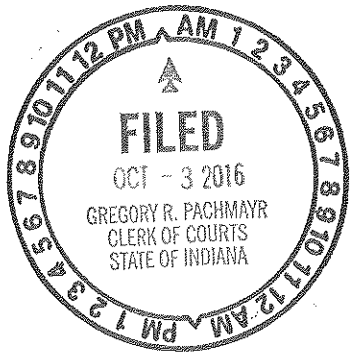

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF:	)	
	)	
KEITH A. HENDERSON	)	CAUSE NO. 22S00-1503-DI-135
Attorney No. 14845-10	)	

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

The Respondent has filed a Petition for Review seeking Court review of certain portions of the Hearing Officer Report ("Report"), filed on August 3, 2016. The Respondent seeks review pursuant to Admission and Discipline Rule 15(a).

The standard of proof in lawyer discipline cases is that the Disciplinary Commission must prove its allegations by clear and convincing evidence. Admis. Disc. R. 23(1)(i). Clear and convincing evidence is a standard of proof requiring the fact-finder to have a high degree of confidence that the facts supporting the conclusions of law are true. The Commission should not prevail if the facts necessary to support its claims of professional misconduct are dubious or less-than certain.

The standard of review in lawyer discipline cases is *de novo* with appropriate deference to the Hearing Officer's factual findings, particularly findings based on the Hearing Officer's unique opportunity to observe the demeanor of witnesses. "[W]hile the review process in disciplinary cases involves a *de novo* examination of all matters presented to the Court, a hearing officer's findings nevertheless receive emphasis due to the unique opportunity for direct observation of witnesses. *See Matter of Brizzi*, 962 N.E.2d 1240, 1244 (Ind. 2012)." *Matter of Campenella*, 56 N.E.3d 631, 633 (Ind. 2016).

I. INTRODUCTION TO THE CAMM CASES

The Count I facts are not in material dispute. The legal significance of those facts is in sharp dispute.

The Respondent is the four-times-elected prosecutor of Floyd County. He was re-elected to that office by the voters of Floyd County even after considerable publicity associated with the allegations in Count I. Before becoming the Floyd County prosecutor, at this Court's request, he completed the term of Jack Riddle, who was disbarred when he was the elected Crawford County prosecutor, and he was elected to serve one term as the Crawford County prosecutor before running for prosecutor in Floyd County. The Respondent has spent his legal career and his previous employment as an Indiana State Police officer in service to the citizens of the State of Indiana.

This case arises from the extraordinary murder prosecution of David Camm, a former Indiana State Police officer, who was accused of gunning down his wife and two young children in the garage of their home. Mr. Camm was tried and convicted of those crimes in a first trial prosecuted by the Respondent's predecessor in office, Stan Faith. The Indiana Court of Appeals reversed that conviction. *Camm v. State*, 812 N.E.2d 1127 (Ind. Ct. App. 2004). The grounds for reversal were that the State put evidence into the record about Mr. Camm's adultery. *Id.* at 1138. Because Camm had not claimed on appeal that the evidence was otherwise insufficient to support his conviction, the court allowed for Camm's retrial on remand. *Id.*

The Court of Appeals also addressed some other issues in the case, not as reversible error, but to guide the trial court and the parties on remand. One point the appellate court addressed was testimony the State presented about Mr. Camm's murdered daughter Jill having been sexually molested. In particular, the Court of

Appeals noted the absence of an objection to this evidence by Mr. Camm at trial and stated, "We would note our agreement that evidence Camm had molested Jill would be relevant as proof of motive under Evidence Rule 404(b). *Id.* at 1140. The court then went on to caution, "Additionally, event relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403. Given the arguments made on appeal, we anticipate in the event of a retrial that Camm will object to the introduction of this evidence. If that is the case, the trial court will need to carefully consider whether the highly inflammatory nature of this evidence substantially outweighs the probative value of any evidence that Camm molested Jill." *Id.* This Court denied transfer.

The Respondent was the Floyd County prosecutor by the time the Camm case was remanded for a second trial. The Respondent opted to re-try Mr. Camm. Mr. Camm was tried and convicted a second time in a case prosecuted by the Respondent. *Camm v. State*, 908 N.E.2d 215, 219 (Ind. 2009). Mr. Camm was convicted of all three murders and sentenced to life without parole. *Id.*

Mr. Camm again appealed—this time directly to this Court. On June 26, 2009, the Court reversed that conviction on appeal, with then-Chief Justice Shepard dissenting. 908 N.E.2d 215. In the second appeal, this Court reversed because evidence of Jill's sexual molestation was outweighed by its prejudicial effect and because of the admission of Mr. Camm's murdered wife's hearsay statement about when she was expected Mr. Camm to come home. *Id.* at 224-225 and 229. The Court nonetheless held that the remaining evidence was sufficient to convict Mr.

Camm, and whether it was sufficient to convict was for a jury to decide on remand, not for the Court to decide on appeal. *Id.* at 229. As noted earlier, Chief Justice Shepard dissented. *Id.* at 237. On the State's petition for rehearing, Justice Rucker joined Chief Justice Shepard in his view that the Court should affirm the trial court. *Camm v. State*, Case No. 87S00-0612-CR-499, docket entry dated November 30, 2009.

The Respondent was still prosecutor when the second Camm conviction was reversed and remanded. Upon remand of the case back to the trial court, the Respondent determined that Mr. Camm should be tried a third time. Shortly after the Respondent announced that he would re-try Mr. Camm, Mr. Camm moved to disqualify the Respondent as prosecutor and appoint a special prosecutor.

On January 7, 2011, the trial judge denied the special prosecutor motion. *Camm v. State*, 957 N.E.2d 205, 209 (Ind. Ct. App. 2011). The State, represented by the Respondent, agreed with Mr. Camm that the issue of whether a special prosecutor must be appointed should be resolved then, and not after a third trial. The Court of Appeals granted interlocutory review of the order denying a special prosecutor. *Id.* On November 15, 2011, the Court of Appeals reversed.

The State petitioned for transfer. On February 14, 2012, the Court denied transfer with Justice Dickson stating that he believed transfer should be granted. *Camm v. State*, 963 N.E.2d 1120 (Ind. 2012). A special prosecutor was appointed Mr. Camm was acquitted after the third trial.

II. THE COMMISSION'S COUNT I CASE

Count I of this case has to do with the fact that after the second Camm trial concluded with a guilty verdict and after the jury recommended a sentence of life without parole and was discharged, the Respondent signed a literary agency agreement with a literary agent, Frank Weimann. The agency agreement was in place for several months while certain post-trial motions were pending. It remained in effect while the appeal from Mr. Camm's second conviction was pending up through this Court's decision reversing Mr. Camm's conviction. The Respondent also entered into a publishing agreement with a division of Penguin Books during the pendency of Mr. Camm's appeal. Mr. Henderson cancelled both the agency and publishing agreements after the Court reversed Mr. Camm's second conviction and returned the uncashed check he had received as an advance to the publisher before the Court denied rehearing and jurisdiction was returned to the trial court. The Respondent worked with a co-author on a book manuscript while the appeal was pending, but the manuscript was never released to the publisher before the publishing agreement was cancelled. The manuscript was a draft work-in-progress between the Respondent and his co-author, and has never been released to anyone.

The Respondent did not solicit the literary agreement in the first instance. Instead, Mr. Weimann initiated contact with the Respondent because he thought the Camm case would be an interesting subject for a book. *Commission's Ex. 1 at 18-19; Henderson Test., Tr. at 618.* Around mid-day on March 3, 2006, the Respondent's wife emailed him a copy of the draft agency agreement that was

received at the Respondent's household while he was in Warrick County waiting for the jury to return its verdict in the second Camm trial. *Commission's Ex. 2-B.* Also, on March 3, 2006, the jury returned a guilty verdict on three counts of murder. *Commission's Ex. 12.* The Respondent did not execute the agreement then. The jury returned to court to deliberate on Camm's sentence on March 6, 2006, returned a recommendation on that same day of life without parole and was discharged by the trial judge. *Id.* On March 6, 2006, the trial judge entered a judgment of conviction and a sentence of life without parole. *Id.* Still, the Respondent did not execute the literary agency agreement. It was only on March 10, 2006, four days after the jury was discharged, that the Respondent executed the agency agreement. *Commission's Ex. 2-B.* After he signed the agency agreement limited proceedings took place in the trial. On March 28, 2006, Mr. Camm was sentenced to life without parole. *Commission's Ex. 12.*

The principal post-judgment motion was a motion to correct errors filed by Mr. Camm on April 27, 2006. *Respondent's Exhibit A-U.* In that motion, Camm claimed error in the trial proceedings based on certain alleged juror misconduct. Nowhere in the Camm motion to correct errors was it alleged by Camm that the State, in general, or the Respondent, in particular, was implicated in the alleged juror misconduct for any reason, let alone to juice up the story of the Camm case in order to make it more interesting. The only claim in the Camm motion to correct errors that touched on the prosecution function was a brief claim in paragraph 6 of trial court error for permitting the prosecutor "to introduce cumulative and

irrelevant evidence of possible molestation and argue that Camm molested his daughter without any evidence connecting Camm to the molest." *Respondent's Exhibit A-U at 13.*

The child molesting evidence had been admitted into the record over a Camm objection on grounds that it was cumulative. Camm did not object that the evidence was irrelevant. *Respondent's Exhibit A-W, CAMM.12.05.05, final.pretrial.doc at pp. 76 through 79.* The alleged cumulative evidence was all placed into the record by the State long before the Respondent had even received the unsolicited agency agreement from Mr. Weimann. The trial court had overruled Camm's objection that the evidence was cumulative.

The State did argue to the jury that the fact that Camm's young daughter, Jill, had been sexually molested created a motive for Camm to murder his family. Camm's objection to that argument was fully presented to the trial judge, and the trial judge declined to tell the State or Camm what counsel could argue to the jury so long as there was supporting evidence in the record. *Respondent's Exhibit A-W, WEEK.8.A.doc, pp. 1 through 6.* As with the child molesting evidence, the closing argument to the jury took place on February 27, 20016, before the Respondent was aware that a proposed literary agency agreement would be forthcoming from Mr. Weimann. *Commission's Ex. 12.*

The trial court denied the motion to correct errors on November 14, 2006, and Mr. Camm's appeal ensued. *Id.* The Clerk filed a notice of completion of the clerk's record on December 15, 2006, at which point jurisdiction of the case transferred

from the trial court to this Court for appeal. *Commission's Ex. 13.* The Attorney General, not the Respondent, had exclusive authority and control of the appeal.

The agency agreement itself did not require the Respondent to do anything. *Commission's Ex. 2-A.* It did not require him to produce any literary work on any subject—alone or with a co-author. It did not require him to author any literary work about the Camm case—alone or with a co-author. All it did was provide that Mr. Weimann was entitled to be compensated from the proceeds of any literary work the Respondent might produce pursuant to a publishing agreement facilitated by Mr. Weimann.

While the Camm case was pending on appeal from the second conviction, Weimann secured an agreement with a publisher to publish a book about the Camm case. *Commission's Ex. 2-B.* Mr. Weimann arranged for a co-author who was to be responsible for creating a draft of a book based on discussions with the Respondent. *Commission's Ex. 2-E.* The Respondent received a modest check of $1,700 as an advance on the book. *Henderson Test., Tr. at 651; Commission's Ex. 2-E.* His co-author received the same amount. *Commission's Ex. 2-E.* The Respondent never cashed the advance check. *Henderson Test., Tr. at 653.* The Respondent also did not have a copy of the manuscript for a book written by his co-author and had never seen it. *Kammen Test., Tr. at 298, 356; Henderson Test., Tr. at 60-61, 752-53.* No manuscript was ever tendered to the publisher and no book was ever published.

When this Court reversed Mr. Camm's second conviction on June 26, 2019, the Respondent was still the Floyd County prosecutor. Unless the Court was to

change its position on rehearing (it did not), the Respondent realized that he was going to be called upon decide whether to prosecute Mr. Camm a third time and to handle that prosecution. The Respondent cancelled the agency and publishing agreements and returned the advance check uncashed after this Court reversed the second Camm conviction and before the case was remanded for a third trial. *Henderson Test., Tr. at 769-70.*

The State filed a rehearing petition on July 27, 2009, which resulted in the Court's retention of appellate jurisdiction. *Commission's Ex. 13.* After briefing, the Court denied the rehearing petition on November 30, 2009, with Justice Rucker now joining Chief Justice Shepard in dissent, favoring a grant of rehearing and affirmation of the trial court's judgment. *Id.* Having concluded all appellate proceedings, the denial of rehearing served to return jurisdiction of the case to the trial court. The Respondent elected to try Mr. Camm a third time.

The Camm defense had become aware of the Respondent's book-related agreements through means not made a part of the record of this case. On December 1, 2009, Mr. Camm filed a motion to disqualify the Respondent as prosecutor in the case and have a special prosecutor appointed. *Commission's Ex. 12.* With the special prosecutor motion pending and before depositions in New York City related to the agency and publishing agreements, the Respondent consulted with the Legal Ethics Committee of the Indiana Prosecuting Attorneys Council ("IPAC") to seek that committee's guidance concerning whether he had a conflict of interest. *Henderson test., Tr. at 73.* He made that request on September 2, 2010, in the form

of a letter to Stephen Johnson, the late Executive Director of IPAC. *Resp. Ex. A-A.* Although the Respondent normally served as the chair of the IPAC Legal Ethics Committee (*Hill Test., Tr. at 453*), he recused himself from consideration of his request for guidance and did not attend the committee meeting at which his request was to be discussed. *Henderson Test., Tr. at 73-74.* The Respondent would have voluntarily stepped off the case if his peers on the IPAC Ethics Committee thought he should do so. *Henderson Test., Tr. at 74.* If the Ethics Committee's guidance had been that he had a disqualifying conflict of interest, it would have been in time to save the expenses to the parties of the New York depositions. *Resp. Ex. A-X; Henderson Test., Tr. at 670-71.*

The IPAC Ethics Committee met on September 16, 2010, to discuss the Respondent's request for advice. *Hill Test., Tr. at 456; Luttrull Test., Tr. at 559.* The advice he received was that he did not have a conflict of interest and should remain on the Camm case. *Hill Test., Tr. at 460; Wilhelm Test., Tr. at 534; Luttrell Test., Tr. at 560.* That advice was the unanimous opinion (or consensus) of the committee members. *Wilhelm Test., Tr. at 534; Luttrull Test., Tr. at 560.* Following that guidance, the Respondent continued to oppose the special judge motion. Henderson Test., Tr. at 678-79.

The trial court agreed with the State that there was no disqualifying conflict of interest and denied the special prosecutor motion on January 7, 2011. *Commission's Ex. 12.* On that same date, the trial court also denied Mr. Camm's discovery request for production of the draft book manuscript. *Commission's Ex. 12.*

On January 20, 2011, Mr. Camm filed a motion to certify the denial of the special prosecutor motion for interlocutory appeal. *Commission's Ex. 12.* The Respondent for the State did not oppose the certification motion because he did not want that issue unresolved for the third trial. *Uliana Test., Tr. at 324.* On the same day as the motion was filed, Judge Dartt granted it. *Commission's Ex. 12.*

The State filed a response to Mr. Camm's Motion to Accept Jurisdiction over Interlocutory Appeal by agreeing that the Court of Appeals should review the special prosecutor question. *Uliana Test., Tr. at 325.* On November 15, 2011, the Court of Appeals disagreed with Judge Dartt by reversing and remanding for appointment of a special prosecutor. 957 N.E.2d at 208.

The Court of Appeals reversed and concluded that, notwithstanding the Respondent's cancellation of the publishing contract, the one-time existence of the publishing contract was "a bell that cannot be unrung," and thus the Respondent had a disqualifying actual conflict of interest. *Id.* at 211. The court looked to Rule of Professional Conduct 1.8(d) as "instructive," but not controlling. *Id.* at 210. It also took into consideration a statement by the Respondent that he was "committed to writing a book," as was his co-author, and that the story of the case "needs to be told." *Id.* at 211. Quoting *Jones v. State*, 901 N.E.2d 655, 658 (Ind. Ct. App. 2009), the Court of Appeals concluded that it was required "to resolve any serious doubt in favor of disqualification." *Id.*

The State petitioned for transfer to this Court on December 15, 2011. *Commission's Ex. 15.* On February 13, 2012, this Court denied transfer, with

Justice Dickson voting to grant transfer. *Id.* On remand, a special prosecutor was appointed and Mr. Camm was tried a third time, with the result that he was acquitted. *Commission's Ex. 12.*

III. PROCEDURAL FACTS RELATED TO AMENDING COUNT I TO INCLUDE AN ALLEGATION THAT THE RESPONDENT VIOLATED RULE 1.7(a)(2).

It is on these facts that the Commission charged the Respondent in Count I with violating two Rules of Professional Conduct: Rule 1.8(d)[1], dealing with the negotiation of publicity rights; and 8.4(d)[2], prohibiting conduct prejudicial to the administration of justice. *Verified Complaint for Disciplinary Action, filed March 19, 2015.*

In his entry following a June 23, 2015 pre-hearing conference, the Hearing Officer gave the Commission until July 17, 2015 to file any amendments its Complaint. *Hearing Officer's July 16, 2016, Entry.* On July 13, 2015, the Commission moved to amend its Complaint, which it did by making a minor amendment by interlineation. *Motion of Disciplinary Commission to Amend the Verified Complaint by Interlineation.* Very late in the life of this case, on September 9, 2015, the Commission decided it ought to be able to amend its Complaint yet

[1] Rule 1.8(d) states: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."

[2] Rule 8.4(d) states: "It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

again, this time to plead for the first time in Count I that the Respondent violated Rule 1.7(a)(2).[3]

On September 14, 2014, the Respondent objected to the Commission's request leave to amend to its Complaint in part because this was an entirely new charging theory that was being introduced for the first time in the case just short of a month before the scheduled final hearing. The Hearing Officer granted the Commission leave to amend its Complaint over the Respondent's objection by allowing it to charge the Respondent with a new violation of the Rules of Professional Conduct in Count I. *Hearing Officer Order of September 25, 2015.* Although the Commission never formally filed an Amended Verified Complaint, the Commission's was implicitly amended by interlineation when the Hearing Officer granted the Commission's motion.

IV. POINTS FOR REVIEW

The facts of this case, which are not substantially contested, do not support the conclusion that the Respondent violated any of the Rules of Professional Conduct charged by the Commission in Count I.

The Commission's complaint against the Respondent included a Count II, which is not in front of this Court by way of this petition because the Hearing Officer concluded (correctly) that the Commission has failed to present clear and

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[3] Rule 1.7(a)(2) states: "Except as provided in paragraph (b) [dealing with client consent], a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

convincing evidence of the violations of the Rules of Professional Conduct alleged in Count II. *Report at 10-12.*

A. The Hearing Officer Erred in Concluding That the Respondent's Representation of the State Continued during the Appeal of the Second Camm Conviction.

In his findings on Mitigation and Aggravation, paragraph 2, the Hearing Officer stated: "The Attorney General's Office did have jurisdiction to prosecute the appeal, even though the Hearing Officer finds Henderson's representation of the State continued." *Report at 14.* The Respondent has identified this as an issue for review because whether the Respondent represented the State in the appeal from the second Camm conviction is relevant to the analysis of whether the agency or publishing agreements, in effect almost entirely when the Camm case was on appeal, limited the Respondent's representation of the State.

Prosecuting attorneys have the statutory power and duty to conduct "all prosecutions for felonies, misdemeanors, or infractions and for all suits on forfeited recognizances." Ind. Code 33-39-1-5(1). The Attorney General is a statutory office. Ind. Code 4-6-1-2. It is the Attorney General, not the prosecuting attorney, who has the power and duty to represent the State in appeals of criminal cases. Ind. Code 4-6-2-1.

An appeal is initiated by filing a notice of appeal. App. R. 9(A)(1). An appellate court acquires jurisdiction of a case upon the clerk's notation in the chronological case summary of the completion of the Clerk's Record. App. R. 8. Notice of completion of the Clerk's Record was filed in the Camm appeal from the

second conviction on December 15, 2006. With limited exceptions not applicable here, in non-interlocutory appeals, the acquisition of jurisdiction over a case by an appellate court deprives the trial court of jurisdiction over the case. *Bradley v. State*, 649 N.E.2d 100, 106 (Ind. 1995).

As a courtesy, but not as a relinquishment of jurisdiction, the Attorney General will often consult with county prosecutors about appeals, giving them the opportunity to review and comment on draft briefs, and extending them the courtesy of sitting at counsel table at oral argument. None of those courtesies changes the jurisdictional fact that it is the Attorney General who has the exclusive authority to represent the State in criminal appeals, file briefs on its behalf and speak on behalf of the State at oral argument.

The Hearing Officer was incorrect as a matter of law when he stated that the Respondent's representation of the State in the Camm case continued during the appeal of the second Camm conviction.

B. The Hearing Officer Erred by Allowing the Commission to Amend into Count I an Allegation That the Respondent Violated Rule 1.7(a)(2).

The Hearing Officer allowed the Commission to amend an entirely new alleged rule violation, Rule 1.7(a)(2), into Count I well after the Commission had filed its complaint, amended it once, and the passage of the Hearing Officer's deadline for amending the complaint. The Respondent incorporates his Opposition to Commission's Motion for Leave to Further Amend the Verified Complaint, attached as Exhibit A, filed on September 14, 2015, in support of this argument.

C. THE COUNT I FACTS DO NOT SUPPORT A VIOLATION OF RULE 1.7(A)(2).

In order to prove a violation of Rule 1.7(a)(2), the Commission must show that the Respondent's signature on the literary agreement, and much later, a publishing agree, created a "significant risk" that the Respondent's representation of the State in the Camm case was "materially limited." These are qualifying words that have import and cannot be ignored.

In order for there to be a material limitation conflict, the lawyer must have a personal interest that creates (1) a significant risk, and (2) the significant risk must be one that materially limits the representation of the client. Neither the agency agreement nor the publishing agreement—both of which were cancelled before the case was remanded after the second reversal—created a significant risk of materially limiting the Respondent's representation of the State in the Camm case.

The Commission made no effort to prove in any way how the Respondent's representation of the State was materially limited because of the agency agreement for the brief time it was in place post-sentencing and before this Court assumed appellate jurisdiction. Likewise, the Commission made no effort to prove in any way how the representation of the State was materially limited because of the agency agreement, and later, the publishing agreement, when the Camm case was on appeal and the Respondent had no control over it. Finally, the Commission made no effort to prove in any way how the Respondent's representation of the State was materially limited on remand after the second appeal when (1) both

agreements had already been cancelled, and (2) the Respondent was disqualified and did not represent the State in the third Camm trial.

When asked to specify the facts supporting its theory that there was a material risk that Respondent's representation of the State was materially limited, the Commission essentially *ipse dixit*. *See Respondent's Ex. A-D, answer to Interrogatory No. 49* ("Here, there was a significant risk that the Respondent's ability to represent his client, the state, was materially limited by Respondent's own personal and financial interest in the ultimate outcome of the Camm case"). The theoretical point made by the Commission is, of course, a valid one. But, on these facts, where the Respondent's representation of the State while the agency agreement (but not the publishing agreement) was in place for a sliver of post-sentencing/pre-appeal time it cannot be credibly argued that the Respondent was at risk of putting his thumb on the scales of justice to jazz up the Camm case for financial gain.

The Commission has never pointed out <u>on these facts</u> how the Respondent could have been susceptible to altering his advocacy on the State's behalf in the post-trial phase because he had signed an agency agreement. Or, in the words of Rule 1.7(a)(2), what significant risk was present that the Respondent's interest in a literary work about the Camm case would have materially limited his advocacy on behalf of the State in the post-sentencing/pre-appeal motions practice?

The Respondent's involvement in the Camm case was over for all practical purposes by the time the Respondent signed the agency agreement. The record for

purposes of an inevitable appeal was set in stone and could not be changed by the Respondent—let alone changed in any way that would have made a book more or less interesting to the reading public than was already set by the closed trial record.

It cannot be credibly argued that the introduction of child molesting evidence (put into evidence before any agency agreement or any thought of an agency agreement) was motivated by publicity considerations. Child molesting evidence had also been entered into evidence at the first trial handled by Stan Faith, the Respondent's predecessor. The Indiana Court of Appeals reversed the first Camm conviction for other reasons (evidence of Camm's adultery, which was not offered in the second trial), not because of the child molesting evidence. 812 N.E.2d at 1138. In fact, providing guidance for the retrial on remand, the Court of Appeals held that, "evidence Camm had molested Jill would be relevant as proof of motive under Evidence Rule 404(b)." *Id.* at 1140. The Court of Appeals simply cautioned that on remand the trial court would need to assess admissibility of the child molesting evidence in light of Evidence Rule 403's guidance that probative value must be weighed against the danger of unfair prejudice. *Id.* In the second trial, the State, mostly through Chief Deputy Prosecutor Steve Owen, offered evidence that Jill was sexually molested. The trial court did not need to engage in an Evidence Rule 403 analysis because Camm did not object to that evidence on grounds that it was unduly prejudicial, and it was admitted into evidence.

Mr. Owen, the Respondent's co-counsel, who largely handled the child molesting aspect of the case (*Owen Test., Tr. at 381*), never had a literary agency

agreement. He never had a publishing contract. At the time the State put the evidence of child molesting into the record during the second trial, the Respondent had no literary agency agreement, and he had no publishing contract. At the time the State made final arguments to the jury, the Respondent had no literary agency agreement, and he had no publishing contract.

The Respondent's conduct of the jury phase of the second Camm trial could not have been affected by an agency agreement that he had never seen or thought about, let alone executed. Or using the terminology of Rule 1.7(a)(2), the future agency or publishing agreements presented zero risk (let alone a substantial risk) of a limitation (let alone a material limitation) on the Respondent's diligent and competent representation of the State of Indiana during the second trial. It is speculative at best and without proof in the record that, having secured a conviction of Camm for the second time, the State's successful opposition to the Camm Motion to Correct Errors was or could have been affected in any way by the fact that on March 10, 2006, the Respondent signed the agency agreement (years before he signed a publishing agreement).

In his representation of the State in opposition to the Motion to Correct Errors, the Respondent was simply carrying out his duties as an able advocate for the State as he was elected to do. Having been successful in having the child molesting evidence put to the jury during the second trial, it is unimaginable that a competent and diligent prosecutor who had no agency contract would concede on a motion to correct errors that it was error for the trial judge to have allowed the

evidence into the record. The Commission certainly presented no evidence that a prosecutor who did not have an agency agreement would have acted otherwise. To suggest that the Respondent opposed the argument made in paragraph 6 of Camm's Motion to Correct Errors because of the recently executed agency agreement flies in the face of the facts of the case and plain common sense.

But the conflict-of-interest standard is not whether the Respondent's conduct of the second Camm trial (especially the post-sentencing/pre-appeal phase) could have been theoretically affected by a literary agency agreement signed after the trial record was closed and the jury was discharged. The Commission must prove by clear and convincing evidence that between March 10, 2006 (the date the agency agreement was executed) and December 14, 2006 (when the Respondent lost authority over the case upon filing of a Notice of Completion of Clerk's Record), the literary agency agreement created a substantial risk of materially limiting his representation of the State of Indiana in his opposition to the Camm motion to correct errors. The Commission has not even tried to show that there was a substantial risk of a material limitation during this brief interval when the Respondent still had jurisdiction over the case.

There is no Indiana case law applying Rule 1.7(a)(2) to prosecutor media agreements—probably because most lawyer discipline matters involving prosecutors and the media go to the separate question (not present here) of whether the prosecutor has engaged in improper trial publicity in order to promote the prosecutor's interests in promoting media interest in a case. The Respondent never

released a literary work for publication while the Camm case was alive; in fact, he never released a literary work for publication at any time. Trial publicity issues are not part of this case.

Every client engagement undertaken by a lawyer is susceptible to some theoretical possibility that the lawyer could be limited by some other interest, including a personal interest. Take, for example, attorney fees. If a lawyer is going to charge a client fees for legal services (which he or she must in order to stay in business), the client will generally want to pay less, whereas the lawyer will generally prefer to be paid more. In hourly fee representations, there are clearly financial incentives for the lawyer to expend more time in order to earn more in fees. There are somewhat different personal lawyer interests in fixed fee and contingent fee representations, but they too present an imperfect alignment between the lawyer's economic interests and the client's interests. There is, in effect, a theoretical conflict of interest at the heart of most all attorney-client relationships. Yet, we do not say that most all attorney-client relationships are permeated by a material limitation conflict of interest and that the client must waive that conflict of interest before the lawyer can even start work. Frankly, that would be silly.

The profession does not believe that lawyers' interests in being paid for their legal work create a material limitation conflict of interest because we generally expect lawyers to act honorably by representing their clients competently and diligently and not allow their professional judgment to be infected by the fact that

they want to be paid for their legal work. Instead, we have a separate rule, Rule 1.5(a), requiring lawyers to contract for, charge and collect reasonable fees. This specific rule, not the general material-limitation conflict-of-interest rule, serves the purpose of regulating lawyer fee-related misconduct.

Lawyers also occasionally take on high profile legal representations. Of course, a legal matter handled by a lawyer that receives a lot of publicity will always presents a theoretical risk that the lawyer will try to jazz up the case to the client's disadvantage in order to raise the lawyer's public profile. If a lawyer actually and provably does that, it would be improper. But, there is no Indiana case law supporting the position that the mere representation of a client in a high profile case creates a material limitation conflict of interest merely because there is a theoretical possibility that the lawyer might use the case for the lawyer's own publicity advantage in the future.

The same goes for prosecutors and any thoughts they might have about discussing their cases in literary works. Indiana has a specific rule, Rule 1.8(d) to regulate literary and media agreements, which we will discuss later. Without (as we will demonstrate) that rule to support its claims, the Commission seeks to leverage a general rule, Rule 1.7(a)(2), to reach conduct that a specific rule does not reach. But, in using Rule 1.7(a)(2) to push past the limits imposed by Rule 1.8(d), the Commission applies Rule 1.7(a)(2) to, in substance, penalize speech and thought. In the absence of any proof that the Respondent took any actions in the Camm case that were anything other than those of a diligent and competent

prosecutor, it goes too far for the Commission to suggest, as it appears to in this case, that there is a substantial risk of a material limitation whenever a prosecutor gives serious consideration to the literary merit of one of his cases.

In order to prevail on its Rule 1.7(a)(2) charge in Count I, the Commission must prove by clear and convincing evidence that there was a significant risk that the Respondent, a long-tenured and honorable public servant, was willing to compromise his sworn duties as a prosecutor in the second Camm trial because he later entered into an agency agreement after Mr. Camm had been sentenced and later still entered into a publishing agreement when he had no authority over the case. There is no proof, let alone proof by clear and convincing evidence, that (1) during jury phase of the second Camm trial, the mere thought of writing a book about the Camm case someday (of which there was no proof) created a substantial risk that the Respondent would handle the second Camm trial in a way he otherwise would not have; or (2) after he signed the agency agreement and during the brief interval when he had trial court-level jurisdiction over the Camm case, the thought of writing a book about the Camm case someday created a substantial risk that he would oppose the Camm motion to correct errors in a way he otherwise would not have; or (3) if he had been given the opportunity to prosecute the third Camm trial after the agency and publishing agreements had been cancelled, there was a substantial risk that he would have allowed the possibility that he might in the future write a book about the Camm case to cause him to handle the case in a way he otherwise would not have.

It is uncontested that the prosecutor is a minister of justice and has certain constitutional and ethical duties to the accused. See generally, Prof. Cond. R. 3.8. The Commission appears to contend that the mere thought of writing a book was enough to create a substantial risk that the Respondent was going to compromise all of the values of ethical prosecution, including duties of fairness to the defendant, in order to sell books. That is speculative and unsupported by any facts, let alone clear and convincing evidence. In the Camm case, a probable cause decision was made long before the Respondent came on the scene. His predecessor had tried Camm once, using evidence that Camm molested Jill, and secured a guilty verdict.

In Mr. Camm, the Respondent had a defendant who had been twice convicted and about whom it had been twice determined on appeal that there was sufficient evidence of guilt to warrant retrial after remand. As regards the third Camm trial, might the abandoned agency and publishing agreements and the thought of writing a book someday in the future create a material risk that the Respondent would pull his punches in the third trial, prosecute the third trial too hard, or something in between? We will never know and the Commission will never be able to prove how those factors presented any substantial risk of material limitation in the third Camm trial because the Court of Appeals deprived the Respondent of his authority to prosecute the third trial.

The Commission has been conspicuously coy about answering how the Respondent's consideration of writing a book supposedly affected his prosecutorial responsibilities beyond engaging in platitudes (important as they are) about the

presumption of innocent and the prosecutor's duty to do justice. In point of fact, after a finding of probable cause, the Respondent's duty as a prosecutor was to work diligently, but fairly, to secure Camm's conviction. He did that. The interests of Indiana's citizens are not well served by prosecutors who do not care whether they convict defendants for whom there has been a finding of probable cause (and in Camm's case, much more—two prior convictions). The Commission has shown nothing other than a theory, disconnected from the practicalities of prosecuting the Camm case, as a substitute for proving in a tangible way that Mr. Camm was at risk of being treated unjustly because the Respondent, for the brief time he had jurisdiction over the case, was taking steps directed at writing a book about the case.

The Respondent does not dispute that the Indiana Court of Appeals reversed Judge Dartt's denial of Camm's special prosecutor motion. But the Court of Appeals did not rely on Rule 1.7(a)(2) to disqualify the Respondent. It referred to a different Rule, Rule 1.8(d), as "instructive." 957 N.E.2d at 210. It did not even mention, Rule 1.7(a)(2). Instead, it applied the "actual conflict of interest" statutory standard, then in effect, set forth in IND. CODE 33-39-1-6(b)(2), for determining that there was a basis for reversing the trial court.

The Respondent accepts the Court of Appeals' opinion, but respectfully disagrees with it. "Actual conflict of interest" is statutorily undefined and there is no basis for equating that standard to conflict-of-interest standards set forth in the Rules of Professional Conduct. On the State's petition for transfer, Justice Dickson

disagreed with the Court of Appeals, too. It would be a misapplication of the Court of Appeals' decision to allow it to have controlling influence on the Supreme Court's consideration of the separate question whether the Respondent violated Rule 1.7(a)(2) and, more importantly, whether he should be professionally disciplined and, potentially, lose his license to practice law because two other Justices did not join with Justice Dickson to make the requisite vote for the Supreme Court to accept transfer to review the decision on the special prosecutor motion. It would be a risky proposition indeed to discipline a long-serving and honorable public servant, for engaging in conduct that a well-regarded trial judge and one member of this very Court apparently believed to not be a disqualifying conflict of interest.

D. The Count I Facts Do Not Support a Violation of Rule 1.8(d).

In his Count I Conclusions of Law, the Hearing Officer characterized Rule 1.8(d) as stating something the rule itself does not state. For example, in Conclusion of Law paragraph 12, the Hearing Officer disregarded the plain language of Rule 1.8(d) to suggest that prior to the conclusion of a legal representation, Rule 1.8(d) is a prohibition on attorneys negotiating or exercising literary or media rights. In Conclusion of Law paragraphs 13 and 15, the Hearing Officer suggested that Rule 1.8(d) governs the exercise of the lawyer's individual publicity rights. That is not what the clear language of Rule 1.8(d) says. In Conclusion of Law paragraph 14, the Hearing Officer asserted that Rule 1.8(d) "instructs government attorneys that personal gain shall not be inserted into public representation." In fact, Rule 1.8(d) does not instruct that.

What Rule 1.8(d) says is: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."

Rule 1.8(d) does not apply on these facts.[4] Comment [9] to Rule 1.8 provides further guidance to the meaning of the rule, stating in relevant part: "An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation." (Emphasis added.)

Both the black-letter rule and the comment are clear: the rule is not triggered by a lawyer's agreement that is something other than the acquisition of literary or media rights. The Respondent acquired no one's literary or media rights. He entered into an agency agreement relating to his own rights, but that agreement did not require him to do anything, including write a book about the Camm case. The agency agreement was decidedly not an agreement in which he either acquired literary or media rights or even in which he contracted away his own literary or media rights to another. Later, when he had no jurisdiction over the Camm case because it was on appeal and under the control of the Attorney General, he contracted to write a book about the Camm case with a co-author, but that contract

[4] Perhaps this explains why the Commission acted in desperation to add a Rule 1.7(a)(2) claim at the last minute.

did not result in either his acquisition of media rights or even disposition of his media rights to another.

The fact that Rule 1.8(d) is located in the chapter of the Rules of Professional Conduct that deals with the client relationship is also meaningful. Rule 1.8 generally describes a variety of specific applications of the Rules of Professional Conduct where conflicts of interest arise from a lawyer's dealings with a client. So, for example, it governs business or other adverse financial transactions with clients (Rule 1.8(a)), solicitation of gifts from clients (Rule 1.8(c)), providing financial assistance to clients (Rule 1.8(e)), and limiting liability to the client (Rule 1.8(h)). In neither the agency agreement nor the publication agreement was the Respondent engaged in a transaction of any kind with his client, the State of Indiana.

Lawyers are accountable to the Rules of Professional Conduct for what they require or prohibit, but they cannot be held to account for conduct that is not required or prohibited by the Rules. Lawyers cannot be found to have engaged in professional misconduct for complying with a rule, but violating someone's idea of the spirit or sense of a rule. That is the case with the Rule 1.8(d) charge. It simply does not apply to the Count I facts.

The Respondent has located no Indiana lawyer discipline case charging a violation Rule 1.8(d), let alone a case in which Rule 1.8(d) was the basis for a claim that a lawyer violated the rule even though the lawyer did not make or negotiate a contract whereby another person gave the Respondent literary or media rights.

One recent case involving a lawyer who wrote a book about his client, did not include a violation of Rule 1.8(d). *See Matter of Smith*, 991 N.E.2d 106 (Ind. 2013)

The Indiana Supreme Court is the source of rules governing lawyer professional conduct. This Court could readily draft a rule that would make it unethical for a lawyer to contract with a literary agent about a case or to contract to create a literary work related to the lawyer's own role in a legal proceeding, but it has not done so. It would violate the Respondent's due process/due course of law rights to force facts into a rule that does not accommodate them. Rule 1.8(d) should be interpreted in a manner that does not present serious questions under the U.S. and Indiana Constitutions.

E. THE COUNT I FACTS DO NOT SUPPORT A VIOLATION OF RULE 8.4(D).

The Hearing Officer in Conclusion of Law paragraph 16 engaged in little analysis of how and why Rule 8.4(d) applies to the Count I facts. He simply stated: "Having found Henderson violated the provisions of Rule 1.7(a)(2) and 1.8(d), it follows that those same actions violated Rule 8.4(d)." He went on: "The insertion of personal interests into the prosecution of the Camm case was prejudicial to the administration of justice." In other words, the predicate for the Hearing Officer's conclusion that the Respondent violated Rule 8.4(d) was solely because he had also violated Rules 1.7(a)(2) and 1.8(d). We have demonstrated why there is no violation of either Rule 1.7(a)(2) or Rule 1.8(d) in this case, so accordingly, under the Hearing Officer's reasoning, there should be no violation of Rule 8.4(d) either.

What constitutes conduct prejudicial to the administration of justice is not apparent from Rule 8.4(d)—what is one person's prejudicial conduct might as easily be another person's vigorous advocacy. It is a rule that is susceptible to being misapplied as a catch-all in a way that fails to fairly put lawyers on notice of the conduct they should avoid so they can steer clear of that rule's prohibition.

In its answer to the Respondent's Interrogatory No. 16, the Commission elucidated its reasons for why it believes the Respondent's conduct violated Rule 8.4(d).

> Respondent engaged in conduct that gave him a personal interest in the outcome of the Camm case that was in conflict with his duties as a prosecutor, thereby placing himself in a situation where his duties to the people were impermissibly compromised by his personal interests. Respondent, who, by virtue of his office, is held to a high standard of ethical conduct, engaged in conduct summarized above in Answers to Interrogatory No's. 14 and 15 that did not serve the ends of justice, that irreversibly compromised his ability to be an advocate on behalf of the people in the Camm case, and that made himself an issue in any trial of Camm thereafter that he would have conducted. Respondent's conduct also resulted in the undue use of trial and appellate court time, substantial undue delay in Camm's prosecution, the extensive lengthening of Camm's incarceration, substantial damage to the government and the taxpayers of Floyd County, and damage to the public's perception of and confidence in the criminal justice system.

Respondent's Ex. A-C at 13.

The first two sentences of this answer are merely a restatement of the Commission's theory that the Respondent engaged in a material limitation conflict of interest in violation of Rule 1.7(a)(2) and violated Rule 1.8(d). Interrogatories

Nos. 14 and 15 set forth the Commission's theory of why it believes the Respondent violated two other rules, not Rule 1.8(d). Respondent's Ex. A-C at 2-13.

In substance, the Commission seems to be saying that the Respondent's conduct was prejudicial to the administration of justice because of the delay occasioned by the interlocutory appeal of Judge Dartt's denial of the Camm special prosecutor motion. But that proves too much. Under the Commission's Rule 8.4(d) theory, any time a prosecutor commits an error that results in an appeal, the delay flowing from the appeal is conduct prejudicial to the administration of justice.

This asks too much of prosecutors. Even the most seasoned and committed prosecutor will make an occasional error that will lead to an appeal. One example is the first Camm case where Mr. Faith's decision to prove motive through Mr. Camm's philandering resulted in a reversal and re-trial. The Commission did not bring a disciplinary action against Mr. Faith. Unfortunately, the comments to Rule 8.4 shed little light on what is meant by conduct prejudicial to the administration of justice. In the Camm case, however, the administration of justice worked exactly as it is supposed to. Cases were tried under the rules, appeals were taken under the rules, decisions were made under the rules, and in the end, the application of fair procedures resulted in a jury's acquittal of Mr. Camm. There was nothing irregular about how justice was administered in Mr. Camm's case. The Respondent should not be held to have violated Rule 8.4(d).

F. THE RESPONDENT'S EFFORTS TO SEEK GUIDANCE FROM THE IPAC ETHICS COMMITTEE IS A MITIGATING CIRCUMSTANCE.

The Hearing Officer rejected as a mitigating circumstance that the Respondent sought guidance on whether he should voluntarily ask for a special prosecutor for the third Camm trial: "Henderson did not seek ethics guidance before he sought literary representation and a book deal." Report at 14. While this observation is true, it fails to recognize that the Respondent sought guidance from the IPAC Ethics Committee before Judge Dartt ruled on the special prosecutor motion.

As the Respondent testified and as Respondent's Ex. A-A demonstrates, the Respondent sought Ethics Committee guidance so he could step away from the case before the parties incurred additional expense and delay.

Seeking guidance on that question ties in directly with the Hearing Officer's next observation: "Henderson did not withdraw when questions were raised, but waited until he was formally removed." Report at 15. The formal removal, as noted, was not by the trial judge, who did not believe there was a basis for removal, but after the results of the interlocutory appeal.

It was with the advice and counsel of the Ethics Committee that he stayed the course to secure a favorable ruling from Judge Dartt. He did not resist an interlocutory appeal. In fact, he welcomed it so the issue could be disposed of before the third trial commenced. Once the interlocutory appeal was in the hands of the Attorney General, he did not control what would happen next, including the

possibility that the Attorney General would determine that the Camm appeal of the denial of the special prosecutor motion should not be opposed.

The Respondent's efforts to obtain guidance about whether he should advocate that he remain the prosecutor in the Camm case for the third trial should be given substantial mitigating weight should this Court determine that there is any basis on the facts and law to conclude that the Respondent violated a Rule of Professional Conduct in Count I.

G. The Respondent's Defense Did Not Include Personal and Aggressive Tactics and Should Not Be a Consideration in Aggravation.

The Hearing Officer made no citations to the record in support of his observation that, "Henderson's defense did include personal and aggressive tactics which necessitated the intervention of Supreme Court rulings prior to hearing on the matter." *Report at 15.* The Hearing Officer noted his disappointment in the inability to conduct attorney conference without a court reporter. *Report at 13-14.* What the Hearing Officer failed to observe was that conferences were conducted in the presence of a court reporter because the Commission, not the Respondent, insisted on it. The Hearing Officer also observed, again with disappointment, that there was a display by counsel for both sides of a "desire to 'win' overshadowing the betterment of the profession." *Report at 14.*

Although he did not cite to the record, it appears that the Hearing Officer was alluding to the fact that the Commission turned to the Court to intervene in the case while it was pending before the Hearing Officer. In Respondent's counsel's

experience, that has never happened before. The issue was briefed to the Court and on September 2, 2015, this Court entered an order striking certain of the Respondent's affirmative defenses. The Respondent respects that order which thereafter controlled this case and conducted his defense of the case in keeping with that order.[5]

It should not be a factor in aggravation that the Respondent raised issues as affirmative defenses that pointed out and alleged violations of Admission and Discipline Rule 23 by the Disciplinary Commission. It is concededly not a frequent circumstance that a respondent in a lawyer discipline case will raise as affirmative defenses provisions in Admission and Discipline Rule 23 that exist to protect the rights of respondents. In briefing before this Court, the Respondent addressed and distinguished every case relied upon by the Commission in support of its position that there is nothing a lawyer can do within the confines of a disciplinary case to raise the Commission's failure to abide by this Court's governing rule, Admission and Discipline Rule 23. *See Respondent's Brief in Opposition to the Commission's Motion to Modify and in Support of Respondent's Motion for Judgment on Counts I and II at 18-24* (incorporated here by reference).

On September 2, 2015, the Court issued an Order striking certain of the Respondent's affirmative defenses and granting the Commission protection from

[5] Because the Commission was unwilling to agree that it would not argue that the filing of those affirmative defenses was not a factor in aggravation, the Respondent had no choice but to offer into evidence as an offer to prove the evidence in his possession that tended to show that the stricken defenses were grounded in fact and not speculation. The Respondent will brief that issue should the Commission argue in its anticipated petition for review that the filing of the stricken affirmative defenses should be considered an aggravating circumstance.

related discovery. In the Order, the Court stated: "None of these allegations [in certain affirmative defenses], even if proven as true, provide a legally cognizable defense to the charges of misconduct in the Verified Complaint or bear on the issue of sanction if misconduct is found."

The Respondent believes that this is the first time this Court has held that the Commission's conduct in an investigation can never be either a defense or a consideration in mitigation. Such is now the law of this case, and it is presumably a precedential holding for future cases—at least to lawyers who are aware of it. As noted earlier, the Respondent respects that ruling, and merely points these things out because in the absence of past known precedent, the Court should not accredit the Hearing Officer's observation in the Mitigation and Aggravation section of his Report that the intervention of the Supreme Court in this case is an appropriate consideration in aggravation.

The Hearing Officer's further observation that he found the processing of the case to be "complicated by the tactics of counsel rather than the facts of the case" was not solely an observation about Respondent's counsel. *See, e.g.*, the Commission's listing of the Respondent's lead counsel as a witness in its case and asserting: "The relevance of [Lundberg's] testimony relates to the Commission's intention to demonstrate that Respondent has engaged in obstreperous conduct in his defense of this matter, that Lundberg has been a cooperative driver of such conduct, and that such conduct is an aggravating factor to be taken into account by the Court when it ultimately passes judgment in this matter." Commission's

Opposition to Respondent's Motion to Strike Lundberg's Name from the Commission's Witness List at 3. That is an extraordinary statement to be made by counsel for the regulator of the bar about opposing counsel. Of course, it is a criticism of counsel, not the Respondent, and should not be accredited by the Court as an basis for aggravating any sanction in this case against the Respondent.

The Court is in a position to assess the conduct of counsel for both sides in this case. The Respondent asserts that Count II of the Complaint was a full-throated attack on the honesty and integrity of the Respondent, a dedicated public servant. The Commission's case on Count II failed to convince the Hearing Officer that there was merit to that attack. While it may be (and probably should be), in the words of the Hearing Officer, that the litigation of lawyer discipline cases should be about the "betterment of the profession" and not the "desire to win," when a Respondent is faced with an attack by the regulator of the bar seeking to damage his professional reputation and deprive him of his livelihood for years on the basis of wrong facts, the Respondent has no choice but to fight vigorously for his professional life. No respondent should be held to a disadvantage for having fought hard to hang on to his reputation and livelihood, and, in particular, he should not be held to a disadvantage because of the Hearing Officer's observations about the conduct of his counsel.

H. The Court Should Disregard Footnote 3 of the Hearing Officer's Report.

One of the witnesses called by the Respondent was the former Chief Justice of this Court Randall Shepard, now a Senior Judge of the Indiana Court of Appeals.

The Hearing officer observed with regard to Judge Shepard's testimony: "Particularly disturbing to the Hearing Officer was the subpoena issued to a former Chief Justice of the Indiana Supreme Court whose questioning amounted to a history lesson on how Henderson became a Prosecutor. Henderson's actions were at issue, not his general reputation. The subpoena to the Chief Justice came across as unnecessary gamesmanship." *Report at 14 n. 3.*

The Respondent cannot comment on how calling Judge Shepard as a witness pursuant to subpoena came across to the Hearing Officer. However, he can explain to this Court that, contrary to the Hearing Officer's understanding, professional reputation is very much an issue in a lawyer discipline case. Unlike civil cases, or even criminal cases in which a separate sentencing hearing is conducted after a finding of guilt, in lawyer discipline cases there is one hearing. That single hearing is an evidentiary hearing on the question of whether the Respondent engaged in professional misconduct, and a conditional hearing on the question of the appropriate sanction to be ordered in the event of a finding of misconduct. The Respondent must make a record at that one hearing for this Court's benefit to be considered in the event the Court concludes that the Respondent engaged in professional misconduct.

This Court has relied often on the ABA Standards for Imposing Lawyer Sanctions ("Sanctions Standards") as a guide to assessing sanctions in lawyer discipline cases, particularly as the Sanctions Standards specify factors to be taken into account in considering the presence of mitigating and aggravating

circumstances. *Sanctions Standards at § 9.0. See, e.g., Matter of Hollander*, 27 N.E.3d 278, 280 (Ind. 2015); *Matter of Brown*, 714 N.E.2d 630, 631 n. 5 (Ind. 1999).

Character and reputation have often been a consideration by this Court in assessing sanction. *See, e.g., In re Anonymous*, 43 N.E.3d 568 (Ind. 2015) ("character and reputation" in the local legal community was a fact in mitigation); *Matter of Thomas*, 30 N.E.2d 704, 709 (Ind. 2015) ("good reputation" was a fact in mitigation); *Matter of Marshall*, 11 N.E.3d 911, 912 (Ind. 2014) ("reputation as a competent, hard-working, ethical, and honest" was a fact in mitigation). Good character and reputation are expressly considered mitigating facts in the ABA standards. *Sanction Standards at § 9.32(g).*

It is unclear whether the Hearing Officer was troubled by the fact that Judge Shepard was subpoenaed to testify—he specifically mentioned that Judge Shepard appeared pursuant to a subpoena. He was subpoenaed because it would have been contrary to the Indiana Judicial Code for him to appear voluntarily. Rule 3.3, Indiana Code of Judicial Conduct.

Judge Shepard had a historical perspective on the Respondent, including the confidence this Court placed in the Respondent under Judge Shepard's leadership to assume his first position as a prosecutor at the Court's request after the order disbarring Jack Riddle as the Crawford County prosecuting attorney. *Matter of Riddle*, 700 N.E.2d 788 (Ind. 1998). Judge Shepard also had a perspective on the Court's confidence in the Respondent and his good character to serve as a member of the Supreme Court Committee on Rules of Practice and Procedure.

It is unfortunate that the Hearing Officer failed to appreciate that the hearing he presided over was the Respondent's only opportunity to make an evidentiary record for this Court's review on both the merits of the Commission's allegations of misconduct, but also on facts that will shed light on an appropriate sanction if, but only if, the Court concludes that the Respondent engaged in professional misconduct.

I. AFFIRMATIVE DEFENSES

The Respondent raised several affirmative defenses that remained in the case after the Court struck others of them. He has already addressed the affirmative defense of reliance on advice from the IPAC Legal Ethics Committee, *supra*, (although that is largely a consideration in mitigation) and will not repeat those points here.

a. Sixth and Seventh Affirmative Defenses: Due Process and Due Course of Law.

With little analysis, the Hearing Officer concluded that the Respondent violated Rule 8.4(d). He said: "Having found Henderson violated the provisions of Rule 1.7(a)(2) and 1.8(d), it follows that those same actions violated Rule 8.4(d). The insertion of personal interests into prosecution of the Camm case was prejudicial to the administration of justice." *Report at 10.*

In contrast to Rules 1.7(a)(2) and 1.8(d), which set forth comprehensible standards that aid lawyers to discern required or prohibited conduct in advance and avoid violating them, Rule 8.4(d) does not. Indeed, even the comments to Rule 8.4(d) provide little guidance beyond, perhaps, Comment [4], which states in part:

"Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."

This comment gives no meaningful guidance beyond the language of Rule 8.4(d) itself. When the State regulates the conduct of its citizens, due process requires that the standards for conduct not be so vague as to effectively set traps for the unwary.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer clear between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the lawful zone' ... than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99 (1972).

Indiana has generally followed a vagueness standard similar to the one set forth in *Grayned* when it applies Art. 1, § 12 of the Constitution of Indiana, our constitution's analogue to the due process clause. "A statute will not be found unconstitutionally vague if individuals of ordinary intelligence

would comprehend it to adequately inform them of the conduct to be proscribed. A statute need only inform the individual of the generally proscribed conduct, a statue need not list with itemized exactitude each item of conduct prohibited." *State v. Downey*, 476 N.E.2d 12, 1221 (Ind. 1985) (citations omitted).

Art. 1, § 12 of the Indiana Constitution appears not to apply to cases that are non-penal in nature. *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 595 (Ind. 1980) (citations omitted). Lawyer discipline cases are not civil, but are prosecuted by a representative of the State under an enhanced burden of proof. Because they are not compensatory in nature, they have similar penal characteristics as the criminal law—sometimes with greater consequences, but oftentimes with lesser consequences.

When the application of rules imposed by the State implicate First Amendment or other expressive rights, a more rigorous examination is warranted. "[I]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand," and not hypothetical situations. *Davis v. State*, 476 N.E.2d 127, 130-31 (Ind. 1985) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)).

In this case, the Respondent's decision to express himself (in the form of a potential, but never-released, book) about the Camm case implicates the

free expression rights that the U.S. Supreme Court was especially solicitous of in *Grayned* and progeny.

The Respondent does not contend that Rule 8.4(d) is unconstitutionally vague on its face—merely as applied in this case. There is nothing in Rule 8.4(d) that would have signaled to him that it was a violation of that rule for him to enter into an agency agreement (but not a publishing agreement) after the jury was discharged, but before appeal. There is nothing in Rule 8.4(d) that would have signaled to him that it was a violation of that rule for him to enter into a publishing agreement at a time when he had no jurisdiction or control over the Camm case. There is nothing in Rule 8.4(d) that would have signaled to him that it was a violation of that rule for him to advocate for his ability to act as an unconflicted prosecutor for the third Camm trial after cancelling both the agency agreement and the publishing agreement before jurisdiction of the case was returned to him for a third trial.

Applying Rule 8.4(d) on these facts would violate the Respondent's rights under Art. 1, § 12 of the Constitution of Indiana and the due process clause of the Fourteenth Amendment to the U.S. Constitution, as well.

The Court could and should avoid having to address the constitutionality of this application of Rule 8.4(d) by holding that Rule 8.4(d) does not apply to the Respondent's conduct in Count I.

b. Tenth and Eleventh Affirmative Defenses: Free Expression and Free Thought.

The Court should either interpret the alleged rule violations in Count I in such a way as to avoid having to conclude that disciplining the Respondent on these facts would violate constitutional protections he enjoys, or conclude that professional discipline on the basis of Count I would violate his expressive rights[6] under the First Amendment to the U.S. Constitution[7] as applied to the States by the Fourteenth Amendment and Art. 1, § 9 of the Constitution of Indiana.[8]

It is a central fact to the Respondent's argument that a literary work about the Camm case authored by the Respondent was never published. He certainly thought about it, but only after he was approached by Mr. Weimann. The only actions he took were entering into an agency agreement that did not obligate him to write a book, and later, after he lost jurisdiction

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[6] The Respondent will refer to his "expressive rights" in light of the U.S. Supreme Court's holding that the right of free speech goes beyond speech alone and includes other expressive conduct. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("... implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

[7] In relevant part, the First Amendment to the U.S. Constitution states: "Congress shall make no law ... abridging the freedom of speech...." The First Amendment applies to the states as a right incorporated into the due process clause of the Fourteenth Amendment to the U.S. Constitution. *Gitlow v. New York*, 268 U.S. 652 (1925). The Indiana Constitution is more explicit in bundling together a group of rights that are expressive in nature, including speech, and written and published expression. Art. 1, § 9, Constitution of Indiana. Interestingly, our constitution also expressly protects thought, or, at least, the "free interchange of thought and opinion." *Id.* It seems obvious that if the government cannot punish the free interchange of thought, it cannot punish pure thought.

[8] "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print freely, on any subject whatever; but for the abuse of that right, every person shall be responsible." Art. 1, § 9, Constitution of Indiana.

when the case was on appeal, he signed a publishing agreement. He cancelled both agreements after the Court reversed the second Camm conviction and before the case was returned to his jurisdiction on remand. With the exception of a short period of time, his consideration of a literary work was during a time period when he had no jurisdiction and no ability to affect the case in any way.

The Respondent also worked with a co-author to create a draft manuscript for a book, but that manuscript has never seen the light of day. Most certainly, the Respondent's communications with his co-author were the "interchange of thought and opinion."

It is one thing for the Court of Appeals to have held that a special prosecutor should be appointed to try Mr. Camm a third time. It is another to professionally discipline the Respondent for having engaged in the preliminary thinking, speaking, writing and other private expressive acts that were a predicate to creating a book about the Camm case that was never published.

The Respondent's expressive actions were indistinguishable from keeping his own daily journal to capture his thoughts about the Camm case with the intent of someday publishing a book about it. Keeping a daily journal would itself be indistinguishable from taking time at the end of each day to ruminate about the case and to capture one's thinking about the case securely in memory, intending to someday publish a book that expresses

those thoughts and ruminations. Had the Respondent actually published a book about the Camm case before it concluded, it might be a different story. And more likely, it would have implicated an entirely different Rule of Professional Conduct—Rule 3.8(f); but that is not what happened.

It is simply impossible to monitor the thinking of prosecutors in this State and punish them for thinking about publishing a book someday about a cases or cases they are working on.

Through a set of circumstances not made set forth in the record in this case, somehow the defense became aware of the agency or publishing agreement and the matter became an issue in the case. Change the facts slightly: assume that the defense becomes aware of a prosecutor's interest in writing a book about the case because the prosecutor tells the defense that he thinks the case is really interesting and might make a good book someday. Should that prosecutor be recused for entertaining such a thought? Maybe, maybe not. But should that prosecutor be professionally disciplined for having entertained that thought? The Respondent says no. His non-public preparation for writing a book about the Camm case is not meaningfully distinguishable from the prosecutor who thinks that a case is interesting and might make an interesting book, but doesn't share his thoughts with others. If the moral hazard we are trying to protect against is prosecutors entertaining thoughts about the literary merit of a case for fear the prosecutor will handle the case so as to enhance its literary merit, it is

irrelevant that the prosecutor shares those thoughts with others. It is just that the prosecutor's thoughts are easier to detect when he shares them with others.

In *Price v. State*, this Court engaged in a comprehensive review of Article 1, Section 9 of our state constitution. 622 N.E.2d 954 (Ind. 1993). As in *Price*, the Respondent was speaking. *Id.* at 957. But the Respondent was also thinking. Accordingly, the legality of his prosecution for professional misconduct "must stand or fall on the dictates of our constitution's free expression provision." *Id.*

Under the "freedom-and-responsibility standard" adopted by the Court in *Price*, in order to harmonize the free-expression provisions of Section 9 with the responsibility-for-abuse provisions appearing later in the same section, the limiting concept of "abuse" must be understood else there would be no limitations on expression whatsoever. *Id.*at 958. Section 9 "derives its function from a constitutional arrangement calculated to correlate the enjoyment of individual rights and the exercise of state power such that the latter facilitates the former." *Id.* at 959. "Abuse then lies in that expression which injures the retained rights of individuals or undermines the State's efforts to facilitate their enjoyment." *Id.*

The Court in *Price*, acknowledged the general obligation of the courts to defer to legislative decisions that balance free expressive rights with police power. *Id.* But this case is quite different from the typical conflict between a

citizen's expressive conduct and the exercise of police power by the enactment of legislation or by the execution of legislation by the executive branch of government. Here it is this very Court, acting quasi-legislatively, that has promulgated the Rules of Professional Conduct that are at issue in Count I, and a subordinate agency of this very Court that is acting to enforce those rules. Consequently, this Court is especially well equipped to engage in appropriate balancing without the typical obligation to defer to a coordinated branch of government.

Even in the context of deference to legislation, "[a] right is impermissibly alienated when the State materially burdens one of the core values which it embodies. *Id.* at 960. Pure political speech is among the core values that animate expressive rights. *Id.* at 963. But, those rights sweep more broadly to include "popular comment on public concerns" that "should not be restrained." *Id.* 961. As in *Price*, the question here is whether professionally disciplining the Respondent for his private thoughts and private expressive conduct about the Camm case will impair by an indefensible order of magnitude the core values of his expressive rights. *Id.* at 963.

Unquestionably, an important counterweight against the conduct of a prosecutor will be a defendant's right to a fair trial. There is extensive regulation both within and without the Rules of Professional Conduct to protect the rights of the accused from the power of the State. *See, e.g., Brady*

v. Maryland, 373 U.S. 83 (1963). Thus, this Court has promulgated Rule of Professional Conduct 3.8 as one mechanism for reigning in the exercise of State power by prosecutors.

It is telling that the Commission did not charge the Respondent with violating any provision of Rule 3.8. Instead, it drew on the generic rule on material-limitation conflicts (Rule 1.7(a)(2)), a rule that does not even fit the situation (Rule 1.8(d)), and a rule so vague as to not have put the Respondent on fair notice of the conduct he should avoid (Rule 8.4(d)). The Respondent states clearly to this Court that he respects all of the rights—constitutional, statutory, case law and regulatory—that protect criminal defendants from the power of the State and assure them a fair trial. But in this case, the Commission goes further. It seeks to punish the Respondent for thinking and privately expressing thoughts about the Camm case.

The Commission will surely argue that the Respondent's expressive conduct is a window into his thoughts. But what thoughts were they? The Commission did not offer the unpublished manuscript into the record—it has never been revealed. The Commission did not prove that the Respondent ever intended to bring his thoughts about the Camm case to the light of day until the case was completely over. In fact, his cancellation of the agency and publishing agreements clearly demonstrate that he had no such intent.

Perhaps they create a window into the Respondent's thoughts that he believed the Respondent was guilty. Let's hope so. If a prosecutor pursues

the conviction of a defendant who the prosecutor believes to be innocent, far more serious problems will be present than in this case. Perhaps they create a window into the Respondent's thoughts that he intended to pursue the Camm case vigorously. Again, let's hope so. It is of no moment that the prosecutor intends to fight hard for the citizens of Indiana and the voters who elected him. While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. U.S.* 295 U.S. 78, 88 (1935).

The moral hazard the Commission wants to protect against is that the Respondent would strike foul blows in his prosecution of Camm. But the record shows no such foul blows. Mere reversal on appeal after the second trial is not proof of that. The entire second Camm trial was conducted without the shadow of any agency or publishing agreement looming over it. It was only after the record in the case was closed and during appeal, when the Respondent had no jurisdiction over the case, that he first entered into the agency agreement and, later, the publishing agreement.

The most that can be said by the Commission is that the Court of Appeals, but not Judge Dartt, believed that his discarded agreements created an insurmountable hurdle to his ability to fairly prosecute Camm a third time.[9] The State's interests in protecting Mr. Camm's rights were fully vindicated by the assignment of a new prosecutor to try Mr. Camm a third time. Professionally disciplining the Respondent for his private thoughts and

[9] Justice Dickson appears to have agreed with Judge Dartt, inasmuch as he voted to grant transfer from the Court of Appeals decision disqualifying the Respondent from prosecuting the third Camm trial.

non-public expressive conduct about the Camm case would be indefensibly punitive of his expressive rights without serving any purpose in actually promoting the State's interest in Camm having a fair trial.

The analysis under the First Amendment of the U.S. Constitution is different, but not qualitatively so. A rule that restricts expressive rights must be narrowly tailored to serve a significant government interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). That state interest must be compelling if the restrictions are content-based and the means of promoting the compelling state interest must be narrowly drawn to achieve that end. *Id.*

The Commission's efforts to professionally punish the Respondent on these facts are content-based. In the Commission's eyes, the Respondent was free to think about any topic in the world for a literary work except the Camm case. The application of the Rules of Professional Conduct pled in Count I to the Respondent on these facts would be an indefensible intrusion into the Respondent's First Amendment rights because they overcorrect in promoting the State's interest in a fair trial for Camm. The rules cited are not in the least narrowly drawn and the State's interests were fully vindicated by the assignment of a new prosecutor for the third Camm trial.

There are ample grounds for the Court to hold that the Respondent did not violate the Rules of Professional Conduct pled in Count I. It should do so and avoid deciding whether the Commission's Count I case against the

Respondent is constitutionally infirm because it would punish him for expressive conduct.

But, if the Court decides that the Respondent's conduct was in violation of one or more of those rules, it should hold that the application of those rules to the Respondent on the facts of this case would violate his expressive rights under Art. 1, Sec. 9, of the Constitution of Indiana and the free speech clause of the First Amendment to the U.S. Constitution as applied to the states through the Fourteenth Amendment.

V. SANCTION

Having recommended a finding of misconduct in Count I, the Hearing Officer recommended that the Respondent be publicly reprimanded. For the reasons set forth above, the Respondent does not believe he engaged in any professional misconduct and, therefore, consideration of a sanction is not needed. Nonetheless, if the Court concludes that the Respondent violated one or more of the Rules of Professional Conduct alleged by the Commission in Count I, a private reprimand is more than adequate to address the situation.

The facts of the underlying case, dealing with a literary agency agreement and later, a publishing agreement are unique and unlikely to recur. There was no Indiana precedent to guide the Respondent. Other considerations the Court should take into account in addition to the substantial mitigating influence of the Respondent's long and honorable career in public service are:

- The Respondent did not seek out a literary agency agreement or the occasion to write a book about the Camm case. Mr. Weimann brought it to the Respondent.
- The Respondent did not give consideration to entering into an agency agreement while the case was heard by a jury and before the jury was discharged.
- The Respondent did not have a publishing agreement in place while he had jurisdiction over the case.
- The Respondent quickly cancelled both agreements upon hearing the results of the Supreme Court's decision in the appeal from the second trial.
- The Respondent sought guidance from the IPAC Legal Ethics Committee when Mr. Camm moved for a special prosecutor.
- The outcome of Mr. Camm's second trial was not influenced by either an agency agreement or a publishing agreement.
- Mr. Camm's third trial was not influenced by the agreements because they were no longer in place and because the Respondent did not prosecute the third trial.

The Respondent respectfully prays that the Court dismiss the Verified Complaint for Disciplinary Action in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October 2016, a copy of the foregoing was served via electronic service through the Indiana E-Filing System on:

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