

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:)
)
THOMAS D. WATKINS,) Supreme Court #SC87252
)
Respondent.)

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

Respondent adopts the Informant's Statement of Facts with the following additions.

The three count information in this case charges in each count that Respondent's conduct was criminal or fraudulent and designed to perpetuate tax fraud against the United States Government and the Missouri Department of Revenue. *See* ¶¶ 9, 11 and 13 of the Information. **App. 5 & 6.** No other type of criminal or fraudulent conduct was alleged.

At the hearing counsel for the Informant started to examine Respondent over the possible applicability of § 575.060 R.S.Mo. which counsel indicated dealt with the crime of making a false declaration. **T. p. 71, ll 16-24.** Respondent's counsel objected on the basis that the applicability of that statute was outside the scope of the Information in the case. The objection was overruled. Thereafter, at the close of the evidence counsel for the Informant moved to amend the Information to be in conformance with the evidence. The motion did not include any specifics of how the Information was to be amended. **T. p. 164, ll 14-22.** Counsel for Respondent renewed his objection. **T. p. 164, ll 23.** Informant and Respondent entered into a stipulation which stated in Paragraph 6 that Respondent engaged in conduct that Respondent knew was dishonest and an act of misrepresentation and that thereby Respondent violated Rule 4-8.4(c) of the Rules of Professional Conduct. **App. 13.** The only stipulation in this case as to

Respondent's state of mind was a stipulation to a knowing state of mind pursuant to Paragraph 6 of the stipulation.

No client sustained any harm and no client has made any complaint concerning the conduct of Respondent. Ex. I, letter from LeRoy C. Bashor, dated August 19, 2005 was received in evidence. It provides information from Mr. Bashor that he had no problems with Respondent's representation and that he did not suffer any harm as a result of Respondent's representations. *See Res. App. 2.*

At the hearing Respondent presented character letters from thirty-four members of the legal community and from members of the business, professional and governmental community in St. Joseph, Missouri. *See Res. App. 3-45.*

After the Hearing Panel issued its decision on December 13, 2005, Respondent advised Informant of Respondent's willingness to concur in the Panel's written decision including the recommendation for discipline. The Chief Disciplinary Counsel did not concur.

Since this matter was heard the Missouri Bar has proposed a new Rule 5.085 which would impose a five year period of limitations for disciplinary actions involving professional misconduct. *See Res. App. 46.*

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT IN ACCORDANCE WITH THE FINDINGS AND RECOMMENDATIONS OF THE DISCIPLINARY HEARING PANEL BECAUSE RESPONDENT VIOLATED RULE 4-8.4(c), BUT SHOULD NOT DISCIPLINE RESPONDENT FOR VIOLATING RULE 4-8.4(d) BECAUSE RESPONDENT HAS NOT VIOLATED RULE 4-8.4(d).

In re Cupples, 952 S.W.2d 226 (Mo. banc 1997)

In re Schiff, 542 S.W.2d 771 (Mo banc 1976)

In the Matter of Miller, 568 S.W.2d 246 (Mo banc 1978)

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

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-8.4(c)

Rule 4-8.4(d)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT FOR VIOLATION OF RULE 4-1.2(d) BECAUSE RESPONDENT DID NOT COUNSEL HIS CLIENT TO ENGAGE IN CONDUCT THAT WAS CRIMINAL OR FRAUDULENT

In re Storment, 873 S.W.2d 227 (Mo. banc 1994)

Rule 4-1.2(d)

POINT RELIED ON

III.

THE SUPREME COURT SHOULD IMPOSE A REPRIMAND IN THIS CASE OR SHOULD FOLLOW THE RECOMMENDATION OF THE DISCIPLINARY HEARING PANEL AND IMPOSE A SUSPENSION WHICH WOULD BE STAYED DURING A PERIOD OF PROBATION FOR THE REASON THAT NO FRAUDULENT OR CRIMINAL CONDUCT WAS INVOLVED, NO CLIENT HARM OCCURRED, IT HAS BEEN FOURTEEN YEARS SINCE THE MISCONDUCT OCCURRED, BECAUSE THE STATE OF MIND OF THE RESPONDENT AS STIPULATED WAS A KNOWING STATE OF MIND, AND BECAUSE THE MITIGATING FACTORS FAR OUTWEIGH THE AGGRAVATING FACTORS.

In re Cupples, 952 S.W.2d 226 (Mo. banc 1997)

In the Matter of Miller, 568 S.W.2d 246 (Mo. banc 1978)

In re Schiff, 942 S.W.2d 771 (Mo. banc 1976)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT IN ACCORDANCE WITH THE FINDINGS AND RECOMMENDATIONS OF THE DISCIPLINARY HEARING PANEL BECAUSE RESPONDENT VIOLATED RULE 4-8.4(c), BUT SHOULD NOT DISCIPLINE RESPONDENT FOR VIOLATING RULE 4-8.4(d) BECAUSE RESPONDENT HAS NOT VIOLATED RULE 4-8.4(d).

Respondent has stipulated, as has Informant, that Respondent knowingly engaged in conduct that was dishonest and an act of misrepresentation when he altered and backdated documents and had Mr. Bashor sign his deceased wife's name. **App. A 8-13.** Respondent stipulated his conduct violated Rule 4-8.4(c). Respondent agrees that he should receive discipline for that conduct and has always accepted responsibility and been willing to accept discipline. Informant claims that the same conduct which Respondent has admitted violated Rule 4-8.4(c) also constitutes a violation of Rule 4-8.4(d).

That Rule provides that it is professional misconduct to “. . . engage in conduct that is prejudicial to the administration of justice.”

Informant's office routinely relies on the ABA Standards for Imposing Lawyer Sanctions in determining whether lawyer misconduct has occurred and if so what discipline is appropriate. Section 6.0 of the Standards deals with Violations of Duties Owed to the Legal System. Clearly this Standard and its

subparts are the only Standards dealing with conduct that would be prejudicial to the administration of justice. This Standard and its subparts deal with situations where evidence is withheld from a court or tribunal, where false statements or documents are presented to the court or where improper communications are had with a judge, juror or witness.

In this case no document was ever presented to a court and no judicial proceeding was involved. It is clear the Respondent is not engaged in conduct that falls within Standard 6.0 and its subparts. The Disciplinary Hearing Panel found no violation of Rule 4-8.4(d) and the record does not support a finding that Respondent violated Rule 4-8.4(d).

The question is what is the appropriate discipline for Respondent's conduct. Informant seeks disbarment. Respondent believes reprimand is appropriate. The experienced members of the Disciplinary Hearing Panel made a thorough analysis of the situation and recommended a one year suspension to be stayed for a two year monitored probationary period. During probation Respondent would be required to make quarterly reports and to perform forty hours of community service in which he would share with attorneys and law students his disciplinary experience and the effect it had on him. **App. 279-293.** Respondent concurred in the decision of the disciplinary hearing panel but Informant did not.

Respondent is a 59-year old married practicing attorney. He has been practicing in the St. Joseph are since his admission to the bar in 1971. He is a fourth generation lawyer. **T. 144** He has no prior disciplinary history. **T. 156** It

is unrefuted that the misconduct which is the subject of this proceeding and which took place in early 1971 is an isolated, out of character, aberrational event in an otherwise lengthy and distinguished career. **T. 87, App. 187.**

At the time of the meeting with the Bashor family in 1971, everything had been done to implement the estate plan of the Bashors except for the issuance of the stock in the Bashor Cattle Company. **T. 30** The stock had not been issued because the company could not do business until January 1, 1971 when their authority commenced under the Packers and Stock Yards Act. **T. 112** Also the stock had not been issued because the value of the assets going into the company could not be ascertained until January of 1971. **T. 116** The original draftsman of the estate plan had left private practice and gone on to the bench and was unavailable to participate in the issuance of the stock. **T 111.**

Unfortunately Mrs. Bashor died at the end of January prior to the issuance of the stock. **T. 116, 117** It is unrefuted that at the time of her death she was the equitable owner of 50 percent of the Bashor Cattle Company. **T. 113** At the time of her death Mrs. Bashor had funded her trust with real estate and it was her intent that her 50 percent interest in the cattle company would go into her trust. **T. 113** Her will provided for her assets to go to her trust and from there they would go to her children. **T. 117, App. 272.**

It is also undisputed that there could not be any federal estate or state inheritance taxes due on Mrs. Bashor's estate. **T. 37, 117** Even before taking

deductions for funeral expenses and administration expenses her estate was slightly over \$500,000.00 well below the \$600,000.00 limit. **T. 115.**

The estate plan that was in place always contemplated that Mrs. Bashor's assets, including her interest in the cattle company would go into her trust. At the time of the meeting the avenues available to put Mrs. Bashor's interest in the cattle company into her trust were 1) run her equitable interest through probate where her Will provided for the interest to go to her trust; 2) issue stock to Mrs. Bashor and then run that through probate and into the trust; or 3) issue stock directly to Mrs. Bashor's trust. **T. 64.**

Unfortunately Respondent did none of these things. He came up with the idea to backdate documents, alter documents and have documents improperly signed. His plan called for the stock to be issued to Mr. Bashor and then from Mr. Bashor to gift the stock to Mrs. Bashor's trust. **T. 124, 153** Even though Respondent talked about tax savings and tax avoidance he was aware at the time of the meeting that there could be no tax due. **T. 37** The net result of Respondent's action was the same if any of the other alternatives had been followed, *i.e.* the stock went to Mrs. Bashor's trust and no tax was due and no tax was lost. **T. 123, 125.**

Respondent has no excuse for what he did and he can think of no explanation for his conduct. The complicated and convoluted procedure simply makes no sense. He can think of no explanation for his conduct nor can his wife

of thirty-eight years who is completely bewildered by his conduct. She indicated it was completely out of character for him. **T. 161.**

There is no client who has complained and there is no client who has been harmed by Respondent's actions. **R. App. 2** No harm has occurred to either the United States government or the Missouri Department of Revenue. **T. 171** Respondent agrees he has breached his duty to the public by failure to maintain personal integrity. Pursuant to the ABA Standards for Imposing Lawyer Sanctions in cases involving failure to maintain personal integrity, disbarment is appropriate when a lawyer engages in serious criminal conduct or engages in intentional conduct involving dishonesty, fraud, deceit or misrepresentation which adversely reflects on the lawyer's fitness to practice. **ABA Standard 5.11.**

Standard 5.11(a) is not applicable because there is no criminal conduct which was involved in this case. Simply put there was no crime which was committed and no criminal conduct involved. Informant charged Respondent with criminal conduct by attempting to defraud the taxing authorities but offered no evidence on that issue.

Standard 5.11(b) is not applicable because it calls for an intentional state of mind. Counsel for Informant, counsel for Respondent and Respondent have stipulated that Respondent's state of mind was a knowing state of mind rather than an intentional state of mind.

Standard 5.12 indicates suspension is appropriate where the lawyer knowingly engages in criminal conduct. Because there is no criminal conduct involved here that Standard is not applicable.

The appropriate Standard is Standard 5.13 which provides that reprimand is the appropriate discipline where there is knowing conduct that involves dishonesty, fraud, deceit or misrepresentation. The parties have stipulated that the state of mind was a knowing one and pursuant to the Standards, Standard 5.13 is applicable.

Once having arrived at reprimand as the appropriate discipline we next look to the factors of aggravation and mitigation. Those factors are found in § 9 of the Standards.

Aggravating circumstances include a) prior disciplinary offenses; b) dishonest or selfish motives; c) a pattern of misconduct; d) multiple offenses; e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; f) submission of false evidence, false statements or other deceptive practices during the disciplinary process; g) refusal to acknowledge wrongful nature of conduct; h) vulnerability of victims; i) substantial experience in the practice of law; j) indifference to making restitution.

Respondent has no prior disciplinary offenses; this is a single event and there is no pattern of misconduct; there are no multiple offenses; there has been no bad faith obstruction of the disciplinary process and in fact Informant has

acknowledged Respondent's cooperation; there has been no submission of false evidence; false statements or other deceptive practices; Respondent has acknowledge the wrongful nature of his conduct; there is no victim; Respondent does have substantial experience in the practice of law and there is no restitution involved.

Thus, the only possible aggravating factors are the possibility of a dishonest or selfish motive and substantial experience in the practice of law. On the mitigating side factors which may be considered are a) absence of a prior disciplinary record; b) absence of a dishonest or selfish motive; c) personal or emotional problems; d) timely good faith effort to make restitution or to rectify consequences of misconduct; e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; f) inexperience in the practice of law; g) character or reputation; h) physical or mental disability or impairment; i) delay in disciplinary proceedings; j) interim rehabilitation; k) imposition of other penalties or sanctions; l) remorse; m) remoteness of prior offenses. Respondent has no prior disciplinary record. He has been completely cooperative with the disciplinary board and has made full and free disclosure. **T. 13** His character and reputation are of the highest quality as shown by the thirty plus letters of community leaders and lawyers in his support. **R. App. 3-45** The event which triggered this took place in 1971 more than fourteen years ago. Pursuant to the recommended limitations rule proposed by the Missouri Bar to the Court this case could not have been brought if that rule were in effect. **R. App. 46** The

Respondent has practiced in those fourteen years without any further disciplinary problems and has rehabilitated himself in the interim. In regard to other penalties or sanctions Respondent has been the subject of a considerable amount of radio, television and newspaper coverage. **T. 162** He had to give up his position with his law firm at a considerable financial sacrifice. **T. 149** He has been depressed, suicidal and completely devastated by this event. **T. 155, 156** He has shown genuine remorse as noted by the disciplinary hearing panel. **App. 287**

It is submitted that pursuant to the standards for imposing sanctions the appropriate discipline is reprimand.

Under the Missouri cases it is also submitted that the appropriate sanction is reprimand. In her brief, Informant cites the case of *In re Cupples*, 952 S.W.2d 226 (Mo. banc. 1997). Cupples was working at highly respected insurance defense firm in Kansas City. Cupples decided he would leave the firm and began to arrange for files that came into the office not to be placed in the law office inventory of files. He did not inform the client of his intent to leave the office and he did not inform the law firm that he was going to leave. He further did not tell the law firm that he had secreted a number of files which were the law firm's property. When he left he stole those files. His conduct was found by the court to involve dishonesty, fraud, deceit and misrepresentation. Clearly it involved criminal conduct in that he took property that belonged to another. The court found that there was harm to the client and to his law firm. Mr. Cupples indicated

no remorse and accepted no responsibility for his conduct. This court imposed a reprimand.

In *In re Schiff*, 542 S.W.2d 771 (Mo. banc. 19776), Mr. Schiff obtained default judgments by violating understandings with other attorneys, obtained a default judgment against a layman by advising him that he would dismiss the case but instead took a default judgment. He cashed garnishment checks made payable to the magistrate court by using the magistrate's library stamp. He was not authorized to use the stamp and he took those monies contrary to a court order not to cash the checks until the motions relating to the garnishment had been heard. He took a default judgment when he knew defendant's attorney had filed an answer and counterclaim. He backdated an affidavit of attachment which was submitted to the court which otherwise would not have been valid. This court imposed the discipline of public reprimand with probation.

In the case of *In the Matter of Miller*, 568 S.W.2d 246 (Mo. banc. 1978), attorney Miller had a power of attorney from his client. He used his client's funds for the lawyer's own personal farming operation. He sold a piece of property in which his client had a security interest to the lawyer's own wife. The lawyer took a promissory note from his wife for the purchase of the property and that promissory note was not paid. The lawyer loaned \$12,000.00 of the client's funds to the lawyer's own wife. The court issued a reprimand and ordered that the lawyer not be involved in doing any fiduciary work for two years. The court noted that the lawyer had been a long time practicing attorney without a prior

disciplinary record, that he demonstrated remorse and had made restitution and had enjoyed an excellent reputation.

Certainly the conduct of Respondent is not nearly as egregious as the conduct in *Cupples, Schiff* and *Miller, supra*.

Other cases in which reprimands have been granted include *In re Wallingford*, 799 S.W.2d 76 (Mo. banc. 1990) wherein the lawyer signed her client's name to two affidavits then notarized her own signatures and filed them with the court. She made a false certificate which stated the other side had been served with papers when that was not true. The court imposed a reprimand.

In *In re Coe*, 903 S.W.2d 916 (Mo. banc. 1995) Ms. Coe intentionally interrupted a federal trial. She had been previously admonished for the same type of conduct. This court imposed a reprimand finding that the lawyer did not have a dishonest motive, offered a public apology and promised not to commit similar misconduct even though this was a situation where there were four offenses involved and the apology did not come until after an absence of remorse was noted in this court's first opinion in dealing with this matter.

In *In re McBride*, 938 S.W.2d 905 (Mo. banc. 1997) Mr. McBride was found guilty of the felony of second degree assault. He wounded two men with a pistol and received a suspended imposition of sentence. This court found that McBride was cooperative, that he did not betray the trust of the client, that there was no client harm, that there was no prior discipline, that the respondent showed remorse and this was an isolated act. Further the lawyer had practiced for twenty

years in a position of public trust and had never been the subject of a disciplinary proceeding.

Under the case law of this State as well as under the Standards for Imposing Lawyer Sanctions, the appropriate discipline is reprimand.

ARGUMENT

II.

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT FOR VIOLATION OF RULE 4-1.2(d) BECAUSE RESPONDENT DID NOT COUNSEL HIS CLIENT TO ENGAGE IN CONDUCT THAT WAS CRIMINAL OR FRAUDULENT.

The Information charged that Respondent engaged in conduct that was designed to perpetuate tax fraud against the U.S. Government or the Missouri Department of Revenue. **App. 5, 6** No other alleged criminal conduct is alleged in the Information. Informant offered no evidence of any alleged tax fraud against the U.S. Government or the Missouri Department of Revenue.

It is conceded that there was no tax that would ever be due. **T. 37, 117** The stock ended up in the exact same place it would have ended up had there been no altered documents. **T. 123, 125** Under these circumstances there could be no tax fraud. Informant does not point to any other person or entity who was defrauded. The Bashor family certainly was not defrauded because they were not only aware of the circumstances but willingly participated.

Was Respondent wrong to have altered and backdated documents?
Absolutely. Was anyone defrauded? Absolutely not. Was there any criminal conduct? Absolutely not.

Informant has never advised Respondent as to what criminal ordinance, rule or statute Respondent is alleged to have violated. Informant has never indicated who was the subject of any fraud.

Respondent is guilty of professional misconduct not criminal or fraudulent conduct.

Informant cites *In re Storment*, 873 S.W.2d 227 (Mo. banc. 1994) for the proposition that acquittal of criminal charges does not preclude disciplinary proceedings. Respondent agrees. The burden of proof in criminal cases is beyond a reasonable doubt as opposed to a preponderance of evidence standard in disciplinary proceedings. In the *Storment* case the lawyer clearly counseled his client to perjure herself. Even though the lawyer was acquitted of suborning perjury he was disciplined for counseling his client to commit the crime of perjury. Clearly there was criminal conduct which was involved. In the present case Respondent has never been charged with any type of crime because no crime exists. Informant's allegation of tax fraud is merely that, an allegation. Where, as here, there could never be any tax due and where the stock ended up in exactly the same place it would have had the conduct not occurred, there simply cannot be any tax fraud.

It is significant that in Informant's argument on Point II that she never sets out how or in what manner the alleged conduct was criminal and never sets out who was the subject of the alleged fraud.

The simply answer is that Respondent did not violate Rule 4-1.2(d) and therefore no discipline can be imposed pursuant to that Rule

ARGUMENT

III.

THE SUPREME COURT SHOULD IMPOSE A REPRIMAND IN THIS CASE OR SHOULD FOLLOW THE RECOMMENDATION OF THE DISCIPLINARY HEARING PANEL AND IMPOSE A SUSPENSION WHICH WOULD BE STAYED DURING A PERIOD OF PROBATION FOR THE REASON THAT NO FRAUDULENT OR CRIMINAL CONDUCT WAS INVOLVED, NO CLIENT HARM OCCURRED, IT HAS BEEN FOURTEEN YEARS SINCE THE MISCONDUCT OCCURRED, BECAUSE THE STATE OF MIND OF THE RESPONDENT AS STIPULATED WAS A KNOWING STATE OF MIND, AND BECAUSE THE MITIGATING FACTORS FAR OUTWEIGH THE AGGRAVATING FACTORS.

Informant cites the Court to ABA Standard 5.11 as requiring disbarment in this matter. As has been previously pointed out Standard 5.11 is involved where there is intentional conduct involving dishonesty, fraud, deceit or misrepresentation. The agreed upon mental state in this case as stipulated to by the parties is a knowing state of mind. **App. 13** Therefore, Standard 5.11 is not applicable.

Standard 5.12 is not applicable because it requires criminal conduct and there simply is no criminal conduct. The appropriate sanction is pursuant to Rule 5.13 which requires a reprimand in this situation.

Informant advises the Court that suspension is the baseline sanction repeatedly recognized by this Court for dishonest or deceitful conduct. While the Court has said that on numerous occasions there are many occasions where that simply has not been the case. *See In re Cupples*, 952 S.W.2d 226 (Mo. banc. 1997); *In re Wallingford*, 799 S.W.2d 76 (Mo. banc. 1990); *In the Matter of Miller*, 568 S.W.2d 246 (Mo. banc. 1978); *In re Schiff*, 542 S.W.2d 771 (Mo. banc. 1976).

Without enumerating them the Informant's counsel notes the strength of the mitigating factors present in this case. One of the strongest mitigating factors in this case is the passage of time of fourteen years without any further blemish on the record of Respondent. It cannot be argued that suspension is warranted to protect the public from Respondent's actions. It is clear that the events that took place in early 1991 constitute a one time offense. Informant has not indicated that she believes Respondent is a threat in any fashion but believes that a harsh discipline should be imposed because of the publicity this case received. Certainly Respondent had nothing to do with the publicity and he was the one who suffered individually as a result of it. Informant indicates that Respondent resigned his position from Shugart Thomson & Kilroy and therefore the economic damages that he suffered should not be considered. If the Informant believes that a person

who enjoyed the position Respondent did in one of the most successful law firms in the State of Missouri left that employment to take a non-lawyer position with Heartland Health and did so freely and voluntarily one could only state that such a belief would appear to be naïve. **T. 148.**

The outpouring of support from the St. Joseph community as evidenced by the many character letters attests to the capabilities and the career of Respondent. He is fully capable of practicing without being a detriment in any fashion to the profession or to the public. **R. App. 3-45.**

In looking at all of the factors including the fourteen year passage of time, the clean disciplinary record, the lack of client harm, the lack of a client complaint, the lack of financial harm to either the federal or state governments, the lack of any criminal conduct, the lack of any fraud, the fully cooperative attitude with the disciplinary authorities, the character and reputation of the Respondent, the publicity, the loss of position and the loss of employment and income, the fact that this is a single isolated incident and the fact that Respondent has shown extreme remorse all indicate that the proper sanction is a reprimand.

If the true reason for attorney discipline is to protect the public, promote confidence in the judicial system and maintain the integrity of the profession then a reprimand is appropriate. If the purpose is to punish the attorney then something other than reprimand would be appropriate.

CONCLUSION

Respondent violated Rule 4-8.4(c) by knowingly engaging in conduct which was dishonest and was an act of misrepresentation. The appropriate sanction is reprimand or at worst a stayed suspension with probations as recommended by the disciplinary hearing panel.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 2006 two copies of Respondent's Brief and a diskette containing the brief in Microsoft Word format has been sent via First Class mail to:

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Attorney for Informant

ROBERT G. RUSSELL

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that his brief:

1. Includes the information required by Rule 55.03
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains, 4,784 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

3. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

ROBERT G. RUSSELL