

1 ROBERT AMPARÁN, SBN 172132  
SHARI L. GREENBERGER, SBN 180438  
2 OMAR FIGUEROA, SBN 196650  
506 Broadway  
3 San Francisco CA 94133  
Telephone: 415/986-5591

4 Attorneys for Defendant  
5 EDWARD ROSENTHAL

6  
7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10  
11 UNITED STATES OF AMERICA,

CR 02-0053

12 Plaintiff,

13 v.

NOTICE OF MOTION AND MOTION TO  
TO RECUSE ASSISTANT UNITED  
STATES ATTORNEY GEORGE L. BEVAN  
JR., FOR PROSECUTORIAL  
MISCONDUCT

14 EDWARD ROSENTHAL,

15 Defendant.

Date: March 2, 2007

Time: 2:00 p.m.

16 \_\_\_\_\_/  
17 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED  
STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:

18  
19 PLEASE TAKE NOTICE that on the date and at the time  
20 indicated above, EDWARD ROSENTHAL, through counsel, will and  
21 hereby does move to recuse George Bevan for prosecutorial  
22 misconduct.

23 This motion is predicated on the files and records herein,  
24 and on the declaration of counsel filed herewith.

25 Dated: February 20, 2007

26 /s/ ROBERT AMPARÁN  
ROBERT AMPARÁN  
27 Attorney for Defendant  
EDWARD ROSENTHAL

**INTRODUCTION**

1  
2 The conduct of Assistant United States Attorney George L.  
3 Bevan Jr. in this matter has been unprofessional, inexcusable  
4 and reproachable, revealing the very basis behind this  
5 prosecution, which is predicated on vindictive motives.<sup>1</sup> Mr.  
6 Rosenthal brings this motion after a recent investigation  
7 revealed a pattern of witness tampering and racketeering  
8 activity in violation of RICO. The defense felt it incumbent to  
9 bring forth this motion to recuse AUSA Bevan at this juncture.

10 Mr. Bevan has exhibited a personal and passionate animus  
11 towards this case, in the course of these proceedings, which is  
12 wholly inappropriate for his position in the government. Mr.  
13 Bevan's impartiality has manifested itself in the form of prose-  
14 cutorial misconduct, ranging from ethical violations to criminal  
15 actions. Mr. Bevan has cast away the fundamental principle that  
16 a prosecutor's primary goal is to seek justice, not to convict,  
17 and circumvented clearly delineated policy and protocol not to  
18 convict by taking any means necessary to achieve such goals.  
19 ABA Model Rule 3.8.

20 More fundamentally, Mr. Bevan's uncontrollable bias against  
21 Mr. Rosenthal has materially affected the government's judgment  
22 and conduct, thereby denying Mr. Rosenthal due process of law.  
23 Mr. Bevan's unpredictable outbursts have taken shape before this  
24 Court in US Attorney correspondence with the defense, and often  
25 extended into unprofessional communications with witness'  
26 counsel.

27 \_\_\_\_\_  
28 <sup>1</sup> The subject of which is addressed in the defense Motion to  
Dismiss for Vindictive Prosecution, filed contemporaneously  
herewith.

1 Most egregiously, Mr. Bevan's prosecutorial misconduct has  
2 transcended into criminal dimensions, culminating in witness  
3 corruption, evidenced by his conduct of aiding and abetting  
4 witnesses in violation of 21 USC 841 and 846, corruptly  
5 persuading such witnesses in the presentation of their testimony  
6 during the Grand Jury proceedings and trial, in violation of 18  
7 USC 1512(b) (1) (tampering with a witness); 18 USC 1962 (engaging  
8 in a pattern of racketeering activity in violation of the RICO  
9 statutes); and extortion 18 USC 1951 (obtaining property of  
10 another under color of official right).

11 Such prosecutorial misconduct, delineated herein, renders  
12 the present proceedings fundamentally unfair and is denying Mr.  
13 Rosenthal due process of law. For the foregoing reasons,  
14 Defense counsel urges this Court to recuse Mr. Bevan from  
15 prosecuting the present charges against Mr. Rosenthal.

16 **STATEMENT OF FACTS**

17 Subsequent to a thorough investigation of Mr. Rosenthal,  
18 the government indicted him on February 12, 2002, charging him  
19 with: 1) cultivation of marijuana, in violation of 21 USC  
20 section 841(a) (1), 2) conspiracy to cultivate marijuana, in  
21 violation of 21 USC section 846, 3) and maintaining a place for  
22 cultivating marijuana, in violation 21 USC 856(a) (1).

23 During the first trial this Court precluded Mr. Rosenthal  
24 from explaining his sincere humanitarian beliefs which formed  
25 the predicate for his medical marijuana research and medicinal  
26 cultivation, acting as an agent under the City of Oakland.  
27 Moreover, he was restricted from explaining his deputization by  
28 the City of Oakland and his reliance on the City of Oakland's

1 support and guidance in this regard. Based upon this lack of  
2 evidence, the jury convicted Mr. Rosenthal on January 31, 2003.  
3 However, after learning the full facts surrounding Mr.  
4 Rosenthal's activities, the jurors publicly condemned the  
5 verdict.

6       Thereafter, on June 4, 2003, this Court sentenced Mr.  
7 Rosenthal to one-day imprisonment and three years of supervised  
8 release, with credit for time served. Mr. Rosenthal steadfastly  
9 maintained his innocence and appealed the verdict, whereafter  
10 the Ninth Circuit found reversible error. United States v.  
11 Rosenthal (9th Cir. 2006) 454 F.3d 943.

12       Mr. Bevan, who also prosecuted the first trial, was  
13 disappointed in the one day sentence from the first trial and  
14 initiated another Grand Jury proceeding, seeking additional  
15 counts against Mr. Rosenthal.

16       A Superceding Indictment was thereafter filed and returned  
17 on October 12, 2006, for money laundering, and filing false tax  
18 returns for failing to include gross receipts for his medical  
19 marijuana cultivation in addition to the original marijuana  
20 charges.

21       Mr. Bevan's behavior has left no dispute that his  
22 impartiality has been compromised, however his conduct has  
23 crossed the line from over zealous lawyering to acting *in*  
24 *participus criminus*, therefore Defense counsel urges this Court  
25 to recuse Mr. Bevan.

26

27

**LAW OFFICES**

28  
506 BROADWAY  
SAN FRANCISCO  
(415) 986-5591  
Fax: (415) 421-1331

SUMMARY OF ARGUMENT

1  
2 **1. AUSA Bevan's Conduct and Participation in Criminal**  
3 **Activity Includes Aiding and Abetting, Tampering with a**  
4 **Witnesses and Racketeering in Violation of RICO Statutes**

5 a. Mr. Bevan is criminally liable and subject to recusal  
6 for the unprecedented aiding and abetting of key government  
7 witnesses against Mr. Rosenthal, specifically Bob Martin and  
8 James Halloran, and conspiring with them to conduct the affairs  
9 of their marijuana operations in violation of 21 USC sections  
10 841 and 846 (cultivation of marijuana and conspiracy to  
11 cultivate marijuana), 18 USC 1512(b)(1) (tampering with a  
12 witness); and 18 USC 1962 (engaging in a pattern of racketeering  
13 activity in violation of the RICO statutes).

14 Mr. Bevan has become a principal in this endeavor by both  
15 conspiring and aiding and abetting these witnesses in violating  
16 21 USC section 841 AND 845; to wit, manufacturing marijuana and  
17 conspiracy to manufacture marijuana and has become a principal  
18 by providing them protection for their respective operations.

19 b. Mr. Bevan has also obtained the property of another  
20 under color of official right in violation of 18 USC section  
21 1951(b)(2) amounting to extortion.

22 **2. AUSA Bevan's Unprofessional Conduct, Further Subjects**  
23 **Him to Professional Discipline and Warrants His Recusal from**  
24 **Prosecuting the Present Charges Against Mr. Rosenthal.**

25 a. Mr. Bevan acted in a hostile and contemptuous manner  
26 to Lauren Reagan, an attorney for witness whom the government  
27 has subpoenaed, Cory Okie, and Ms. Reagan's new associate, Ms.  
28 Dunlap.

When Ms. Dunlap explained that she simply could not help  
him with his requests to accept service on behalf of Ms.

1 Reagan's client Bevan began yelling that as an associate in Ms.  
2 Reagan's office that she was obligated to fulfil his requests.  
3 Ms. Dunlap was distressed by the abusive and intimidating  
4 treatment. Moreover, Bevan's attempts to bully and trick Ms.  
5 Dunlap into obliging his requests reflects a pattern of manipu-  
6 lation and underhanded tactics further supporting his recusal.

7       b. Mr. Bevan has consistently acted in an outrageous and  
8 unprofessional manner with Mr. Rosenthal's defense counsel. Mr.  
9 Bevan memorialized his unprofessional conduct on February 1,  
10 2007 in a letter from himself to Shari L. Greenberger. See  
11 Exhibit N. In the letter, Mr. Bevan launched a verbal tirade  
12 where he characterized the Defense's discovery letter and  
13 request for volumes 7 and 8 of the trial transcripts as  
14 "ridiculous," asserted that such requests were frivolous, and  
15 took the liberty to challenge the competency of defense counsel  
16 claiming that the requests were merely "an overall stall by the  
17 Defense - doing whatever it takes to delay the trial of the tax  
18 counts, because you don't know how to defend against them," and  
19 further asserting that the requests were merely designed to  
20 document a "feigned state of non-readiness and complete disorder  
21 in the defense camp." (Exhibit N)

22       Mr. Bevan's emotional outburst in this letter alone  
23 reflects his irrational and unprofessional conduct relating to  
24 the handling of this particular case.

25       c. Mr. Bevan's vindictive prosecution of Mr. Rosenthal,  
26 set forth in the Motion to Dismiss for Vindictive Prosecution,  
27 his prejudicial conduct at Grand Jury proceedings, and his  
28 selective prosecution of Mr. Rosenthal, further reflect Mr.

1 Bevan's personal animosity towards Mr. Rosenthal which has  
2 unequivocally resulted in pattern of prosecutorial misconduct,  
3 and continues to effect his decisions, actions, and interactions  
4 to date.

5 I.

6 GEORGE BEVAN'S PROSECUTORIAL MISCONDUCT,  
7 BOTH CIVIL AND CRIMINAL, GREATLY PREJUDICES  
8 MR. ROSENTHAL AND WARRANTS RECUSAL

9 Any conduct involving dishonesty, deceit or misrepresenta-  
10 tion constitutes professional misconduct. ABA Model Rule 8.4(c).  
11 To the extent that a defendant alleges prosecutorial misconduct,  
12 he must show that it is "more probable than not that the  
13 [prosecutorial] misconduct materially affected the verdict,"  
14 United States v. Hinton, 31 F.3d 817, 824 (9th Cir. 1994), or  
15 that he was deprived of a fair trial because of such misconduct.  
16 See United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.  
17 1988). Additionally, the prosecution's alleged misconduct must  
18 be viewed in the context of the entire trial and pretrial  
19 proceedings. See United States v. Christophe, 833 F.2d 1296,  
20 1300 (9th Cir. 1987).

21 Mr. Bevan's misconduct greatly prejudices Mr. Rosenthal.  
22 Mr. Bevan cannot hide his personal bias and anger against Mr.  
23 Rosenthal. Discovery, Grand Jury proceedings, witness collu-  
24 sion, and attorney correspondence reflect the prejudice Mr.  
25 Rosenthal faces from Mr. Bevan's prosecutorial misconduct. In  
26 addition to the misconduct reflecting bias and prejudice, Mr.  
27 Bevan is acting *in participus criminis* with witnesses, Bob  
28 Martin and James Halloran. Mr. Bevan is clearly unable to  
proceed as a "minister of justice," in seeking truth on behalf

1 of the government. Rather, he has cast aside ethical codes and  
2 the laws that he is subject to and seeks a conviction by any  
3 means necessary.

4 Moreover, where prosecutorial misconduct is so egregious  
5 that it prejudices a defendant and denies him a fair and  
6 impartial trial, in violation of his Due Process rights,  
7 dismissal is warranted. Donnelly v. DeChristoforo, 416 U.S.  
8 637(1974) (prosecutorial misconduct cannot give rise to a  
9 constitutional claim unless the prosecutor's acts constitute  
10 "egregious misconduct"); United States ex rel. Crist v. Lane,  
11 745 F.2d 476, 482 (7th Cir. 1984; Jones v. Greer, 627 F. Supp.  
12 1481, 1485 (D. Ill. 1986).

13 AUSA Bevan's egregious activity constitutes professional  
14 misconduct, and warrants his recusal from prosecuting the  
15 present charges against Mr. Rosenthal.

16 A. George Bevan's Actions In Participus Criminus Amounts  
17 to Prosecutorial Misconduct and Subjects Him to Criminal  
18 Liability.

19 George Bevan's criminal activity including aiding and  
20 abetting the illegal activity of witnesses, tampering with  
21 witnesses and racketeering in violation of RICO, subjects him to  
22 professional and criminal sanctions, and warrants his recusal  
23 from the present proceedings.

24 Various federal courts have employed their supervisory  
25 authority to control the conduct of the prosecutor in order to  
26 enforce ethical and professional standards and to devise  
27 sanctions for misconduct by government investigators. See, e.g.,  
28 United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974) (criminal

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506 BROADWAY  
SAN FRANCISCO  
(415) 986-5591  
Fax: (415) 421-1331

1 charges dismissed with prejudice because of several incidents of  
2 prosecutorial misconduct and bad faith during discovery and  
3 trial).

4 Although George Bevan and the government will attempt to  
5 claim that he is immune from liability, the immunity of prose-  
6 cutors from liability does not leave the public powerless to  
7 deter misconduct or to punish that which occurs. Policy consid-  
8 erations which compel civil immunity for certain governmental  
9 officials do not place them beyond the reach of the criminal  
10 law. Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

11 Moreover, as the function test of Imbler recognizes, the  
12 actions of a prosecutor are not absolutely immune merely because  
13 they are performed by a prosecutor. Qualified immunity "repre-  
14 sents the norm" for executive officers, Malley v. Briggs, 475  
15 U.S. 335 (1986), quoting Harlow v. Fitzgerald, 457 U.S. 800  
16 (1982), so when a prosecutor "functions as an administrator  
17 rather than as an officer of the court" he is entitled only to  
18 qualified immunity. See Imbler, 424 U.S. at 431, n. 33.

19 There is a difference between the advocate's  
20 role in evaluating evidence and interviewing  
21 witnesses as he prepares for trial, on the  
22 one hand, and the detective's role in  
23 searching for the clues and corroboration  
24 that might give him probable cause to  
25 recommend that a suspect be arrested, on the  
26 other hand. When a prosecutor performs the  
27 investigative functions normally performed  
28 by a detective or police officer, it is  
"neither appropriate nor justifiable that,  
for the same act, immunity should protect  
the one and not the other."

Buckley v. Fitzsimmons, 509 U.S. 259, 273-274 (1993).

27 In the present case, Mr. Bevan is criminally and civilly  
28 liable and subject to recusal for the unprecedented aiding and

1 abetting of key government witnesses against Mr. Rosenthal,  
2 specifically Bob Martin and James Halloran, and conspiring with  
3 them to conduct the affairs of their marijuana operations in  
4 violation of 21 USC sections 841, 846 and 856(a)(1),  
5 (cultivation of marijuana, conspiracy to cultivate marijuana,  
6 and maintaining a place); 18 USC 1512(b)(1) (tampering with a  
7 witness); 18 USC 1962 (engaging in a pattern of racketeering  
8 activity in violation of the RICO statutes) and extortion 18 USC  
9 1951 (obtaining property of another under color of official  
10 right).

11 Mr. Bevan has conspired to aid and abet these witnesses in  
12 violating 21 USC section 841 and 845; to wit, manufacturing  
13 marijuana, conspiracy to manufacture marijuana, and maintaining  
14 a place, and has become a principal by providing them protection  
15 for their respective operations.

16 Indisputably both witnesses have conveniently continued to  
17 operate marijuana dispensaries in violation of federal law  
18 without being subject to prosecution or any collateral conse-  
19 quences. While other marijuana dispensaries are being shut  
20 down, and providers such as Ed Rosenthal face protracted  
21 criminal federal litigation, they continue to operate with  
22 immunity and without fear of closure or criminal liability. It  
23 is evident that AUSA Bevan has conspired with Martin and  
24 Halloran to violate the federal law by conducting the affairs of  
25 this enterprise through a pattern of racketeering, actively  
26 manufacturing and distributing marijuana in violation of the  
27 Controlled Substances Act section 102, in exchange for their  
28 direct testimony on the government's behalf against Mr.

1 Rosenthal.

2 "Racketeering activity" means "any act which is indictable  
3 under 18 USC section 1512 (relating to tampering with a  
4 witness). See 18 USC section 1961 (definitions). Through  
5 defendant Bevan's underhanded dealings and corrupt endeavor to  
6 influence these witnesses', Bob Martin and James Halloran,  
7 testimony at relevant proceedings, he has violated 18 USC  
8 section 1512(b)(1), and is thus, engaging in a pattern of  
9 racketeering activity, in violation of RICO, which he is both  
10 civilly and criminally liable. 18 USC section 1962.

11 By doing so, AUSA Bevan has committed the predicate acts to  
12 establish a pattern of racketeering, in his corrupt endeavor to  
13 influence witnesses in violation 18 USC 1512(b)(1). This  
14 conspiracy includes defendant George Bevon aiding and abetting  
15 Bob Martin and James Halloran in the manufacture and distri-  
16 bution of marijuana, the filing of false tax returns and money  
17 laundering activity. This conduct has extended to the  
18 conspiring by AUSA Bevan with the witnesses on tax related  
19 issues, debts and past obligations notwithstanding the fact that  
20 retroactive adjustments are insufficient in curing the past and  
21 present illegalities.

22 Bevan's criminal actions in violation of 21 USC section 846  
23 and 18 USC section 1512(b)(1), amounts to an outright RICO  
24 violation.

25 18 USC section 1962 states:

26 (b) It shall be unlawful for any person  
27 through a pattern of racketeering activity  
28 ... to acquire or maintain, directly or  
indirectly, any interest in or control of  
any enterprise which is engaged in, or the  
activities of which affect, interstate or

1 foreign commerce.

2 AUSA Bevan's direct participation in the aiding and  
3 abetting witness' criminal activity establishes the predicate  
4 acts to demonstrate a pattern of racketeering in his corrupt  
5 endeavor to influence witnesses in violation of 18 USC section  
6 1512 (b) (1), by "engaging in misleading conduct" with the intent  
7 to influence "the testimony of any person in an official  
8 proceeding."

9 The criminal enterprise includes the entities of the United  
10 States Attorney's Office of the Northern District; the Drug  
11 Enforcement Administration (DEA) in San Francisco; and Halloran  
12 and Martin's respective marijuana grow operations located in the  
13 Northern District of California. The defendants include George  
14 Bevon, James Halloran, and Bob Martin. The criminal activity  
15 involves marijuana cultivation, conspiracy, maintaining a place,  
16 marijuana distribution, tax evasion, false reporting and money  
17 laundering. The "racketeering activity" includes "any act which  
18 is indictable under 18 USC section 1512 (relating to tampering  
19 with a witness). 18 USC section 1961.

20 Assessing the totality of Mr. Bevan's actions: he is  
21 conducting the affairs of this enterprise through a pattern of  
22 racketeering, to wit actively manufacturing and distributing  
23 marijuana in violation of the Controlled Substances Act section  
24 102. Moreover, his criminal activity occurred while performing  
25 the functions as an administrator, and not while acting as an  
26 officer of the court, and his unprofessional and illegal  
27 dealings with witnesses, Bob Martin and James Halloran, were  
28 completely outside the scope of professional conduct. Neither

1 absolute immunity nor qualified immunity will provide a safety  
2 net for Mr. Bevan's actions because criminal abuses while acting  
3 in prosecutorial capacity, subjects Mr. Bevan to both criminal  
4 and professional sanctions. See Imbler v. Pachtman, 424 U.S.  
5 409, 429 (1976); Bernard v. County of Suffolk, 356 F.3d 495 (2d  
6 Cir. 2004); Malley v. Briggs, 475 U.S. 335, 343 n.5 (1986)  
7 (prosecutorial abuses ... are subject to criminal and  
8 professional sanction); and Dababnah v. Keller-Burnside, 208  
9 F.3d Acting outside the scope of his duties as a United States  
10 Assistant Attorney has deprived him of any absolute or qualified  
11 governmental immunity.

12 Mr. Bevan has also obtained the property of another under  
13 color of official right in violation of 18 USC section  
14 1951(b)(2) amounting to extortion. Mr. Bevan engaged in this  
15 extortion by seizing the Mandela Parkway grow operation under  
16 the color of official right, property which in part belongs to  
17 the City of Oakland predicated upon Mr. Rosenthal's designation  
18 as an agent of the City of Oakland. Mr. Bevan utilized his  
19 power to put Mr. Rosenthal out of business while allowing his  
20 competition (Bob Martin and James Halloran) to operate, much  
21 like a mobster trying to control his territory.

22 Accordingly, where George Bevan's misfeasance and the  
23 government's professional and criminal misconduct subjects Bevan  
24 to both criminal and civil sanctions, his recusal from this case  
25 is warranted.

26

27

28 **LAW OFFICES**

506 BROADWAY  
SAN FRANCISCO  
(415) 986-5591  
Fax: (415) 421-1331

1 B. George Bevan's Interactions With Defense Counsel,  
2 Defense Witnesses and Counsel of Defense Witnesses Subjects Him  
3 to Ethical Discipline, Warranting Recusal.

4 The professional ideal is that advocates relate to each  
5 other with a respectful and cooperative attitude marked by  
6 civility consistent with their responsibility to their clients.  
7 Lawyers also should treat all participants in a proceeding with  
8 such respect and cooperativeness. ABA Model Rule Restatement  
9 section 106, comment d. On the other hand, any conduct  
10 involving dishonesty, deceit or misrepresentation constitutes  
11 professional misconduct. ABA Model Rule 8.4(c).

12 The prosecutor in a criminal case is not simply expected to  
13 act as an advocate for the government, he is also expected to  
14 act as a minister of justice; the prosecutor's primary goal is  
15 to seek justice, not to convict. Comment 1 to ABA Model Rule  
16 3.8. Therefore, the prosecutor must assure that the defendant  
17 is tried by fair procedures and that guilt is decided on proper  
18 and sufficient evidence.

19 A prosecutor is subject to discipline at the most basic  
20 level of engaging in conduct that is prejudicial to the  
21 administration of justice. ABA Model Rule 8.4 (d).

22 Mr. Bevan in no way heeds to the professional ideals set  
23 forth in the ABA Model Rules or Restatements. "Respect" and a  
24 "cooperative attitude" does not characterize his interactions  
25 with counsel to date. Contrary to the ideals that an attorney  
26 is expected to honor, Mr. Bevan has acted in a contemptuous  
27 manner towards Defense counsel and other attorneys related to  
28 this case, driven by his personal bias and animosity against Mr.

1 Rosenthal.

2 On February 1, 2007, subsequent to a straightforward  
3 discovery request from Defense counselor, Ms. Greenberger, Mr.  
4 Bevan responded with an irrational written tirade, where he  
5 refused to provide this discovery, and threatened to take the  
6 matter up with this Court instead. This letter was clearly  
7 antagonistic and could not disguise his personal animus toward  
8 Mr. Rosenthal and his overall hostility relating to this very  
9 case. (See Exhibits M and N)

10 Again, reflective of Mr. Bevan's unprofessional misconduct,  
11 Mr. Bevan acted in a hostile and contemptuous manner to Lauren  
12 Reagan, an attorney for witness Cory Okie, and Ms. Reagan's new  
13 associate, Ms. Dunlap.

14 In late January of 2007, Mr. Bevan called Ms. Reagan's  
15 office. Although Ms. Dunlap explained to Mr. Bevan that Ms.  
16 Reagan was out of the country, that she was unable to reach her,  
17 and that she had no knowledge of any particulars relating to Mr.  
18 Okie or the case, Mr. Bevan was unsatisfied with her response.  
19 He quickly launched into an abusive verbal tirade, attempting to  
20 force Ms. Dunlap to accept service, obligate Ms. Reagan to court  
21 dates and answer questions about Ms. Reagan and Mr. Okie.  
22 Although intimidated by Mr. Bevan's outburst, Ms. Dunlap  
23 continued to explain that she simply could not help him with his  
24 requests. At such time, Bevan asserted that she was actually  
25 obligated to fulfill his requests, because she was an associate  
26 of Ms. Reagan.<sup>2</sup> Such trickery is inexcusable conduct and

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<sup>2</sup> Supporting declaration will be filed immediately upon receipt.



