), by engaging in intimidation tactics against Mrs. Nash to get her to withdraw her and her husband's reference letter;

4-8.4(d), by threatening Mrs. Nash that, if she and her husband did not withdraw their letter, their names would be given to the media to be published as supporters of child molestation, and their reputations would be at risk.

Facebook Post

4-3.8(f), by making extrajudicial comments on the Prosecutor's Office Facebook page that had a substantial likelihood of heightening public condemnation of the accused.

Press Release

4-4.4(a), that including the names and places of employment of the letter-writers in the press release, and therein accusing the letter-writers of choosing the side of the child molester over the victim, had no substantial purpose other than to embarrass, delay, or burden the letter-writers;

4-8.4(d), that including the names and former places of employment of the Nashes and Mr. Hagg in the press release, and therein stating that they supported a child molester over the victim, was prejudicial to the administration of justice.

RESPONDENT'S POSITION

Meeting with Mr. Hagg

Respondent denies that he violated Rule 4-3.4(f) because neither he nor anyone in his office ever told Mr. Hagg or any of the letter-writers not to provide information to the defense in the Darren Paden case.

Respondent denies that he violated Rules 4-5.1 and 4-8.4(d) because his assistant prosecutors did not use intimidation tactics with Mr. Hagg. While Assistant Prosecuting Attorney Seufert has a passionate style and approach,³ he was not attempting to intimidate Mr. Hagg. Mr. Seufert was merely attempting to inform Mr. Hagg of the true facts of the case and the consequences of him having written a letter in support of Darren Paden.⁴

³ In recounting his conversation with Mr. Hagg's legal representative, Respondent testified that he said, "Abe, you know Chris is a very passionate advocate for the State of Missouri. And that's what he's like, that's part of his personality." Transcript of Proceedings, – Vol. II, (Page 551:25 – 552:3).

⁴ Regarding previous testimony by Respondent that there are many things that prosecutors and other lawyers do every single day that someone could characterize as intimidation, Mr. Seufert was asked whether he uses the same style with laypeople, such as the letter-writers, as he would use with criminal

Phone Conference with Mrs. Nash

Respondent denies that he violated Rule 4-3.4(f) because neither he nor anyone in his office ever told Mrs. Nash or any of the letter-writers not to provide information to the defense in the Darren Paden case.

Respondent denies that he violated Rule 4-8.4(d) because he was not attempting to intimidate Mrs. Nash. As a friend and a former co-officeholder, he was merely attempting to inform Mrs. Nash of the true facts of the case, and the consequences of her and her husband having written a letter in support of Darren Paden.

Facebook Post

Respondent denies that he violated Rule 3.8(f) because at the time of the Facebook post, Darren Paden had already pled guilty to his crimes, and was no longer the “accused.” Therefore, nothing in the Facebook post “had a substantial likelihood of heightening public condemnation of the accused.” Respondent also contends that the content of the Facebook post fell within the “safe harbor” provisions of Rule 4-3.6(b).

defendants and other lawyers. Mr. Seufert responded, “I guess I have to say I am just kind of who I am. I am likely to use the same tone of voice, . . . ” Transcript of Proceedings, – Vol. II, (Page 622:17-19).

Press Release

Respondent denies that he violated Rules 4-4.4(a) and 4-8.4(d) by including the names and former places of employment of the Nashes, Mr. Hagg, and the other letter-writers in the press release, and therein stating that they supported a child molester over the victim. Respondent contends that there were several substantial purposes for listing the names and occupations of the letter-writers in the press release, and indicating that justice had been served despite their apparent support of the child molester:

- a. Providing transparency, especially in such a high-profile case;
- b. Letting the public know that prominent members of the community will not get special treatment, or special access to the judge;
- c. Creating a deterrent for others who might commit such crimes;
- d. Providing an incentive for other victims of sex crimes to come forward;
- e. Verifying for the press (*in anticipation of them asking*) the identities of the “prominent people” referred to in the press release.

Respondent also contends that the content of the press release fell within the “safe harbor” provisions of Rule 4-3.6(b).

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CONCLUSIONS OF LAW

Meeting with Mr. Hagg

This Panel finds that Respondent DID NOT violate Rule 4-3.4(f). There was no evidence presented that Chris Seufert ever requested that Mr. Hagg refrain from voluntarily giving relevant information to another party.

This Panel finds that Respondent DID violate Rule 4-5.1(c)(1). Chris Seufert told Mr. Hagg that, if he did not withdraw his letter, his name would be included in a press release as being in support of child molestation. Prior to meeting with Mr. Hagg, Mr. Seufert specifically asked Respondent if he could make that representation to Mr. Hagg, and Respondent replied “yeah.” Therefore, Respondent ordered and/or ratified the conduct of Mr. Seufert.

This Panel finds that Respondent DID violate Rule 4-8.4(d). As more fully explained hereinbelow, the sole determinant of whether Mr. Hagg’s name would be included in a press release as supporting a child molester over the victim was whether he would concede to the insistent demand of the Prosecutor’s Office that he withdraw his letter of support. While the lawful power of the Office of the Prosecuting Attorney is rightly directed at criminal suspects and defendants, the threat of retribution should not be wielded against ordinary members of the public not subject to potential criminal charges. The threat of a public shaming of a non-suspect, noncriminal citizen should not be a tool of the Prosecutor’s Office, used to force citizens to obey its

will. This type of conduct diminishes the public's faith in our governmental institutions, and is prejudicial to the administration of justice. In ordering and/or ratifying the conduct of Mr. Seufert in this regard, Respondent violated Rule 4-8.4(d).

Phone Conference with Mrs. Nash

This Panel finds that Respondent DID NOT violate Rule 3.4(f). There was no evidence presented that Respondent ever requested that Mrs. Nash refrain from voluntarily giving relevant information to another party.

This Panel finds that Respondent DID violate Rule 4-8.4(d). Respondent told Mrs. Nash that, if she and her husband did not withdraw their letter, their names would be included in a press release as being in support of child molestation, and their reputations would be at stake. For the reasons set forth hereinabove, such conduct diminishes the public's faith in our governmental institutions, and is prejudicial to the administration of justice.

Facebook Post

This Panel finds that, with respect to the Facebook post, Respondent DID NOT violate Rule 4-3.8(f). The Facebook post did not have a substantial likelihood of heightening public condemnation of Darren Paden.

Press Release

This Panel finds that, with respect to including the names and places of employment of the letter-writers in the press release, and therein accusing the letter-writers of choosing the side of the child molester over the victim, Respondent DID violate Rule 4-4.4(a). The purposes articulated by Respondent for issuing the press release:

- a. Providing transparency, especially in such a high-profile case
- b. Letting the public know that prominent members of the community will not get special treatment, or special access to the judge
- c. Creating a deterrent for others who might commit such crimes
- d. Providing an incentive for other victims of sex crimes to come forward

could have been achieved without listing the names of the letter-writers, or indicating that they appeared to “choose the side of a child molester over the child he repeatedly abused.” In fact, according to Respondent’s testimony, the Facebook post was done to achieve the very same purposes; yet the Facebook post did not include the names of the letter-writers nor suggest that they chose the side of a child molester over the child he repeatedly abused. The Panel believes that Respondent’s purpose in including the names and former occupations of Mr. Hagg and the Nashes in the press release, and stating therein that they chose the side of

a child molester over his victim, was to make good on Respondent's previous threat to do so, since the Nashes and Mr. Hagg refused to withdraw their letters. This conduct had no substantial purpose other than to embarrass the letter-writers, including the Nashes and Mr. Hagg. This conclusion is borne out by the testimony of Chris Seufert.

Mr. Seufert indicated that there were three letter-writers who, although they did not withdraw their letters of support for Darren Paden, did write letters for or show sympathy for the victim after being presented with the true facts of the case by Mr. Seufert. The names and occupations of those three letter-writers, according to Mr. Seufert, were not included in the press release. In essence, then, those letter-writers who acceded to Respondent's request and mollified their support of Darren Paden by writing letters for or showing support for the victim, were omitted from the press release and were not identified as supporting a child molester over the child he repeatedly abused. On the other hand, those letter-writers (*such as Mr. Hagg and the Nashes*) who refused to accede to Respondent's request, had their names and occupations included in the press release and were identified as supporting a child molester over the child he repeatedly abused. Inasmuch as acceding to Respondent's wishes was the determining factor of whether a letter-writer was or was not included in the press release, such inclusion had no substantial purpose other than embarrassing those who did not capitulate.

Regarding Respondent's contention that inclusion of the names and occupations of the letter-writers was done to verify for the press up front the identities of the "prominent people" referred to in the press release, the Panel finds that this did not constitute a substantial purpose. According to Respondent's testimony, some press outlets chose to print the names of the letter-writers and others chose not to. Moreover, the names of the letter-writers were part of the court file, which any press outlets were free to access if they wanted more information. Thus, inclusion of the letter-writers' names, while convenient to save the press a couple of steps, was not necessary and did not serve a substantial purpose other than to embarrass the letter-writers.

This Panel finds that the provisions of Rule 4-3.6(b) – referred to by Respondent as the "safe harbor provisions" – do not legitimize Respondent's conduct. Respondent contends that Rule 4-3.6(b) provides him protection for statements that are true and/or are part of the public record. This argument is unpersuasive for two reasons. First, there is nothing in Rule 4-3.6 that suggests that it trumps or takes precedence over Rule 4-4.4(a); conversely, there is nothing in Rule 4-4.4(a) which indicates that it is subject to Rule 4-3.6. Therefore, finding that a statement falls under the ambit of Rule 4-3.6(b) does not preclude a finding that the same statement is violative of Rule 4-4.4(a).

Second, the fact that a statement may be true does not necessarily mean that it was made for a substantial purpose other than to embarrass someone. Often,

statements that embarrass someone do so *because* the statements are true. The key criterion of Rule 4-4.4(a) is not whether the statement made was true; it is whether there was no substantial purpose for making the statement other than to embarrass a third party. The truthfulness of a statement, therefore, cannot be an absolute defense to an alleged violation of Rule 4-4.4(a). Otherwise; statements made for the sole and singular purposes of embarrassing someone would be permissible under Rule 4-4.4(a) so long as the statement was truthful. That is not what the Rule provides.

That Mr. Hagg is a former President of Platte Valley Bank is a true statement; that Mr. Nash is the owner of Nash Gas, and Mrs. Nash is a former Platte County Collector are true statements. That Mr. Hagg and the Nashes wrote letters seeking leniency for Darren Paden are true statements. Irrespective of the truth of those statements, the inclusion of the names and former occupations of Mr. Hagg and the Nashes in the press release, and stating therein that they chose the side of a child molester over his victim, had no substantial purpose other than to embarrass them, and was in violation of Rule 4-4.4(a).

Finally, this Panel finds that Respondent DID violate Rule 4-8.4(d). For the reasons previously set forth hereinabove, making good on the threat of the public shaming of a non-suspect, non-criminal citizen should not be a tool of the Prosecutor's Office, used to force citizens to obey its will. This type of conduct diminishes the public's faith in our governmental institutions, and is prejudicial to the administration of justice.

Due to his violation of one or more of the Rules of Professional Conduct as set forth above, this Panel finds that Respondent is guilty of professional misconduct under Rule 4-8.4(a).

DISCIPLINE RECOMMENDATION

Having found that Respondent is guilty of professional misconduct, this Panel now addresses the subject of recommended discipline.

This appears to have been an isolated case with fairly unique circumstances. The manner in which the letter-writers were handled in this case was different from other cases handled by the Office of the Platte County Prosecuting Attorney – from subpoenaing them to testify at the sentencing hearing, to meeting with them individually to discuss the specifics of the defendant’s confession.

Although it was in the context of an isolated and unique circumstance, the conduct described hereinabove was nevertheless intentional. It was not a spur-of-the-moment decision on the part of Respondent, nor an oversight or omission, but part of a devised strategy borne out of a meeting with Assistant Prosecuting Attorneys Gibson, Perry, and Seufert. Its object was to achieve a specific result: to convince the letter-writers – particularly Mr. Hagg and the Nashes – to withdraw their letters of support for Darren Paden, first by reasoning with them and then by the threat of public shaming if reasoning failed. As explained above, this type of conduct, especially by a public official,

diminishes the public's faith in our governmental institutions, and is prejudicial to the administration of justice.

It should be noted that there was some harm resulting from Respondent's actions. Mr. Hagg testified that, after the press release was issued, an effort was made by members of the Platte-Clay Electric Cooperative Board to remove him as a board member because he was supposedly in support of child molestation. Mrs. Nash testified that the telephone conversation with Respondent made her feel intimidated and bullied to the point of tears, and that the issuance of the press release suggesting that she supported a child molester over his victim upset her, caused her to stop going to any kind of political events, and resulted in some sleepless nights.

The objective harm to Mr. Hagg's and the Nashes' reputations may be subject to debate. Mr. Hagg testified that, ultimately, he was not removed from the co-op board; he served out the remainder of his term and he chose not to run for re-election. When asked whether anyone in the community treated him differently because of his involvement in this matter, he said there was nothing specific that he noticed; but he just felt it, so it was probably very limited. Similarly, Mrs. Nash testified that she and her husband felt that people shied away from them in public settings, but it was probably just their own perception. There was no evidence presented that the Nashes lost any friendships, or that Mr. Nash lost any of his gas customers, because their names were listed in the press release.

While the Panel considered aggravating factors such as the subjective and objective consequences of Respondent's conduct, the Panel also considered mitigating factors, as well. There was no evidence presented to the Panel that there was or is a widespread or ongoing pattern of intimidation or public-shaming by the Respondent or by the Office of the Platte County Prosecuting Attorney. The evidence before the Panel also demonstrated that, by all accounts, the Office of the Platte County Prosecuting Attorney was well run, took serious its responsibility to prosecute criminals, and cared about the crime victims with whom it came into contact. The evidence further demonstrated that the Office regularly engages in and commits funds to training for its staff, and has been recognized statewide for its office practices. The Information filed with the Court indicates that Respondent does not have a prior disciplinary history. For whatever reason, the course of conduct undertaken with respect to the letter-writers in this case was not business as usual for the Office of the Platte County Prosecuting Attorney, or for Respondent.

Consistent with Section 3.0 of the American Bar Association Standards for Imposing Lawyer Sanctions, the Panel considered, as set forth hereinabove, the duties violated, Respondent's mental state, the potential or actual injury caused by Respondent's misconduct, and the existence of aggravating or mitigating factors. The Panel also considered for reference purposes Section 5.2 of the American Bar Association Standards for Imposing Lawyer Sanctions, pertaining to public

App. 32

officials, and the appropriateness of the available levels of discipline under the circumstances.

After due consideration of the evidence presented and all factors involved, the Disciplinary Hearing Panel recommends that a Public Reprimand be issued to Respondent pursuant to Supreme Court Rule 5.16(d).

DATED: December 6, 2017

/s/ Keith A. Cutler
KEITH A. CUTLER,
Presiding Officer
