IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
SETH D. SHUMAKER	**)**	**Supreme Court #SC91076**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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ATTORNEYS FOR INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Respondent and Complainants

Seth Shumaker. Respondent Shumaker was licensed to practice Missouri law in 1990. App. 5, 19. He has a general practice in Kirksville, Missouri. App. 458 (T. 924).

The Office of Chief Disciplinary Counsel has issued two admonitions to Respondent. The first admonition, issued in 1994, was for violation of Rules 4-1.4(a) (communication) and 4-1.15(b) (d) (safeguarding property). The admonition letter states Respondent failed to promptly notify a client that a pension check had been received by him, and failed promptly to either deliver the check to the client or deposit the check for the client in an interest bearing account. App. 676.

The second admonition, which issued in 2007, is described in the course of chronological events set forth in this Statement of Facts.

Rustyn (Rusty) Plunkett. Complainant Plunkett graduated from high school in Philadelphia, Missouri, and subsequently went to work in 1987 for an insurance agency located in Hannibal. App. 253 (T. 240-241). Mr. Plunkett holds a Missouri producer's license to sell insurance. App. 268 (T.299). As an insurance salesman, Mr. Plunkett traveled around Missouri selling insurance policies, through the Hannibal agency, on behalf of Old American/Kansas City Life Insurance Companies. App. 253 (T.241), 255 (T.249). Mr. Plunkett sold insurance from 1987 until May of 2006, then resumed working for the same Hannibal agency in the spring of 2007. He continued to hold that same position through the time of his testimony at the disciplinary hearing. App.258 (T. 261).

From May of 2006 thru February of 2007, Mr. Plunkett was chief executive officer of Mid-America Credit Bureau , LLC. App. 255 (T. 249), 256 (T.251).

Andrew (Andy) Skinta. Complainant Skinta, married to co-complainant Dorothy Skinta since the early 1970s, is a college graduate and earned a master's degree in school administration. He started, but did not complete, both a doctoral program and law school. App. 167 (T. 16-17). Mr. Skinta initially taught high school, then taught communication skills and use of audio visual equipment for ten years in the education department at (then) Northeast Missouri State University. App. 167 (T.17).

Beginning in the mid-70s, the Skintas ran a real estate sales agency called Windsong Realty, owned and managed some rental property, and operated an electronics sales and video rental store called Kaleidoscope. App. 168 (T. 20), 203-204 (T. 162-164). By 2006, Windsong had been out of business for several years, and Kaleidoscope's business had dwindled to the point that the Skintas derived only $7,500.00 from the store for the year. App. 168 (T. 19-20), 188 (T. 99-100).

In 1978, Mr. Skinta was hospitalized and diagnosed as suffering from depression. App. 178 (T. 40-41). Subsequently, in 1989, Mr. Skinta was diagnosed as suffering from bi-polar disorder. App. 174 (T. 43-45). Although he was prescribed different combinations of medication to control the symptoms of the bipolar disorder, it was not until September of 2008 that a trio of medications effectively controlled Mr. Skinta's symptoms. App. 174 (T. 43-44), 205 T.167). While the bipolar disorder did not preclude Mr. Skinta from running Kaleidoscope or Windsong, before September of 2008

Mr. Skinta was subject to random bouts of manic and depressed behavior. App. 205 (T. 167), 215 (T.214).

Dorothy (Dot) Skinta. Ms. Skinta is Andy Skinta's wife and co-complainant against Respondent Shumaker. She has bachelor's and master's degrees in art education. She taught in public schools until 1976. App. 203 (T. 161-162). After she left teaching, Ms. Skinta, who had acquired a license to sell real estate, began selling realty for Windsong and, with Andy, operating Kaleidoscope. She also helped manage their rental property. App. 203 (T. 162). Ms. Skinta allowed her realtor's license to lapse in the early 2000s. App. 204 (T.163). Beginning in 2006, Ms. Skinta has worked hourly wage jobs, making at most $10.00 per hour. App. 204 (T.165-166), 211 (T.196-197.

Individuals Involved in Counts I and II

In addition to Respondent and Complainant Plunkett, the following individuals played a role in Counts I and II of the underlying information.

Brad DeKraai. Mr. DeKraai worked for various debt collection businesses before becoming one of the original members, and president, of Mid-America Credit Bureau, LLC (MACB) in 2006. App. 256 (T. 254), 288 (T.387-388), 458 (T.925).

Chris Shoemaker. Although not one of the original members, Mr. Shoemaker (not related to Respondent Seth Shumaker) became an early investor in MACB. App. 292-293 (T.406-407). In December of 2006, Respondent Shumaker named Chris Shoemaker chief financial officer of MACB. App. 293 (T. 407).

Becky Chadd. Ms. Chadd began working in the debt collection business in 1985. App. 361 (T. 651). She started working for MACB in May of 2006. App. 360 (T. 649).

Ms. Chadd was named president of MACB in September of 2006 and retained that position until October of 2008. App. 361 (T. 651-652).

Justin Meeks. Mr. Meeks is a Kansas-licensed attorney. He practices in Fort Scott, Kansas. App. 349 (T. 604). He and his (then) law partner, Eric Klutman, were hired to represent MACB from its inception until it ceased operating. App. 349 (T. 605). Mr. Meeks handled the "labor side" of Meeks & Klutman's representation of MACB. App. 338 (T. 559).

Eric Klutman. Mr. Klutman, along with Mr. Meeks, provided legal representation to MACB. App. 336 (T. 552). He has a master's degree in tax law. App. 337 (T. 555). Mr. Klutman drafted MACB's Operating Agreement. App. 336 (T. 553-554).

Web Bixby. Mr. Bixby was president of Old American/Kansas City Life during the time Mr. Plunkett sold that company's policies thru the Hannibal insurance agency. App. 264 (T. 284).

Michael Kelly. Mr. Kelly was the principal figure behind Resorts Holding International (RHI) and a scheme to defraud investors in RHI. App. 264 (T. 285-286).

Individuals Involved in Count III

In addition to Respondent Shumaker and Complainants Andy and Dot Skinta, the following individuals played a role Count III.

Harry Rider. Mr. Rider is a self-employed real estate appraiser who works in the Kirksville area. App. 305 (T. 456).

William King. Mr. King was a Kirksville Police Officer in February of 2007. He responded to a call regarding suspicious activity at Kaleidoscope on February 9, 2007.

App. 972-973. Mr. King has been friends with Respondent since they were in grade school together. Mr. King and Respondent Shumaker are members of the same lodge and church. They also have been in the rental property business together for sixteen or seventeen years. App. 322 (T. 525), 325 (T. 536).

Individuals Involved in Counts I, II, and III

The following individuals played a role in all three counts of the amended information.

Lorrie Malloy. Ms. Malloy has worked for Respondent Shumaker as an administrative assistant since 1999. App. 436 (T. 834-835). She has been a notary public for thirteen or fourteen years. App. 436 (T. 834).

Ashley Pauley. Ms. Pauley worked for Respondent Shumaker in his Kirksville office from 2004 until July of 2009. App. 320 (T. 517).

Danieal (Danny) Miller. Mr. Miller was licensed to practice law in Missouri in 1980. Respondent Shumaker is Mr. Miller's friend and attorney. App. 403 (T. 821). Mr. Miller represents Respondent in *Reaggy LLC v. Skinta*, 09AR-CV00649, a civil case currently pending between the Skintas and Respondent. Mr. Miller began representing Respondent Shumaker in this disciplinary case after his prior counsel withdrew. App. 393 (T. 779). Mr. Miller also represented Respondent in a case filed in 2006 in Johnson County, Kansas, state court styled *DeKraai vs. MACB and Seth Shumaker*, 06CV07951. App. 393 (T. 780). Mr. Miller testified on Respondent's behalf in the case sub judice as a fact witness as well as a character witness.

Character Witnesses

The following witnesses testified solely as character witnesses on Respondent Shumaker's behalf, i.e., they had no knowledge of the facts alleged in the information: Judge Richard Webber and Timothy Hunt.

Judge Webber has known Respondent since he appeared as a young lawyer in Judge Webber's circuit court. He knew Respondent as a competent and ethical lawyer. Judge Webber has had very little contact with Respondent since he became a federal judge 14 years ago. App. 303-304. (T. 448, 452).

Mr. Hunt has known Respondent for ten years. Respondent has represented Mr. Hunt and his family members in various criminal, domestic, and probate matters over the years. Mr. Hunt has a high opinion of Respondent. App. 314-315 (T. 493-495).

Counts I and II

(In light of the multiple narrative threads woven into this record, the evidence is related in primarily chronological, as opposed to strictly subject matter, order.)

Rusty Plunkett and Respondent Seth Shumaker became acquainted approximately twenty years ago. In addition to a social relationship, Respondent represented Mr. Plunkett on a few speeding violation matters. App. 253 (T. 241).

In 2003, Mr. Plunkett began selling "universal leases" on behalf of a company called Resorts Holding International (RHI). App. 264 (T. 285-286). The company and the universal lease investment scheme were the brainchild of a man named Michael Kelly. App. 264 (T. 285). The investment marketed by Mr. Plunkett on RHI's behalf

was in a "universal lease," or rental agreement, with resorts located in Cancun, Mexico. Pursuant to the training RHI provided Mr. Plunkett, he told the people to whom he sold the leases that they would earn a guaranteed 9% return on their investments from rental income and could withdraw their entire initial investment after three years if they chose to do so. App. 264 (T. 285), 279 (T. 349). Mr. Plunkett marketed the universal leases to individuals to whom he had been selling insurance through the years. App. 264 (T. 285-286).

Mr. Plunkett asked Mr. Shumaker's advice about whether he should sell the RHI leases. App. 265 (T. 287-288). Respondent Shumaker accompanied Mr. Plunkett on two trips to Cancun to help him check out the company. After the second trip, and when RHI failed to produce the financial statements requested, Respondent Shumaker advised Mr. Plunkett not to sell any more of the leases. It was good advice, and Mr. Plunkett followed it. App. 265 (T. 287-288), 279 (T. 348), 533 (T. 1122-1123).

When Plunkett learned, in December of 2005, that Michael Kelly had been arrested by authorities, he told Mr. Shumaker. App. 267 (T. 295). Mr. Plunkett wanted Respondent Shumaker to take legal action against Kelly and RHI on behalf of the individuals to whom he had sold the leases. Mr. Plunkett's RHI customers, to whom he had sold insurance for years, had lost a lot of money, App. 267 (T. 295), 282 (T. 360), and Mr. Plunkett felt very bad about it. App. 265 (T. 287, 290), 282 (T. 360).

Mr. Plunkett's Personal Injury Case

On April 30, 2004, Respondent Shumaker filed in Jackson County Circuit Court a two-count petition styled *Plunkett v. American Family Insurance Group*, 04CV213569.

The suit stemmed from a vehicular collision in which Mr. Plunkett had been injured. The collision occurred in September of 2002 in Shelby County, Missouri. The petition sought damages from Mr. Plunkett's insurer and the driver of the other vehicle under the uninsured motor vehicle provision of Mr. Plunkett's policy. App. 253 (T. 242), 627-648.

Department of Insurance Fine Against Mr. Plunkett

On January 12, 2006, the Missouri Department of Insurance fined Mr. Plunkett $400.00 in settlement of a complaint that had been filed against him. The complaint alleged Mr. Plunkett sold multiple life insurance policies to an elderly person without regard to need, ability to pay, or mental status. The early 2006 fine is the only administrative action ever taken by the Department of Insurance against Mr. Plunkett in the twenty plus years he sold insurance. App. 712.

Mid-America Credit Bureau

On February 6, 2006, the four original members of Mid-America Credit Bureau, LLC, signed the fledgling company's Operating Agreement. The four original members were Respondent Shumaker, Mr. Plunkett, Mr. DeKraai, and Chuck Cramer. App. 974-988.

Mid-America Credit Bureau's (MACB) business was to purchase (from a debt buyer) and attempt to collect old, "bad" credit card debt that the creditor had, in most instances, already unsuccessfully attempted to collect. App. 256 (T. 251-252). The idea to start the company came from Mr. Plunkett. Mr. Plunkett had no previous experience working in the debt collection business. App. 256 (T. 252), 367 (T. 677-678). He got the idea to start the business through a friend of his who had successfully operated such a

business and eventually sold it, making a lot of money. App. 255 (T. 248), 367 (T. 678). MACB was located in Lenexa, Kansas. App. 255 (T. 248).

Although Mr. Plunkett lacked the knowledge and expertise to run a collection agency, he knew people, through his friend, who did have that experience. App. 256 (T. 254), 288 (T. 389), 441 (T. 857). Mr. Plunkett knew Mr. DeKraai from Mr. DeKraai's work in his friend's collection business. App. 256-257 (T. 254-255). Mr. DeKraai was named MACB's first president. App. 256 (T. 254).

Mr. DeKraai had a non-compete clause with the employer for whom he had worked before starting with MACB. App. 269 (T. 304). In a letter dated April 4, 2006, Respondent Shumaker responded on Mr. DeKraai's behalf to the previous employer's communications regarding enforcing the non-compete clause. Mr. Shumaker identified himself as Mr. DeKraai's lawyer and referred to DeKraai twice as "his client" in the letter. App. 269 (T. 304), 715.

The MACB Operating Agreement, at article III §3.1, identifies the four original members of the LLC, their initial contributions to MACB, and the percentage of ownership units assigned to each. Respondent Shumaker made the only initial capital contribution to the company -- $200,000.00, and was assigned 65% of the ownership units. Mr. Plunkett, Mr. DeKraai, and Mr. Cramer made no initial capital contributions, but were assigned 25%, 7%, and 3% of MACB's ownership units, respectively. App. 976. Respondent Shumaker was the "funding arm" of MACB; the only original member to put an initial capital contribution in the company to "get the initial ball rolling." App. 337 (T. 557). Mr. Shumaker agreed to give Mr. Plunkett a 25% interest in the company

because the idea to start the business, as well as the "people contacts" necessary to run it, were Mr. Plunkett's. App. 288 (T. 388-389). Mr. DeKraai had the debt collection know how. He was made president and was to use his experience and contacts to run the business. App. 350 (T. 608). Mr. Plunkett and Mr. DeKraai had contacts and know how and not a lot of money. As MACB's attorney testified, Mr. Plunkett "did not have any financial – on the front end, he did not have any financial obligations to the company. That was made very clear to us the very first time we met with the representatives from MACB that basically Brad and Rusty had the knowledge, and Seth basically had the money." App. 355 (T. 629). Mr. Cramer, a relative of Mr. DeKraai's, was to be the IT person for the business. App. 337 (T. 558).

The MACB Operating Agreement provides, in article V §5.3, that all initial capital contributions be completed to MACB within thirty days of the date of the agreement (February 6, 2006), unless the members agreed in writing upon a different date. No written agreement establishing a different date for members, specifically Mr. Plunkett, to make their initial capital contributions exists. App. 535 (T. 1130), 979-980. The only initial capital contribution listed in the agreement was Respondent Shumaker's $200,000.00. App. 534 (T. 1127), 980. Mr. Plunkett made no initial capital contribution, other than his labor and services, or "sweat equity," within the designated thirty days. App. 344 (T. 583-584, 535 (T. 1131). Nor did he oblige himself, verbally or in writing, to make a capital contribution in the future. App. 255 (T. 249-249).

The MACB Operating Agreement provides that members "may make additional capital contributions but shall not be required to do so." App. 980. In addition to a

provision for issuance of additional LLC units, which Respondent Shumaker does not recall ever being done, future, additional capital contributions to the LLC were recognized through transfers of ownership shares. App. 536 (T. 1136-1137), 978. For example, Respondent Shumaker transferred some of his interest, i.e., ownership shares, in MACB to subsequent investors in MACB, such as Chris Shoemaker and Mr. Nagel. App. 302 (T. 446), 536 (T. 1136-1137). Such share transfer agreements were drafted by Meeks & Klutman. App. 340 (T. 570), 536 (T. 1136).

Mr. Klutman, who drafted the MACB Operating Agreement, advised the LLC members from the beginning that there could be tax consequences to the individual member who did not make a capital contribution to the LLC. App. 339 (T. 566), 347 (T. 595, 597). Mr. Klutman told them that "you can initially have sweat equity, but eventually you have to put money into the company in order to get the tax advantages of being a member of the LLC." App. 459 (T. 928).

MACB opened for business in April of 2006. App. 255 (T. 248). The business had 25-30 employees, including collectors and managers. App. 256 (T. 251). In mid-May of 2006, Mr. Shumaker named Mr. Plunkett CEO of MACB, and Mr. Plunkett became a full-time employee.

Initially, when the business opened in April, Mr. Plunkett had continued in his long-standing job of selling insurance policies around the state. After a few weeks, Respondent Shumaker told Mr. Plunkett he wanted him physically present in MACB's Lenexa office to serve as Respondent's eyes and ears (Respondent Shumaker continued to practice law in Kirksville). At Respondent Shumaker's request, Mr. Plunkett quit his

insurance sales job and went to work for MACB at a before tax salary of $8,000.00 per month plus benefits. App. 255-256 (T. 249-251), 257 (T. 256). Mr. Plunkett called Respondent every day, sometimes multiple times, to report on how things were going at MACB. App. 272 (T. 322), 365 (T. 667).

Mr. Plunkett, who had no formal education beyond high school, had no prior experience running a business. His previous work experience was in insurance sales. App. 256 (T. 252). He did not know how much MACB paid to rent its office space, who the landlord was, or the terms of the lease. App. 252 (T. 253). He was not familiar with MACB's short range business plan or its long range strategic business plan. App. 252 (T. 253). Mr. Plunkett was never an authorized signator on an MACB bank account, nor was he ever given the use of an MACB credit card. App. 256-257 (T. 253-255).

As early as June of 2006, by which time Chris Shoemaker had become an MACB investor, Chris Shoemaker was sounding the alarm that the business was losing money. App. 293 (T. 408-409). On June 16, 2006, Mr. DeKraai reported to Respondent Shumaker, via Respondent's office messaging system, that he was going to talk to Mr. Plunkett about him and Mr. Plunkett taking a pay cut. App. 1300. Pay cuts were discussed at an MACB meeting. App. 271-272 (T. 318-319). When Respondent's counsel took Mr. Plunkett's deposition in this disciplinary case Mr. Plunkett produced a copy of a letter memorializing that pay cuts were discussed at an MACB meeting. App. 272 (T. 319).

When Mr. Plunkett's complaint was filed with the Office of Chief Disciplinary Counsel in February of 2008, Mr. Plunkett attributed his poor financial condition in the

summer of 2006 to a pay cut or cessation of pay from MACB during the summer of 2006. After reviewing the wage records produced by Respondent Shumaker, Mr. Plunkett realized his MACB pay had not been cut or terminated during 2006. App. 290 (T. 395). At the disciplinary hearing, Mr. Plunkett testified in his direct examination that if MACB's records reflected no reduction or cessation of his pay during his MACB employment, he had no reason to disagree with the records. App. 256 (T. 251), 289-290 (T. 394-395).

Although his pay had not been reduced or eliminated, Complainant Plunkett was in poor financial shape in the late summer of 2006. He was commuting between Lenexa and his home in Boone County, Missouri, on a regular basis, incurring motel and meal expenses when he stayed overnight in Lenexa, satisfying a monthly child support payment of $1,850.00, and incurring personal expenses by rewarding MACB employees with meals and event tickets. App. 258-259 (T. 262-264), 368 (T. 680). It was not unusual for Mr. Plunkett to ask his colleagues to borrow money. While they worked together at MACB, two of Mr. Plunkett's colleagues recall loaning him money at different times. App. 294 (T. 412), 363 (T. 661).

By August of 2006, it was clear to MACB's members that the company was in dire financial straits. The company's liquidity was a common topic that summer, with August proving to be a major cash drain. App. 257 (T. 257), 296 (T. 421). The LLC's members, which now included subsequent investors Chris Shoemaker and Respondent's brother-in-law Darrell Nagel, had several member meetings in August concerning MACB's financial status. App. 257-258 (T. 257-259), 293 (T. 409-410), 462 (T. 941).

Chris Shoemaker estimated at one of the meetings that MACB needed $230,000.00 to $270,000.00 additional capital to keep going. App. 293 (T. 410). It was generally agreed among MACB's members that additional capital would have to be raised if the company was to continue operating.

At an August meeting held at Respondent's Kirksville office, attended by Respondent, Chris Shoemaker, and Mr. Plunkett, the question of raising additional capital was debated. App. 257-258 (T. 257-260), 293-294 (T. 409-411), 462 (T. 941). Chris Shoemaker and Respondent Shumaker indicated they had invested all they intended to invest in MACB. When Mr. Plunkett kept urging his fellow LLC members to invest more, Respondent Shumaker remarked that it was easy for Mr. Plunkett to say, because he had "no skin in the game," i.e., Mr. Plunkett, unlike the others, had no financial investment in MACB. App. 293 (T. 410), 296 (T. 419), 462 (T. 941). Mr. Plunkett was not asked to invest money in MACB, because all the owner-members knew he had no money. App. 258 (T. 259). The subject of Mr. Plunkett's Boone County property arose during the meeting, although who initially raised the subject is uncertain. App. 293-294 (T. 410-411, 295-296 (T. 418-420). However it was raised, and by whom initially, Mr. Plunkett expressed only that he would "think about" putting a second on his house if it would get additional capital into MACB. At no time did Mr. Plunkett offer to give Respondent Shumaker a second on his house in return for an additional capital investment by Respondent Shumaker. App. 258 (T. 260), 294 (T. 411), 296 (T. 419, 421-422).

Additional Capital Contribution

Respondent's Exhibit RR is a printout of a "transaction detail by account" covering MACB's bank account for the period September through October of 2006. The exhibit documents deposits to MACB on September 1 ($75,000.00), September 14 ($60,000.00), October 6 ($40,500.00), October 12 ($19,800.00), and October 12 ($4,840.00). App. 1299. Respondent Shumaker's secretary, Lorrie Malloy, testified that the exhibit "shows loan proceeds being deposited into the MACB US Bank account." Respondent Shumaker testified that the exhibit is an "accounting printout of recitation of loan proceeds into MACB." App. 447 (T. 880). Ms. Malloy testified the loan proceeds were from a $200,000.00 loan personally guaranteed by Respondent Shumaker. The loan proceeds were disbursed to MACB in increments. App. 302 (T. 445), 447 (T. 880). Respondent testified on cross examination:

> Q. So it is your testimony that the monies represented on Exhibit RR were a capital contribution to MACB by the Shumakers on Mr. Plunkett's behalf; correct?
>
> A. Yes. That is what I believe it was.

App. 537 (T. 1139). The exhibit reflects that the last increment of the $200,000.00 loan was deposited into MACB's account on October 12, 2006. App. 1299.

Ms. Malloy testified that Respondent Shumaker borrowed the $200,000.00 to put into MACB because Chris Shoemaker and Mr. Plunkett had convinced him that MACB would make it, if it only had some additional capital. App. 447 (T. 880). She also

testified that Respondent Shumaker took out the loan after Mr. Plunkett signed a deed and note to Respondent Shumaker. App. 447 (T. 880).

Promissory Note and Deed of Trust

On September 5, 2006, Mr. Plunkett was in Respondent Shumaker's office to sign a release that would allow Mr. Shumaker to obtain medical records for use in Rusty's personal injury case, still pending in Jackson County. App. 319 (T. 514). Ms. Malloy may have shown him, and asked him to sign, a promissory note and deed of trust on that date. App. 259 (T. 265, 260 (T. 267). Mr. Plunkett recalls brushing off Ms. Malloy's efforts, telling her he would only talk to Seth (Respondent) about it. App. 260 (T. 267-268). Mr. Plunkett adamantly denies signing a promissory note or deed of trust on September 5, 2006. App. ~~275~~ 269a (T. 310). Mr. Plunkett denies being given a copy of either a note or deed of trust on September 5, 2006. App. 259 (T. 266), 260 (T. 268), ~~275-276~~ 269a-270 (T. 310-311).

Exhibit 18 is a document titled "Promissory Note." It is dated September 7, 2006. It states that "On this date" Mr. Plunkett promised to pay Seth Shumaker and his wife $250,000.00 in yearly $35,000.00 increments beginning September 7, 2007, and continuing until paid in full. Provision for late penalty fees, acceleration of the debt, and collection fees is made in the note. The note is signed by Rustyn L. Plunkett. App. 659. Respondent Shumaker testified that Mr. Plunkett signed the note in front of Respondent on September 5, 2006, while he was in Respondent's office. App. 461 (T. 936-937), 463 (T. 945). Ms. Pauley, one of Respondent Shumaker's secretaries, testified positively that she saw Mr. Plunkett sign the note on September 5, 2006. App. 321 (T. 521).

Respondent Shumaker's explanation for why the note is dated September 7 if it was signed September 5 is that "it was going to take a couple of days to make arrangements for the funds to be available to put into the company." App. 463 (T. 945).

Respondent's Exhibit PP is a letter sent by Respondent Shumaker to Mr. Plunkett. The letter is dated September 11, 2006. The letter references a "Deed of Trust and Promissory Note." After the opening salutation, the letter reads in its entirety: "Please find the enclosed Deed of Trust and Promissory Note. Please execute the same and return them to me in the SASE I have provided." The letter is signed by Respondent Shumaker. App. 1297.

Ms. Malloy testified that she typed the letter (Ex. PP). Her only explanation for why she would have sent, on September 11, an unsigned copy of a note that, according to Respondent Shumaker and Ms. Pauley had already been signed on September 5, is that Mr. Plunkett "had not signed the deed of trust." App. 446 (T. 877). Respondent Shumaker's explanation for why he would sign a letter dated September 11 directing Mr. Plunkett to sign a document that, according to him, had been already signed by Mr. Plunkett on September 5 was that:

> I do not know, unless it was on my desk and the girls just thought that I had not had a signed copy yet, but it was there, but I noticed at the bottom it says "Enclosure." It does not say Enclosures, but I am not sure why they would have enclosed another copy of the promissory note.

App. 464 (T. 947).

September 12, 2006

On September 12, 2006, Complainant Plunkett drove to Respondent's office in Kirksville to see if Respondent would loan him some money. App. 259 (T. 264), 260 (T. 269). Mr. Plunkett had already asked Chris Shoemaker for a loan and been turned down. App. 294 (T. 414). Chris Shoemaker then called Respondent Shumaker to tell him that Mr. Plunkett had tried to borrow money from him. Chris Shoemaker wanted to forewarn Respondent Shumaker that Mr. Plunkett was asking to borrow money. App. 297-298 (T. 426-427).

According to Respondent Shumaker's office messaging system, Respondent Shumaker was advised at 10:16 a.m. on the 12th that Mr. Plunkett wanted Respondent Shumaker to call him. App. 1295. Mr. Plunkett testified that he called Respondent Shumaker on that day to tell him he was driving up to his office. Mr. Plunkett was going to Kirksville to ask Respondent to loan him $2,000.00. App. 260 (T. 269), 275 269a (T. 310). The office messaging system (Ex. LL) reflects that Respondent Shumaker was advised at 2:36 p.m., on September 12, 2006, that "Rusty is here and so is your 3:00 appt," and then again at 4:01 p.m. that "rusty is here." App. 1295.

When Mr. Plunkett arrived at Respondent's office for the first time on September 12, he saw only Ms. Malloy. He told her he had come to see Respondent to ask to borrow some money. Ms. Malloy told Mr. Plunkett that Mr. Shumaker was not there, but that before Mr. Plunkett did anything he would have to sign some documents. Mr. Plunkett responded that he would not sign anything "until I talk to Seth." App. 260 (T. 270).

The documents Ms. Malloy wanted Mr. Plunkett to sign were a promissory note and a deed of trust. App. 260 (T. 270). The note has been previously described in this Statement of Facts at p.21. The deed of trust appears as Exhibit 19 in the record. The deed states it is "Made and entered into this 7th day of September, 2006, by and between" Mr. Plunkett and Respondent Shumaker and his wife. Mr. and Mrs. Shumaker are identified as the grantees (parties of the third part), and Mr. Plunkett as the grantor (party of the first part). The deed of trust recites that Mr. Plunkett, "in consideration of the Debt and Trust hereinafter mentioned and created," is conveying his Boone County property. Subsection (e) of the second "Whereas" paragraph (on the second page of the deed of trust) reads as follows:

> (e) that if the parties of the First Part default in the payment of a Promissory Note given to Seth Shumaker and Barbara Shumaker, husband and wife, in the principal sum of Two Hundred Fifty Thousand Dollars ($250,000.00), it shall be considered a default under the terms of this deed of trust.

App. 660-664.

After Mr. Plunkett told Ms. Malloy he would not sign anything until he talked to Respondent, Ms. Malloy advised him Respondent was not there and asked if he would be willing to drive a document to Edina, the Knox County seat, for filing. Mr. Plunkett agreed to do so and did, then returned to Respondent's office in Kirksville. App. 260 (T. 270), 443-444 (T. 865-866).

Respondent Shumaker met with Mr. Plunkett upon his return from running the errand. They met for a total of approximately ten minutes in Respondent's office. Respondent told Mr. Plunkett that before Respondent would give him any money, he would have to sign the documents (deed of trust and note). App. 260-261 (T. 270-271), 262 (T. 276). Mr. Plunkett answered that he did not want to sign a promissory note and deed of trust to borrow $2,000.00. Respondent Shumaker then assured Mr. Plunkett not to worry about it, that he (Respondent) was not going to do anything with the documents, was not going to file them or use them for anything. Respondent told Mr. Plunkett that he might tell the (MACB) ownership group that he (Respondent) had got a promissory note and deed of trust on Mr. Plunkett's property. App. 261 (T. 271-272), 262 (T. 275-276), 275 (T. 331), 291 (T. 402).

> Seth Shumaker told me. . . "Go ahead and sign this. If you want $2,000.00, you are going to have to sign it. Don't worry. We are not ever going to do anything with it. I am not going to file it. I am just going to tell the other ownership people that we have that."

App. 275 (T. 331).

Mr. Plunkett signed the promissory note and deed of trust on September 12, 2006. App. 261 (T. 274). In return, Respondent Shumaker gave Respondent a check for $2,000.00, dated September 12, 2006, written from an MACB bank account. App. 665. The next day, Mr. Plunkett deposited $1,700.00 of the check and retained $300.00 cash. App. 262 (T. 275), 665.

Mr. Plunkett signed the note and deed of trust on September 12, 2006, because he needed the $2,000.00, and because Respondent Shumaker had assured him he would not file the deed of trust or do anything with the note other than, perhaps, telling the other MACB members that Mr. Plunkett had given him the note and deed of trust on Rusty's property. Mr. Plunkett trusted Respondent Shumaker because Respondent was his attorney (in the pending personal injury case), and he was Mr. Plunkett's boss at MACB. App. 262 (T. 275), 268-269 (T. 302-303), 270 (T. 312), 291 (T. 402).

At no time on, before, or after September 12, 2006, did Respondent Shumaker go over the terms of the note and deed with Mr. Plunkett. App. 259 (T. 266), 261 (T. 272-273), 287 (T. 383-384). At no time on, before, or after September 12, 2006, did Respondent Shumaker suggest to Mr. Plunkett that he confer with another lawyer before signing the note and deed of trust. App. 260 (T. 268), 261 (T. 272-273), 287 (T. 384). At no time on, before, or after September 12, 2006, did Respondent Shumaker discuss with Mr. Plunkett the potential for, or existence of, a conflict of interest in entering into the transaction with Respondent and his wife. App. 259 (T. 266), 261 (T. 272-273), 287 (T. 384). Mr. Plunkett did not even know, until after he arrived at Respondent's office on S**e**ptember 12, that he would be asked to sign a note and deed of trust. App. 261 (T. 274).

On September 12, 2006, Respondent said nothing to Mr. Plunkett about any connection between the $2000.00 check, the note and deed of trust, and a capital contribution to MACB. On September 12, Respondent Shumaker never said anything to Mr. Plunkett about the note and deed to the Shumakers being in exchange for the Shumakers' willingness to put more capital into MACB. App. 262 (T. 275).

Ms. Malloy notarized the deed of trust from Mr. Plunkett to the Shumakers. App. 442 (T. 860-861). The paragraph above Ms. Malloy's signature on the deed reads as follows:

> On this 14th day of September, 2006, before me personally appeared Rustyn L. Plunkett . . . .

App. 453 (T. 902), 660-664. Mr. Plunkett signed the deed of trust on September 12, 2006. He did not "appear personally before" Ms. Malloy on September 14, 2006, even by Ms. Malloy's own admission. App. 442 (T. 861), 453 (T. 903), 458 (T. 923).

Ms. Malloy, who became a notary in the 1990s, did not maintain a journal of notarial acts until after she was deposed in this disciplinary case in December of 2009. App. 435 (T. 831-832), 453 (T. 903). There is no journal of notarial acts documenting when Mr. Plunkett signed the deed of trust. Ms. Malloy testified that it was her belief that notaries were not required to maintain a journal of notarial acts when she became a notary. App. 453 (t. 903), 457 (T. 921).

Ms. Malloy testified that she knows that Mr. Plunkett signed the deed of trust on September 14, 2006, even though she did not see him do it, because he called her that day and told her he signed it at his Columbia house. She testified that she notarized it on September 14 after Respondent Shumaker brought it to her. App. 442 (T. 860-861).

Respondent Shumaker testified that Mr. Plunkett gave him the signed deed on September 14 in Lenexa. He testified that he met Mr. Plunkett and Chris Shoemaker for lunch in Lenexa, and that Mr. Plunkett handed him the already signed deed at the

restaurant. Respondent testified that he then took the signed deed back to his Kirksville office, where Ms. Malloy notarized it. App. 463-464 (T. 945-946).

Chris Shoemaker recalled the lunch with Mr. Plunkett and Respondent Shumaker, but did not see a deed. App. 296 (T. 422), 301 (T. 441). Nor did Chris Shoemaker hear any discussion about a deed of trust that day. App. 302 (T. 445).

In the summer of 2006, Mr. DeKraai's former employer filed suit against him in Ohio state court to enforce the non-compete clause. The case settled in late August or early September of 2006. As part of the settlement, Mr. DeKraai agreed not to work for MACB for one year. Mr. DeKraai's employment with MACB ended (in early September of 2006) as a direct consequence and in compliance with his settlement of the Ohio non-compete litigation. App. 356-357 (T. 634-635). Much of MACB's upper management was let go at the same time that Mr. DeKraai left. App. 361 (T. 652).

After Mr. DeKraai's departure, Mr. Plunkett, Chris Shoemaker, and Becky Chadd, who had been named the new MACB president, ran the MACB business in Lenexa. App. 297 (T. 424), 361 (T. 652). In roughly mid-September of 2006, Chris Shoemaker noticed money started coming in to pay MACB's bills. He asked Respondent Shumaker where the money was coming from. Respondent Shumaker told him that Mr. Plunkett had given him a second on his house, so Respondent Shumaker decided to inject more capital into the business. App. 294 (T. 413-414), 297 (T. 424-425). This information came from Respondent Shumaker; Mr. Plunkett never conveyed to Chris Shoemaker that the deed and note were in exchange for an additional capital contribution by Respondent Shumaker. App. 297 (T. 425).

Mr. Plunkett heard from other MACB members that Respondent had filed the deed of trust to his house. App. 270 (T. 312), 275 (T. 331). The LLC's members connected the deed and note to Respondent Shumaker's additional capital contribution to MACB. App. 270 (T. 312). Respondent Shumaker said nothing to Mr. Plunkett connecting the note and deed to any additional capital contribution he put into MACB until after the note and deed were signed. App. 263 (T. 279-280), 276 (T. 335), 277 (T. 339-340). Mr. Plunkett did not discuss the deed of trust with Chris Shoemaker until December or January. When he did talk about it he said he had signed the deed to get $2,000.00. App. 294 (T. 414). After hearing repeatedly, from other MACB members and from Respondent Shumaker, that the note and deed were connected to an MACB capital contribution, Mr. Plunkett began to believe it himself. App. 263 (T. 279-280). Before or at the time Mr. Plunkett signed the note and deed, however, no one told him that the note and deed were in any way related to MACB's capital needs, or to guarantee a capital contribution to MACB from Respondent. Mr. Plunkett does not even know whether Respondent Shumaker actually contributed any additional capital to MACB in September of 2006 or thereafter. App. 274-275 (T. 330-332).

Respondent Shumaker has acknowledged that it is his belief that Mr. Plunkett is not the smartest guy around; "not the brightest bulb in the chandelier." In a deposition Respondent gave in the DeKraai v. Shumaker litigation (see below), Respondent Shumaker responded to DeKraai's attorney's comment that Mr. Plunkett "is not the brightest bulb in the bunch," by stating "I don't think he is a member of MENSA by any means." App. 533 (T. 1123-1124).

Chris Shoemaker testified that Mr. Plunkett lacked the ability to understand financial documents and lacked the intelligence to be chief executive officer of a company. App. 300 (T. 435-437). Ms. Chadd, who worked with Mr. Plunkett from May of 2006 until February of 2007, testified that Mr. Plunkett had limited knowledge of the debt collection business and that, in her opinion, he was not a good businessman. App. 367-368 (T. 678-679).

Respondent Shumaker testified that the note and deed of trust were "to secure me and my wife borrowing the funds to put his capital contribution for Mr. Plunkett." App. 461 (T. 937). "He [Plunkett] signed a note and deed of trust so that me and my wife would make a capital contribution on his behalf into the company." App. 465 (T. 951). "To his [Plunkett's] benefit, we made the contributions on his behalf because he could not borrow the money from the bank to make the contribution to keep the company going." App. 544 (T. 1166). On cross-examination, the following questions were asked Respondent and answered by him:

> Q. In fact, your testimony is that what Mr. Plunkett got out of the deal was your willingness to put more money into MACB on his behalf. Isn't that what you testified to?
>
> A. No. I made a contribution on his behalf so that this business could continue, he wanted to do that, that he had been talking about that since August before this, and he did not want to go back to selling insurance.
>
> Q. So the Shumakers paid Mr. Plunkett nothing; correct?

A. They paid money on his behalf.

Q. Did the Shumakers write –

A. Ma'am, you have already asked that.

Q. – Pay Mr. Plunkett anything for signing the deed of trust?

A. Yes. To his benefit, we made the contributions on his behalf because he could not borrow the money from the bank to make the contribution to keep the company going.

Q. So you are not saying that the contributions reflected on the Exhibit RR were made payable to Rusty Plunkett?

A. No. They were on his behalf for the company.

Q. My question is: No money was paid to Mr. Plunkett from the Shumakers; is that correct?

A. That is correct. There was no cash from me to him, or a big check written to him.

Q. Isn't it a fact that you did not have Mr. Plunkett sign a conflict waiver before he executed that deed?

A. I did not see a conflict. He was not my client. It was not adverse to him. I was not required to get a conflict waiver at the time even if there was a conflict, which I do not believe there was, because it was not adverse. He was wanting me to do that, and I did.

Q. Isn't it a fact that you did not have Mr. Plunkett sign a conflict waiver before he executed the deed of trust?

A. Assuming there was a conflict? No. I did not have him do that. I was not required to at the time.

App. 543-544 (T, 1165-1166).

Respondent Shumaker acknowledged in his testimony that the money he borrowed and put into MACB "on Mr. Plunkett's behalf," and "for his benefit," was, per the MACB Operating Agreement, an additional capital contribution, not an initial capital contribution. "Mr. Plunkett never made an initial capital contribution. This would have been his additional capital contribution. Yes. You could call it that." App. 537 (T. 1138). MACB's tax attorney, Mr. Klutman, testified that the monies put into MACB on Mr. Plunkett's behalf would have been an additional capital contribution, "not the initial." App. 347 (T. 595-596). Klutman, who drafted MACB's Operating Agreement, testified as follows on direct examination by Respondent's counsel.

Q. I just want to clear up any confusion. I mean, based on the starting capital position of MACB, was this $250,000.00 to secure Mr. Plunkett's ownership?

A. Yes.

Q. And it was to secure his ownership interest, as well as keeping the company operating?

A. That is right.

> Q. So Mr. Shumaker made this capital contribution to MACB on Rusty's behalf because he pledged his house and signed the note?
>
> A. That was understanding. Yes.
>
> Q. And I am going to ask you this: The reason you did not go back and change Rusty's percentage of ownership interest on the basis of that contribution was because at the inception of the company, it was expected that he would contribute to the business in the future; is that correct?
>
> A. That is correct.

App. 339 (T. 563-566).

Mr. Meeks, MACB's other attorney, testified that he was never present at any ownership meeting where the subject of using Mr. Plunkett's house to guarantee contributions to MACB was discussed. What he did hear about it occurred after the transaction occurred. App. 355 (T. 630).

Chris Shoemaker testified that he did not know anything about Mr. Plunkett's ownership shares in MACB, and that he never participated in any MACB meeting where it was acknowledged that Mr. Plunkett made a capital contribution to MACB. App. 300-301 (T. 437-439). When Chris Shoemaker made an additional capital contribution to MACB, however, he did receive an increased ownership share in the company. App. 302 (T. 446).

In return for what was characterized by Respondent Shumaker as Mr. Plunkett's capital contribution to the company, Respondent Shumaker testified that Mr. Plunkett benefited by continuing his job as CEO. "He continued to draw $8,000.00 a month pay. He continued to have the opportunity to benefits for him and his family by way of health insurance from MACB. He also had the ability to hopefully turn that company around and make it into a profitable company so that he would have something for his retirement." App. 537 (T. 1140). Mr. Shumaker was then asked:

> Q. I take it from that answer that MACB provided Mr. Plunkett no additional shares in MACB as a consequence of the contributions reflected in Ex. RR [Ex. RR is the accounting printout of disbursements from the Shumakers' loan into MACB] is that a correct statement?
>
> A. I believe they might have. It might have been a couple of more percents, I believe.
>
> Q. You believe?
>
> A. I believe so.
>
> Q. We have not seen anything like that in this case yet; have we?
>
> A. I do not know that anyone has asked for it.

App. 537 (T. 1141).

On October 10, 2006, the deed of trust from Mr. Plunkett to the Shumakers was filed by Respondent Shumaker's assistant with the Boone County Recorder of Deeds. App. 317 (T. 503-504), 660-664.

On October 11, 2006, Mr. DeKraai filed suit in a Kansas state court seeking indemnification from MACB and Respondent Shumaker, individually, for the monies expended on Mr. DeKraai's behalf in defense and settlement of the Ohio non-compete case. App. 345 (T. 587), 542 (T. 1158).

On October 12, 2006, Respondent Shumaker dismissed without prejudice Mr. Plunkett's personal injury case, which had been pending in Jackson County since April of 2004. App. 647. On October 30, 2006, Respondent refiled the petition in the Shelby County Circuit Court. App. 651-654.

In the Kansas case filed by Mr. DeKraai against MACB and Respondent Shumaker, Mr. DeKraai alleged that Respondent intentionally or recklessly misrepresented facts regarding the non-compete clause, and alleged professional malpractice breach of fiduciary duty by Respondent to Mr. DeKraai. App. 345 (T. 587), 542 (T. 1158). Counterclaims were filed against Mr. DeKraai. App. 345 (T. 589). Respondent's legal malpractice carrier provided him a legal defense in DeKraai v. MACB and Shumaker. App. 542 (T. 1158). Mr. Miller Respondent's good friend and an attorney, represented Respondent Shumaker personally in the case. App. 393 (T. 780).

On February 22, 2007, Mr. Plunkett's deposition was taken in DeKraai v. MACB and Shumaker. App. 285 (T. 375-376). Mr. Plunkett described the case as being about "DeKraai and the lawsuit with Mid-America Credit Bureau about, you know, how the

company was run and everything like that. That is what it was." App. 285 (T. 375). Mr. Plunkett was designated by MACB to be deposed as the LLC's corporate representative. App. 341 (T. 571-572). Mr. Plunkett did not volunteer to be MACB's corporate representative at the deposition; he was told he would be. App. 285 (T. 378). The evening before the deposition was taken, Mr. Meeks met with Mr. Plunkett for twenty to thirty minutes to prepare him for the deposition. App. 275 (T. 332), 285 (T. 378). Mr. Plunkett recalls being asked at the deposition how MACB was running, how it started, its financial situation, and "stuff like that." App. 275 (T. 333-334, 285 (T. 376-377). Mr. Plunkett knew hardly any of the answers to the questions. App. 285 (T. 377-378), 342 (T. 576-577).

Not long after Mr. Plunkett's deposition in the DeKraai case, Respondent Shumaker asked him to try to work from his house in Boone County because MACB was not able to pay him anymore. App. 273 (T. 323), 290 (T. 396). After a couple of weeks of not getting paid, Mr. Plunkett returned to selling insurance for the Hannibal insurance agency. App. 290 (T. 397).

The DeKraai v. MACB and Shumaker case eventually settled. The Bar Plan paid money on Respondent Shumaker's behalf to settle the case. Nothing was paid to Respondent Shumaker. App. 358 (T. 640), 393 (T. 780).

Respondent Shumaker lost over a million dollars, over a third of his assets, in the MACB venture. App. 46 (T. 931).

RHI Case

In March of 2007, Respondent Shumaker filed, in the federal court for the eastern district of Missouri, a three page complaint seeking damages from Michael Kelly for the losses suffered by the people to whom Mr. Plunkett and others sold the RHI universal leases. App. 538 (T. 1143, 1145). The federal complaint, styled Johnson v. Kelly, 2:07CV00016, alleged that Respondent Shumaker's clients (plaintiffs in the suit) were damaged by purchasing, from RHI's Missouri employees and agents, the universal leases. The complaint alleged that RHI and its employees and agents conspired to acquire the plaintiffs' money with the intent to never pay it back. App. 539 (T. 1146-1147). Mr. Plunkett, as Respondent Shumaker knew, was one of several agents who sold the RHI leases. App. 538 (T. 1142-1143).

Personal Injury Case

In March of 2007, Respondent Shumaker continued actively to represent Mr. Plunkett in the personal injury case pending in (by then) Shelby County, Missouri. On March 19, 2007, Respondent Shumaker filed a notice and request for trial setting in Mr. Plunkett's case. On April 4, 2007, the court filed a letter sent by Respondent listing Respondent's available trial dates. On April 6, 2007, Respondent participated, on his client Plunkett's behalf, in a trial setting hearing in *Plunkett v. American Family*. App. 539 (T. 1147).

RHI

On March 14, 2007, the Missouri Secretary of State's office issued a cease and desist order to Mr. Plunkett, and several others, prohibiting them from selling

unregistered securities, i.e., the RHI universal leases. App. 681-711. The order references actions taken by Mr. Plunkett when he was selling the RHI universal leases in 2003. App. 685-689. Mr. Plunkett, who had stopped selling the RHI leases several years before, complied with the cease and desist order. The order was the only action taken by authorities against Mr. Plunkett for his conduct in selling the RHI leases. He was not fined or criminally prosecuted. The cease and desist order had no impact on his license to sell insurance. App. 265 (T. 288-289).

Mr. Plunkett cooperated fully with the FBI in its investigation of the RHI scheme. He did not know the leases were fraudulent when he was marketing them.

> I had no idea that the leases were going to go bad. If I would have thought they would have, I would have never sold them. A friend of mine had been selling them for five years, and he had never had any trouble at all, and I no more than got to selling them, and the whole deal went bad within a year.

App. 265 (T. 290). Mr. Plunkett called all the people to whom he had sold leases and apologized and urged them to contact the authorities. App. 265 (T. 289-290).

Second Admonition

On June 8, 2007, the Office of Chief Disciplinary Counsel issued an admonition to Respondent Shumaker for violation of Rule 4-8.2(a). The admonition states that in 2005 Respondent filed a pleading in the Adair County Circuit Court containing statements that were false or were made with reckless disregard as to their truth or falsity. The false or misleading statements had to do with the role a local judge's wife played in an election

campaign, a prosecutor's investigative efforts, the status of an investigation against a judge, and the relationship between a local judge and prosecuting attorney. App. 677-678. Respondent Shumaker accepted the admonition. App. 533 (T. 1122).

Bixby Letter

Web Bixby was president of the insurance company, Old American, for whom Mr. Plunkett sold, through the Hannibal agency, insurance policies. Respondent Shumaker knew who Mr. Bixby was through his association with Mr. Plunkett. App. 264 (T. 284-285), 471 (T. 975-976).

In July of 2007, Mr. Plunkett, Respondent Shumaker, and Mr. Shumaker's friend and attorney, Danieal Miller, met in a social setting in Columbia. Respondent Shumaker and Mr. Miller relayed to Mr. Plunkett the idea of "teeing up" Old American Insurance Company as a way to reach a deep pocket on behalf of Respondent Shumaker's Johnson v. Kelly clients. App. 286 (T. 380-381), 380 (T. 729-730). Respondent told Mr. Plunkett that "Danny wanted to know what you thought about teeing up Old American Insurance Company to see if they can get some money out of them to pay back these lease holders since they had Old American Insurance Company." App. 266 (T. 292). "Teeing up" is a phrase universally used in the plaintiffs' bar. "Whenever you sue people, you tee them up." App. 390 (T. 769). Of the three people involved in the subject conversation, only Mr. Plunkett was not a lawyer. App. 390 (T. 770). Mr. Miller and Respondent Shumaker suggested to Mr. Plunkett that Old American would want to keep its name out of the RHI deal, and that the company had a lot of money, so "Let's go after them and get your policyholders back their money." App. 266-267 (T. 294-295).

Mr. Plunkett told Respondent and Mr. Miller unequivocally not to approach Mr. Bixby. App. 286 (T. 380-382). The only connection between Old American Insurance and the Johnson v. Kelly plaintiffs (Respondent's clients) was that Mr. Plunkett marketed and sold the RHI leases to the same people to whom he sold Old American policies over the years. App. 266 (T. 294). Mr. Plunkett told them that contacting Mr. Bixby could jeopardize his job selling insurance, and that according to his FBI contact, the FBI had the RHI situation under control.

> A. I told them. I said, "there ain't no sense in doing that." I talked to Jennifer French, which was the head person in charge of the universal lease program in Chicago, for our work with victims.
>
> Q. This was the FBI?
>
> A. This was the FBI. She was the head on this particular case, the RHI case, and she said, "you know, we are out here. We are going to help these victims and help everybody get their money back, but it is just going to take some time," and, in turn, I would call all my leaseholders and give them all that information, to tell them to hold tight, that I think we are, going to, get to the bottom of this.

App. 286 (T. 380-381). Mr. Plunkett told Respondent and Mr. Miller that if they contacted Mr. Bixby, "I will probably be out of a job completely." App. 266 (T. 292).

Mr. Plunkett never changed his mind and gave Respondent Shumaker his consent to contact Mr. Bixby. App. 286 (T. 382).

In a letter dated August 8, 2007, Respondent Shumaker wrote Mr. Bixby and advised him that he represented a number of people who had lost money in the RHI scheme. He stated he had filed a federal lawsuit against Mr. Kelly seeking the return of his clients' money. Respondent noted that a least one of the agents who marketed the RHI leases also "sold or sells Old American/Kansas City Life policies." Respondent Shumaker's letter continued:

> Since these clients were Kansas City Life/Old American policy holders that were approached by at least one of your agents/representatives to invest in RHI, your companies have civil exposure in my opinion. Accompanying this letter is a list of those policy holders who are affected along with the current respective amounts of restitution owed to them.
>
> Should you be willing, I would like to speak further with you and/or your representative(s) about this matter. Should I not hear from you within ten (10) days from the date of this letter, I will proceed accordingly.

App. 670-671. Respondent Shumaker did not obtain written consent from Mr. Plunkett before sending the letter to Bixby. App. 540 (T. 1150).

When Mr. Plunkett found out that Respondent Shumaker had written the letter to Mr. Bixby, he could not believe Respondent Shumaker would do it. App. 286 (T. 382). After Respondent wrote the letter to Mr. Bixby, Mr. Plunkett left an angry message on Respondent's answering machine telling Respondent he would get what was coming to him, or would not get by with this one. App. 283 (T. 369), 473 (T. 983-984). The angry message was left in late August of 2007. App. 473 (T. 984).

Both Respondent Shumaker and Mr. Miller testified that sending Mr. Bixby the letter was not only Mr. Plunkett's idea, but that Mr. Plunkett demanded that Respondent write the letter because he was afraid of being criminally prosecuted for his role in the RHI matter. App. 379-380 (T. 726-727), 389 (T. 766).

Both Respondent Shumaker and Mr. Miller testified that they discussed the potential for conflict of interest on the July 2007 day the Bixby letter was discussed with Mr. Plunkett. App. 381 (T. 732), 473 (T. 984). In Mr. Miller's opinion, there was no conflict because there was no direct relationship between Mr. Plunkett and Old American Insurance Company, and Mr. Plunkett was entitled to direct Respondent Shumaker to write such a letter to keep himself out of jail. Mr. Miller also saw no conflict in Respondent's representation of Mr. Plunkett in the personal injury matter and in representing the RHI investors in Johnson v. Kelly. App. 381 (T. 733-734). Respondent's recollection of Mr. Miller's conflicts advice is very like Mr. Miller's. App. 473 (T. 985). Respondent Shumaker testified that writing the letter to Bixby was advancing Mr. Plunkett's interests by helping him stay out of jail. Respondent Shumaker testified that no written waiver was required. App. 540 (T. 1150).

September 2007 to Present

The first $35,000.00 payment Mr. Plunkett owed Respondent pursuant to the terms of the September 2006 promissory note was due September 7, 2007. App. 263 (T. 280), 659. Mr. Plunkett did not pay Respondent the $35,000.00. App. 263 (T. 280). In a certified letter from Respondent to Mr. Plunkett dated September 28, 2007, Respondent reminded him that his payment was past due. Respondent offered to grant him an extension of time to March 7, 2008, to make the payment and enclosed a document he asked Mr. Plunkett to sign and return to him memorializing the extension of time. App. 263 (T. 281-282), 668.

A second letter, also dated September 28, 2007, and sent certified mail by Respondent to Mr. Plunkett, referenced the *Plunkett v. American Family* case. Respondent stated in the letter that Mr. Plunkett seemed "unhappy or concerned about something" and questioned whether Mr. Plunkett wished him to continue representing him in the personal injury case. App. 263 (T. 282), 667.

Mr. Plunkett did not respond to either of Respondent Shumaker's September 28, 2007, letters because Mr. Plunkett was very upset with Respondent. App. 263-264 (T. 282-283). Mr. Plunkett questioned why he would respond to Mr. Shumaker after Respondent had betrayed him, was dishonest with him, and "never done anything that he told me he was going to do. He said he was never going to do anything with my promissory note. He wasn't going to do anything with the trust, and he run right down to Columbia in Boone County within thirty days and filed it." App. 270 (T. 313-314).

On October 19, 2007, Respondent filed a motion to withdraw from Mr. Plunkett's personal injury case. The motion states Respondent was moving to withdraw because Mr. Plunkett, his client, failed to cooperate and communicate with him. App. 655. On November 9, 2007, the judge sustained Respondent's motion to withdraw "but only effective upon entry of appearance by substitute counsel." App. 657.

On or about October 29, 2007, Respondent Shumaker sent letters to all of his Johnson v. Kelly clients to whom Mr. Plunkett had sold RHI leases. App. 540 (T. 1151). The letters acknowledge that the clients may have been referred to him by Mr. Plunkett. The letter advised the clients that the RHI case had been delayed by Mr. Kelly's incarceration and stayed by the court until the criminal charges were resolved. The letter goes on to state:

> Perhaps you know that I have represented Mr. Plunkett in the past. I currently represent him in a personal injury matter and want to be clear that should any of you harbor any thoughts of pursuing a matter against Mr. Plunkett or any company or individual he works for, I cannot represent you further. I cannot even advise you on what you can or cannot do or may do in this regard. Therefore, I request that you seek legal advice from another attorney pertaining to such matters.
>
> By this correspondence, I am not suggesting that Mr. Plunkett did anything wrong. However, it has come to my

> attention that he was the agent through which you purchased this lease. Please speak with the counsel of your choice should you wish to explore such matters further. In the event that you wish for me to continue representing you in this matter please execute and release the enclosed form. It indicates that you have been apprised of this situation, you waive any potential conflict that may arise in this regard and release Mr. Plunkett, his superiors and companies for which he sells insurance.

A release and waiver of conflict form was enclosed with each letter for the client to sign and return to Respondent Shumaker. App. 540 (T. 1153), 672-674.

Respondent Shumaker testified that there was no conflict of interest in the Johnson v. Kelly case that required him to obtain the waivers. App. 476 (T. 994). He testified he sent the conflict waiver forms to his RHI clients in late October of 2007 because Mr. Plunkett left the angry message on his answering machine (in late August) after he found out Respondent had written the Bixby letter. App. 540-541 (T. 1153-1154).

On January 25, 2008, the judge in Plunkett v. American Family made Respondent's motion to withdraw effective. The court cancelled the trial dates set for the case in February and continued the case to March 28, 2008. On March 28, 2008, the court noted no appearances and continued the case "until noticed by either party." On July 14, 2008, the court, on joint stipulation of the parties, dismissed the case with prejudice. App. 657.

After Respondent Shumaker withdrew from his case, Mr. Plunkett talked directly with American Family's counsel and agreed to settle the personal injury case for $30,000.00. American Family sent Mr. Plunkett a check, made out to him and Respondent Shumaker, for that amount. App. 264 (T. 283). Mr. Plunkett endorsed the check and sent it to Respondent's attorney. App. 264 (T. 284). When Respondent would not endorse the check, Mr. Plunkett obtained the services of Jim Griffin, an attorney who practices in Kansas City, to assist him in getting his share of the American Family settlement and to help him with the deed of trust held by Respondent. Mr. Griffin worked with Respondent's attorney to get Respondent to endorse the check so Mr. Plunkett could get his share of the settlement. App. 288 (T. 387). Respondent Shumaker wrote a check dated July 19, 2008, made payable to Mr. Plunkett and Mr. Griffin, in the amount of $19,970.90. Respondent Shumaker retained the other, approximately, $10,000.00. App. 264 (T. 284).

Respondent Plunkett has not filed any litigation against Respondent Shumaker. App. 284 (T. 372). Mr. Griffin did assist Mr. Plunkett in filing a complaint against Respondent Shumaker with the Office of Chief Disciplinary Counsel in February of 2008. App. 534 (T. 1126), 545 (T. 1171).

Count III

Background

In the mid-70s, Andy and Dot Skinta purchased a lot fronting Highway 63 (street address 1316 North Baltimore Street) in Kirksville, Missouri. App. 168 (T. 20-21), 170 (T. 27-29). A pole barn structure, constructed in 1971 and consisting of approximately

1800 square feet on the ground floor, sat on the store lot. App. 170 (T. 27). In 1977, the Skintas opened a retail store, called Kaleidoscope, in the building. Initially the Skintas rented audio visual equipment out of the store, but later expanded into selling Apple computers and other electronic equipment, as well as renting videos. App. 168 (T. 20).

In 1975 the Skintas started a real estate business they called Windsong Realty in Kirksville. App. 167-168 (T. 18-19). Windsong Realty was a minor player in the Kirksville real estate market. App. 313 (T. 488-489). Windsong went out of business in 2002. App. 168 (T. 20).

Mr. and Ms. Skinta owned some residential rental properties in Kirksville. At most they owned two rental houses and a four-plex, a mobile home, as well as some vacant lots. App. 167 (T. 18), 198 (T. 141). By 2006, their rental property, exclusive of empty lots, consisted of the two houses, one of which was in a state of disrepair. The other was occupied by a tenant who was paying $305.00 per month rent. App. 176 (T. 52), 198 (T. 140-141).

Mr. Skinta hired Respondent, who he had known for several years, to represent him in 2001 or 2002 in a license revocation matter. App. 172 (T. 36-37). Mr. Skinta had been stopped and asked to take two breathalyzer tests, which he "passed," then was asked to take a third, which he refused to do. He hired Respondent to get his license reinstated. Mr. Skinta explained to Respondent Shumaker that he suffered from bipolar disorder, and that the police could mistake his manic behavior for drunkenness or being under the influence of drugs. App. 175 (T. 48), 481 (T. 1017). Respondent Shumaker explained

the situation to the judge, who reinstated Mr. Skinta's license. Mr. Skinta was pleased with Respondent's representation. App. 175 (T. 48-49).

By late October of 2006, the Skintas owned three contiguous lots, one of which was the previously described store lot, located at the intersection of Highway 63 (Baltimore Street) and New Street in Kirksville. The lots are depicted on Informant's Exhibit 4 and Respondent's Exhibit W. App. 610, 971. The store lot is on the northeast corner of the intersection of Highway 63 and New Street and abuts Highway 63 on its southern border. (On Informant's Exhibit 4, north is at the bottom of the exhibit, east the left side of the exhibit, and west the right side of the exhibit. App. 168-169 (T. 22-23). Intuitive spatial orientation can be achieved by rotating the exhibit 180 degrees.) None of the other property shown on Exhibits 4 or W, i.e., property other than the Skintas' three lots, has sold in years. App. 311 (T. 481-482).

Directly north of the Kaleidoscope store lot is the "house lot." App. 169 (T. 24). The third lot owned by the Skintas in October of 2006 was a vacant lot consisting of two thirds of an acre. It is located east of the house lot and northeast of the store lot. App. 169 (T. 25).

In July of 2004, the Skintas purchased the one-bedroom, 900 square foot house located on the "house lot" to the north of the Kaleidoscope lot. Although the mortgage on the Kaleidoscope property had been paid off in 2003, the Skintas borrowed money in 2004 both to purchase the house (for $45,000.00) and against the Kaleidoscope property, in order to make improvements to the store. App. 171 (T. 31). The 2004 loan, borrowed from Northeast Missouri State Bank, was for around $70,000.00. App. 212 (T. 200-

201). The monthly loan payment the Skintas owed the bank was $501.69. App. 171 (T. 32), 485 (T. 1031).

The Skintas' mortgage payments on the 2004 loan were current until April of 2006. App. 205-206 (T. 170-171). In April of 2006, they stopped paying the mortgage. The Skintas had suffered some business and personal setbacks that they believed contributed to Mr. Skinta's manic behavior and poor decision-making, and consequent mortgage arrearage. Mr. Skinta was spending their mortgage money to remodel one of their two rental houses and the Kaleidoscope store. App. 176 (T.52-54), 206 (T. 171). In the summer of 2006, Mr. Skinta was hiring all kinds of people to help him with the remodeling project and was "bouncing off walls." App. 215 (T. 214). When Ms. Skinta would come home from her hourly wage job on Fridays, "there were people waiting in the kitchen for money so that I could pay them." App. 215 (T. 214).

In August of 2006, Northeast Bank sent the Skintas a letter advising them they were $2,007.96 behind in their payments. The bank warned it would accelerate the loan payments and initiate foreclosure proceedings if the Skintas did not bring the loan current by August 21, 2006, which they were unable to do. App. 176 (T. 54), 177 (T. 57), 611.

In late September of 2006, the bank sent the Skintas a Notice of Trustee's Sale, advising them the two lots would be sold at the Adair County courthouse on October 27, 2006, at 2:00 p.m. App. 177 (T. 56-57), 612. The Skintas had never before been a party to foreclosure proceedings. App. 177 (T. 57).

The Skintas did not have the $69,000.00 to $70,000.00 they owed the bank. App. 207 (T. 176-177). Their income in October of 2006 consisted of what Ms. Skinta earned

working 35-40 hours per week at $7.95 to $9.95 per hour, rental income from the one tenant in the amount of $305.00, and sporadic nominal income from sales at Kaleidoscope. App. 176 (T. 52), 211 (T. 196-197). Windsong had stopped operating in 2002, and the Skintas' real estate licenses had lapsed. App. 176 (T. 52), 214 (T. 208).

In early October of 2006, the Skintas assessed their limited options. They thought they could negotiate for additional time with the bank, watch the foreclosure sale go forward and hope to recoup from the sale some of the equity they believed they had in the property, or exercise their right of redemption. App. 207 (T. 176-177).

Ms. Skinta had discovered the right of redemption by doing research on the internet. It was her understanding, from her internet research, that if the Skintas filed something prior to the foreclosure sale and if the bank bought the property, the Skintas would gain one year to come up with the loan arrearage to get the property back. App. 207 (T. 176-177). Mr. Skinta understood that if a "right of redemption," which he thought was a legal form, was filed before the sale, that it would "go into effect" and give them one year to come up with the money to redeem the property. App. 179 (T. 63-64). He did not realize, and Respondent never explained to him, that the right could only be exerted if the bank bought the property and if the Skintas posted bond. App. 182 (T. 77-78, 191 (T. 113). All the Skintas knew about the right of redemption is what they got off the internet. App. 182 (T. 77-78).

Ms. Skinta estimated the fair market value of the store and house lots, in October of 2006, was approximately $175,000.00. App. 183 (T. 81). She estimated that the Skintas had about $100,000.00 equity in the two lots. App. 207 (T. 176).

Mr. Skinta estimated the fair market value of the house and store in October of 2006 was approximately $175,000.00. App. 183 (T. 81). He estimated that they had about $105,000.00 in equity in the two lots. App. 183 (T. 81).

The three lots owned by the Skintas in October of 2006 are together worth more than the store and house lots without the vacant lot. App. 310 (T. 476).

Mr. and Ms. Skinta believed they had a chance at convincing the bank to hold off the foreclosure. Before the bank accelerated the note, they were in arrears only about $3,500.00. App. 178 (T. 60). They owned other property that could be sold and could be put up as additional collateral, or they could liquidate the store inventory to raise money. App. 178 (T. 60, 62), 179 (T. 65).

On about October 22, 2006, Ms. Skinta composed and sent a letter to approximately twenty people who lived around Kirksville. She sent the letter to people who she knew were interested in real estate and who she thought would be financially able to bid on their property at the foreclosure sale. App. 206 (T. 173), 620. Ms. Skinta believed the two lots to be sold at the foreclosure sale were worth far more than they "were being foreclosed for." App. 206 (T. 174). She reasoned that the more people, with the means and the savvy to realize the real value of the property, who showed up to bid at the sale, the greater the likelihood would be that the Skintas would realize enough equity from the sale to restart their lives. That was why she sent the letters. App. 206 (T. 174). Ms. Skinta mailed one of the letters to Respondent. App. 184 (T. 85).

Warranty Deed and Lease Agreement

On Tuesday, October 24, 2006, Mr. Skinta telephoned Respondent to see if he could help them. App. 177 (T. 57-59). He told Respondent that the Skintas were in a lot of trouble; that their property was being foreclosed later in the week. He asked Respondent Shumaker if he could help them in negotiating with the bank or in exerting the right of redemption for them. App. 178 (T. 59-61). Mr. Skinta chose to call Respondent because he had been pleased with the earlier representation; Mr. Skinta knew Respondent owned numerous rental properties and farms, so assumed he would be familiar with real estate law; and Mr. Skinta believed Respondent was a former member of the bank's board, so might have connections that could assist them in negotiating with the bank. App. 177-178 (T. 58-59).

Respondent Shumaker said he would contact the bank. He did not explain or discuss the right of redemption with Mr. Skinta. App. 182 (T. 77). He then asked whether the Skintas would consider leasing the house and store back from him if he ended up owning or acquiring the property. App. 178 (T. 61). Mr. Skinta replied that that would have to be an absolute last resort; that he would have to talk to Dot (Ms. Skinta) about it. App. 178 (T. 61). Respondent also asked Mr. Skinta to get an appraisal, or evaluation, of the property as soon as possible. App. 179 (T. 65), 190 (T. 107).

Mr. Skinta then called Harry Rider, a local appraiser. App. 179 (T. 65-66), 306 (T. 461). Mr. Rider went to the Skintas' property on the evening of October 24. App. 306 (T. 462). Mr. Skinta told him that he was trying to come up with ideas to stop the

bank foreclosure. Mr. Skinta could not afford, and there was not enough time, for Mr. Rider to do a formal appraisal. App. 309 (T. 474). Mr. Rider instead provided Mr. Skinta with a handwritten evaluation of the property. App. 613. He indicated that all three lots were worth $100,000.00 in a "quick sale," or $200,000.00 to $350,000.00 if the property could be marketed for one to two years. App. 180 (T. 68-70), 613. Mr. Rider told Mr. Skinta he could take the handwritten evaluation to the bank and tell the bank that was how much the property would list for. App. 309 (T. 474). Mr. Rider and Mr. Skinta then went out to the back yard, and Mr. Rider offered him $100,000.00 for the property. App. 180 (T. 69-70). Mr. Skinta declined the offer because the Skintas did not want to sell it, and because they believed Respondent would succeed in working something out with the bank. App. 180 (T. 70). The Rider evaluation was faxed by Ms. Skinta late that evening to Respondent's office, with a cover note written by Ms. Skinta saying "Thanks. Anything you can do to help us would be great." App. 213 (T. 204-205), 447 (T. 998).

Respondent Shumaker called the bank after talking to Mr. Skinta on the 24th. Respondent was told he needed to talk to Gary Major, a bank vice-president. App. 477 (T. 999). Mr. Major officed in a different town so Respondent called Mr. Major's office and left a message for him, as he was not there. App. 477 (T. 1000). Mr. Major testified that when he did speak to Respondent, he was "not aware it was in the Skintas' behalf but he called and asked me if we would postpone the sale, and I advised him we would not." App. 957.

In a subsequent telephone conversation between Respondent and Mr. Skinta, which probably took place on October 25, Respondent acknowledged receiving the fax

(property evaluation) sent by Ms. Skinta. Respondent told Mr. Skinta the bank was "really pissed off at you," and that Respondent ought to be able to tell the Skintas something by later that day or the next. App. 180-181 (T. 70-71).

Mr. Skinta heard nothing further from Respondent Shumaker. He anticipated Respondent was negotiating with the bank or filing whatever paperwork was necessary for them to claim the right of redemption. App. 181 (T. 71-72).

On the morning of October 27, Ms. Skinta went to work. App. 208 (T. 181). Ms. Malloy, respondent's secretary, telephoned Mr. Skinta at the Skinta home. She told him there were papers at Respondent's office that he and Ms. Skinta needed to sign before noon. App. 181 (T. 74). Mr. Skinta picked Ms. Skinta up from work, and they drove to Respondent's office. App. 182 (T. 75). Mr. Skinta anticipated the paperwork would have to do with postponing the foreclosure or exercising the right of redemption, because that is what he had discussed with Respondent. App. 182 (T. 75).

Respondent Shumaker was not at the office when the Skintas arrived, but Ms. Malloy was there. Ms. Malloy told them Respondent was at the hospital, where his mother-in-law was undergoing surgery. App. 182 (T. 75-76), 209 (T. 185), 484 (T. 1026). Ms. Malloy told the Skintas she had some papers for them to sign. The paperwork consisted of a warranty deed and a lease agreement. App. 182 (T. 76), 208 (T. 182).

The warranty deed appears as Exhibit 9 in the record. App. 614-615. The deed conveys all of the Skintas' interests in the store and house lots to Miller Properties, LLC.

The lease appears as Exhibit 10 in the record. App. 616-618. Miller Properties, LLC is identified as the landlord, and Mr. and Ms. Skinta as the tenants. The document leases the house and store to the Skintas for $700.00 a month.

Both Mr. and Ms. Skinta were shocked when they saw what the paperwork was. Mr. Skinta went into the restroom and got sick. App. 183 (T. 80), 209 (T. 183). Ms. Skinta asked what "Miller Properties" was, since she had never heard of it. App. 209 (T. 183, 185). Ms. Malloy said it was a relative of Seth's in Columbia. App. 209 (T. 183. Ms. Skinta told Ms. Malloy she "would rather take my chances at the courthouse steps." App. 209 (T. 183), 449 (T. 889). Ms. Malloy responded that "Seth wouldn't screw you." App. 209 (T. 183), 450 (T. 891). The Skintas asked to speak to Respondent, but he was not available. App. 209 (T. 185).

Neither Mr. nor Ms. Skinta knew there would be a warranty deed or lease for them to sign at Respondent's office on October 27, 2006. App. 183 (T. 80, 82), 193 (T. 120), 209 (T. 184), 217 (T. 220-221). Mr. Skinta speculated that the deed and lease were a "legal maneuver" that Respondent had come up with that would allow them to "own the property back." App. 193(T. 120). Ms. Skinta's mind was racing. She knew that the foreclosure sale would happen in two hours. She knew her husband was depressed. She thought she should not trust what was in front of her, but she also believed she needed to trust what was happening and that Respondent would not screw them because he was their attorney. App. 209 (T. 183), 210 (T. 187).

At no time on or before October 27, 2006, had Respondent Shumaker explained to Mr. or Ms. Skinta what Miller Properties, LLC was or what Respondent's connection to

it, if any, was. App. 184 (T. 84). At no time on or before October 27, 2006, had Respondent Shumaker talked to Mr. or Ms. Skinta about conflict of interest or asked them to sign a conflicts waiver. App. 184 (T. 83), 210 (T. 187). At no time on or before October 27, 2006, did Respondent Shumaker advise Mr. or Ms. Skinta to seek the advice of counsel before signing the deed and lease. App. 184 (T. 83). There had been no negotiation or discussion about the amount of the rent, which exceeded the monthly mortgage payment the Skintas had been unable to pay by $200.00. App. 183 (T. 82), 209 (T. 186). The only discussion about selling the property to Mr. Shumaker and leasing it back had been Respondent's query to Mr. Skinta on October 24. App. 192 (T. 116-118). Ms. Skinta did not communicate with Respondent at all, other than her note on the fax cover sheet, in the week before October 27. App. 208 (T. 181), 219 (T. 227).

Mr. and Ms. Skinta did sign the warranty deed and lease on October 27, 2006. App. 184 (T. 84, 209-210 (T. 186-187). They believed Respondent Shumaker was acting as their lawyer and would not do anything contrary to their interests. App. 184 (T. 85), 218-219 (T. 226-227). Respondent had in no way communicated to the Skintas that he was not representing them on October 27, 2006. App. 181 (T. 72-73), 184 (T. 85), 208 (T. 181), 524 (T. 1088).

Respondent Shumaker testified that he called Mr. Skinta on October 26 and told him the bank would not work with them. He testified that Mr. Skinta then called him back, on the 26th, and asked if Respondent would buy the property and lease it back to them. He testified that Mr. Skinta told him on the 26th that the Skintas would sell him the lots for $70,000.00 and lease them back from Respondent for $700.00 a month. App. 480

(T. 1010-1013). Respondent Shumaker testified that, late on the afternoon of the 26th, he had a title lien search done on the property. App. 480 (T. 1013). The title lien search revealed a $15,584.00 judgment lien against Mr. Skinta for a student loan default and an $8,709.00 judgment lien against Ms. Skinta for unpaid credit card debt. App. 194 (T. 126-127), 200 (T. 150), 214-215 (T. 209-211), 307 (T. 465-466).

Respondent Shumaker testified that, on October 26, he called the bank and ascertained the bank would sell him the Skintas' note for $70,000.00. App. 481 (T. 1014-1015). Respondent Shumaker testified that he then conferred with Mr. Miller about how best to purchase the property, given the presence of the liens. App. 482 (T. 1020). Respondent was aware that because the liens were against the Skintas individually, but the property was owned by the entireties, that the liens were not necessarily true clouds on the title. App. 482 (T. 1020-1021). Respondent wanted, nevertheless, to avoid the risk of becoming responsible for the liens if one of the Skintas passed away. App. 482 (T. 1021).

Respondent Shumaker and Mr. Miller came up with the idea of making Miller Properties, LLC, the grantee of the Skintas' property. App. 482 (T. 1021). Miller Properties, LLC was used as a straw party in the transaction to "clear up liens and title problems." App. 382 (T. 737-738), 482 (T. 1021), 525 (T, 1093).

Mr. Miller was the only member of Miller Properties, LLC. App. 397-398 (T. 798-799). Miller Properties, LLC, was a one-third owner/member of KV1316, LLC. App. 486 (T. 1035), 524 (T. 1089). Respondent Shumaker was also a one-third owner/member of KV1316, LLC. App. 486 (T. 1034-1035), 546 (T. 1174).

Respondent Shumaker, along with his wife, were the only owner/members of Reaggy, LLC. App. 389 (T. 765), 525 (T. 1090).

Mr. Miller testified that the liens meant "there would likely have to be a foreclosure." App. 383 (T. 739). He allowed Respondent to use Miller Properties, LLC as a straw party in the transaction because he did not care if Miller Properties was a party to a foreclosure, whereas the Skintas or Respondent Shumaker would care. App. 383 (T. 739-740). Mr. Miller authorized Respondent Shumaker to act as Miller Properties' agent in the transaction. App. 383 (T. 741), 400 (T. 810). According to Mr. Miller, Miller Properties' risk in the transaction was that if one of the Skintas died before the liens were "cleared up" or if Respondent had died, and the property was foreclosed, Miller Properties would be responsible for paying the surviving Skinta's judgment lien. App. 383 (T. 740), 398 (T. 800), 402 (T. 815). After conferring with Mr. Miller, Respondent Shumaker testified he had a third conversation with Mr. Skinta, wherein he explained the lien issue and that the property would convey to Miller Properties to avoid it. App. 483 (T. 1022). Respondent testified he thereafter prepared the warranty deed and lease agreement for the Skintas to sign the next day. App. 481 (T. 1015-1016).

In a letter from Northeast Bank (Mr. Major), dated October 30, 2006, the Skintas were advised that their 2004 note, in the amount of $70,000.00 secured by a deed of trust, had been "assigned to KV1316 LLC in care of Seth Shumaker." App. 619. Respondent Shumaker personally guaranteed the money used to purchase the note. App. 486 (T. 1036). No one paid the Skintas any money for the conveyance. App. 528 (T. 1103). The warranty deed by which the Skintas conveyed the two lots to Miller Properties, LLC, was

filed in the Adair County Recorder of Deeds office on November 1, 2006. App. 614-615. It was always Respondent's intent that the Skinta property be owned by the Shumakers, regardless of what entity it was initially conveyed to. App. 525 (T. 1093).

It will never be known what would have happened had the foreclosure sale gone forward on the afternoon of October 27, 2006, other than that the bank would have bid what was owed the bank, something in the area of $69,000.00. App. 217 (T. 222-223), 957-958. Typically the bank bids what is owed on the loan, plus attorney's fees, then the property goes back to the bank and the bank sells it. App. 312(T. 486).

The Skintas continued living in the house after October 27, 2006. They did not know what had happened. Mr. Skinta was a "wreck." He opened the store only sporadically. App. 185 (T. 87-88). They paid no rent to Respondent for the first three months. App. 210 (T. 188).

On the afternoon of February 9, 2007, Mr. Skinta was assisting a customer in the Kaleidoscope store. He heard a knock on the store's front door and noticed a police car parked in the driveway. As he was walking toward the back door, two Kirksville police officers walked in. App. 185 (T. 88). The officers told Mr. Skinta that he no longer owned the building, that Respondent Shumaker did, and that he and the customer should leave the building and contact Mr. Shumaker. App. 185 (T. 88-89), 196 (T. 131). Mr. Skinta believed he was ordered out of the store and never afterward felt he had unfettered access to the store building. App. 185 (T. 89).

One of the policemen who answered the "report of suspicious activity" at the store on February 9, 2007, was Officer William King. He was an old friend and long-time

business partner (in an LLC called Esquire Investments) of Respondent Shumaker's. App. 322 (T. 525), 325 (T. 536). Mr. King testified that he did not order Mr. Skinta out of the building. App. 323 (T. 530). The "narrative for event" portion of the report prepared by Officer King regarding the February 9 call states that Mr. Skinta "was advised to contact the new landlord." App. 972-973.

On March 26, 2007, a warranty deed by which Miller Properties, LLC, conveyed the store and house lots to Reaggy, LLC, was recorded in Adair County. App. 679-680.

On April 3, 2007, a deed of trust between Respondent Shumaker and his wife and U.S. Bank was recorded in Adair County. The deed of trust secured a loan to the Shumakers not to exceed $112,500.00. The Shumakers used the store and house lots to secure the deed of trust and obtain the loan. App. 530 (T. 1111-1112), 919-929.

The Skintas paid Respondent a total of $8,950.00 for rent between February 26, 2007 and March of 2009. All the checks were made payable "Seth Shumaker". App. 210 (T. 188), 1191-1199.

2007 to Present

Communication between Respondent and the Skintas from 2007 through early 2009 reveals disagreement over payment of rent and unreimbursed property taxes, access to the store building, and Respondent's interest in purchasing the Skintas' third lot, the vacant lot. App. 621-624, 943-945. The issue with the property taxes arose because Respondent was "required" by the Adair County Collector to pay the back property taxes on the Skintas' vacant lot when he went to pay the taxes on the "property I did purchase." App. 625. On May 12, 2009, Respondent wrote the Skintas a letter stating unless they

brought their past due rent current and reimbursed him the property taxes, they should vacate the premises no later than July 1, 2009. App. 626.

On June 26, 2009, the Skintas' complaint against Respondent Shumaker was received by the Office of Chief Disciplinary Counsel. App. 896-915.

Post Complaint

On July 13, 2009, Respondent, through Reaggy, LLC, the LLC wholly owned by him and his wife, filed a petition in Adair County against Mr. and Ms. Skinta for rent and damages. In late July of 2009, the Skintas met with Respondent Shumaker in his Kirksville law office. App. 526 (T. 1096), 1309-1310. Respondent Shumaker covertly videotaped and recorded the meeting. App. 190 (T. 107), 215 (T. 213). Respondent did not tell the Skintas he was recording the meeting. The camera that recorded the meeting was not out in the open where the Skintas would notice it. App. 218 (T. 224). A DVD, but no transcript, of the meeting was entered into evidence as Respondent's Exhibit BBB. Respondent, who had already received a copy of the Skintas' complaint against him, said nothing to the Skintas during the secretly taped meeting about the three telephone calls he testified occurred on October 26, 2006, between Mr. Skinta and him. Nor does Respondent's written response to OCDC regarding the complaint which he described as his counsel's response, not his, mention anything about the alleged October 26 telephone calls. App. 526-527 (T. 1097-1098).

On September 8, Informant filed an amended information incorporating the Skintas' complaint into Count III. App. 50-66.

On September 14, 2009, Respondent filed a second amended petition for rent and damages against the Skintas. Respondent sought to evict the Skintas in Count IV of the petition. App. 930-935. Respondent never asked the court for leave to file the second amended petition. App. 527 (T. 1101). The Skintas filed counterclaims against Respondent, and the case is currently pending in the Second Judicial Circuit as Skinta v. Shumaker, 10AR-CV00010.

In late November of 2009, Mr. Miller contacted a Columbia real estate appraisal company about doing an appraisal of the store and house lots purchased by Respondent in October of 2006. App. 374 (T. 705), 375 (T. 710). The company inspected the property on December 7, 2009. The company performed a retroactive value opinion appraisal of the property, which means the appraiser made the extraordinary assumption that the buildings were in similar condition in December of 2009 as they were in October of 2006. App. 374 (T. 703-704). The appraisal concluded the property had a market value of $114,000.00, which took into account the cost of razing the buildings (which, it was concluded, would be the highest and best use of the property). App. 370-371 (T. 690-691). It was estimated to cost $14,000.00 to raze the buildings. The appraisal estimated the liquidation value of the property to be $68,000.00. The liquidation value takes into account the payment of the judgment liens and unpaid property taxes, which would have to be paid before the property could be developed. App. 371-372 (T. 693-695). The appraisal did not take into account the value of the property to the Skintas or the value of the property with the third lot, still owned by the Skintas. App. 373 (T. 699-700), 376 (T. 714).

The Skintas and Mr. Plunkett did not know each other and had no relationship before their disciplinary complaints were filed with OCDC. App. 186 (T. 92), 211 (T. 196), 267 (T. 296)

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN ADVERSE INTEREST IN CLIENT PLUNKETT'S PROPERTY (PROMISSORY NOTE AND DEED OF TRUST) ON TERMS THAT WERE UNREASONABLE AND UNFAIR, WERE NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING, DID NOT ALLOW PLUNKETT REASONABLE OPPORTUNITY TO SEEK ADVICE OF INDEPENDENT COUNSEL, AND TO WHICH PLUNKETT DID NOT CONSENT IN WRITING.

Rule 4-1.7

Rule 4-1.8

Rule 4-1.8(a)

Rule 4-1.9

Rule 5.15(c)

Bybee v. S'renco, 316 Mo 517, S.W. 459 (Mo. 1926)

Demmell v. Hammett, 230 S.W.2d 686 (Mo. 1950)

Laspy v. Anderson, 361 S.W. 2d 680 (Mo. 1962)

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.7(b) AND RULE 4-1.8(b) IN THAT RESPONDENT'S REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS WAS MATERIALLY LIMITED BY HIS OWN INTERESTS AND THOSE OF MR. PLUNKETT'S, RESPONDENT COULD NOT HAVE REASONABLY BELIEVED HIS REPRESENTATION OF MR. PLUNKETT WOULD NOT ADVERSELY AFFECT HIS REPRESENTATION OF THE JOHNSON CLIENTS, AND IN THAT HE USED INFORMATION RELATING TO THE REPRESENTATION TO MR. PLUNKETT'S DISADVANTAGE AFTER THE CLIENT TOLD HIM NOT TO.

Rule 4-1.7(b)

Rule 4-1.8(b)

ABA/BNA Lawyers Manual on Professional Conduct 51:101

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN INTEREST ADVERSE TO THE SKINTAS (WARRANTY DEED AND LEASE) ON TERMS THAT WERE NOT FAIR AND REASONABLE, NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING TO THE CLIENTS, AND TO WHICH THE CLIENTS WERE NOT GIVEN A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL, AND DID NOT GIVE WRITTEN CONSENT.

Rule 4-1.8(a)

Restatement (Third) of The Law Governing Lawyers §14(1)(a)

In re Trewin, 684 N.W.2d, 121 (Wisc. 2004)

IV.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE HE KNOWINGLY AND BY SUBTERFUGE ACQUIRED OWNERSHIP OF OR INTERESTS ADVERSE TO CLIENTS' PROPERTY IN THAT THE CLIENTS WERE IN VULNERABLE SITUATIONS, RESPONDENT DID NOT DISCLOSE IN WRITING THE TERMS OF THE TRANSACTIONS AND DID NOT OBTAIN WRITTEN INFORMED CONSENT TO THE CONFLICTS INHERENT IN THE TRANSACTIONS.

Rule 4-1.7(a)

Rule 4-1.7(b)

Rule 4-1.8(a)

Formal Opinion 123

ABA Standards for Imposing Lawyer Discipline (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN ADVERSE INTEREST IN CLIENT PLUNKETT'S PROPERTY (PROMISSORY NOTE AND DEED OF TRUST) ON TERMS THAT WERE UNREASONABLE AND UNFAIR, WERE NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING, DID NOT ALLOW PLUNKETT REASONABLE OPPORTUNITY TO SEEK ADVICE OF INDEPENDENT COUNSEL, AND TO WHICH PLUNKETT DID NOT CONSENT IN WRITING.

In this original discplinary proceeding, the Court reviews the evidence de novo and draws its own conclusions of law. *In re Coleman*, 295 S.W. 3d 857, 863 (Mo. banc 2009). The role of the disciplinary hearing panel is advisory; this Court independently determines all issues respecting witnesses' credibility. *In re Snyder*, 35 S.W. 3d 380, 382 (Mo. banc 2000). Professional misconduct must be proven by a preponderance of the evidence. Rule 5.15(c).

Long before there were disciplinary rules and rules of professional conduct, common law recognized the scrutiny to which all dealings between an attorney and his client were subject.

> [D]ealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, and to sustain a transaction of advantage to himself with his client the attorney has the burden of showing, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger.

Bybee v. S'renco, 316 Mo 517, 291 S.W. 459, 461 (Mo. 1926). The reason for such a high level of scrutiny is, of course, that the attorney stands in a position of trust, a fiduciary relationship, with the client. The relationship easily lends itself to overreaching by the lawyer. As a consequence, the attorney client relationship is "highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith on attorney's part." *In re Oliver*, 365 Mo 656, 285 S.W. 2d 648, 655 (Mo. banc 1956). See also *Demmel v. Hammett*, 230 S.W. 2d 686 (Mo. 1950) and *Laspy v. Anderson*, 361 S.W. 2d 680 (Mo. 1962).

Civil cases, typically pitting a client against a lawyer, and seeking an equitable remedy to rescind or cancel the outcome of a business transaction with the lawyer, are distinguishable from lawyer discipline cases on issues of burden of proof and presumptions. The law defining the relationship between lawyer and client is, however, applicable to both types of cases. Cf. *McRentals Inc. v. Barber*, 62 S.W. 3d 684 (Mo.

App. 2001). In this case, it is Informant's burden to prove, by a preponderance of the evidence, that the $250,000.00 promissory note from Mr. Plunkett to Respondent and his wife, and the deed of trust conveyed by Mr. Plunkett to Respondent and his wife, were business transactions in violation of Rule 4-1.8(a).

Before turning to the elements of the rule, it is necessary to debunk one of Respondent's persistent claims at the hearing of this matter. Respondent testified at least a half dozen times at the hearing that Mr. Plunkett was not his client. Mr. Plunkett was Respondent's current client at the time of the business transactions by virtue of the personal injury case, in which he represented Respondent from some time before the case was filed in 2003 until he was allowed to withdraw in 2008. Rule 4-1.8(a) does not require that the business transaction between the lawyer and client be substantially related to the representation. Rule 4-1.9, which governs conflicts with former clients, does contain the "substantial relationship" test. Rules 4-1.7 and 4-1.8, however, govern conflicts with current clients. The fact that the note and deed of trust had no direct relationship to Mr. Plunkett's personal injury case does not shield Respondent from the ethical constraints Rule 4-1.8(a) placed on his business transaction with Mr. Plunkett.

Rule 4-1.8(a) provided, in 2006, as follows:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interests adverse to a client unless:
>
> (1) The transaction and terms on which the lawyer acquires the interests are fair and reasonable to the client and

are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client consents in writing thereto.

The rule, then, required: that the transaction be fair and reasonable with all terms being disclosed and transmitted in writing to Mr. Plunkett in a manner that could be understood by Mr. Plunkett; that Mr. Plunkett have reasonable opportunity to seek the advice of counsel; and that Mr. Plunkett consent in writing.

This brief will assume as true the version of the facts related by Mr. Plunkett in those instances where Informant's evidence conflicts with Respondent's evidence. The credibility issue is specifically discussed under Point Relied On IV. It should be borne in mind, however, that a significant portion of Informant's case is not, and cannot, be disputed by Respondent. Those elements of Informant's case that cannot be disputed include the following facts:

1. Mr. Plunkett was, in September of 2006, Respondent's client in Plunkett v. American Family.

2. In September of 2006, Respondent prepared, and Mr. Plunkett signed, a Promissory Note agreeing to pay Respondent and his wife $250,000.00 in $35,000.00 annual payments.

3. In September of 2006, Respondent prepared, and Mr. Plunkett signed, a deed of trust conveying an interest in Mr. Plunkett's Boone County property to Respondent and his wife. Respondent had the deed of trust recorded on October 10, 2006.

4. Respondent did not have Mr. Plunkett sign any kind of waiver of conflict of interest regarding the transaction.

5. Respondent did not transmit in writing to Mr. Plunkett the transaction and terms on which Respondent was acquiring an ownership interest adverse to Mr. Plunkett and obliging Plunkett to pay him $250,000.00.

In contrast to the foregoing established facts, Respondent does dispute the fairness and reasonableness of the transaction. Respondent Shumaker testified that Mr. Plunkett's promise to pay $250,000.00 to the Shumakers, and his conveyance of a deed of trust in his home to the Shumakers, were in exchange for the Shumakers' additional capital contributions to MACB. He testified that Plunkett derived benefit by continuing to draw his salary and benefits from MACB's continued existence. Respondent also testified that the capital contributions put into MACB from September through October of 2006 were to secure Mr. Plunkett's capital contribution, and that Plunkett was given a percentage of the company for his capital contribution.

The Shumakers' additional capital contributions were not, by the terms of the MACB Operating Agreement, an initial contribution paid in consideration for the

ownership units that had been assigned to Mr. Plunkett at the LLC's inception. The time had come and gone for initial contributions. Mr. Plunkett already had his twenty-five percent interest in the company. Additional contributions were expressly, according to the Operating Agreement, discretionary and "shall not be required." The only conceivable way the capital infusion by the Shumakers, made supposedly in return for a promise by Plunkett to pay them $250,000.00 and convey to them a security interest in his house, could be fair and reasonable to Mr. Plunkett is if Mr. Plunkett had been awarded or transferred additional shares in the LLC. There is no persuasive evidence that happened. Meeks and Klutman kept track of capital contributions to MACB, and neither recalled any additional shares going to Mr. Plunkett. Klutman, the tax attorney, was asked, "The reason you did not go back and change Rusty's percentage of ownership interest on the basis of that contribution [made by Respondent on Plunkett's behalf] was because at the inception of the company, it was expected that he would contribute to the business in the future; is that correct?" Mr. Klutman answered "That is correct." Chris Shoemaker, the only MACB owner/member other than Respondent and Plunkett to testify at the hearing, recalled nothing about any additional shares going to Plunkett; only that Respondent's contribution was made on Plunkett's behalf. Respondent was asked on cross examination, "I take it . . . . MACB provided Mr. Plunkett no additional shares in MACB as a consequence of the contributions reflected in Exhibit RR, is that a correct statement?" Respondent answered that Mr. Plunkett might have been given a couple more percents, he "believed." When asked why nothing substantiating that seemingly critical bit of evidence, which would have been very favorable to Respondent's case, had

been produced, Respondent answered "I do not know that anyone has asked for it." In point of fact, the subpoena served on Respondent before his deposition was taken in this matter asked Respondent to produce any "documentation reflecting that Mr. Shumaker's acquisition of an interest in Plunkett's realty in September of 2006 was fair and reasonable to Mr. Plunkett." No documentary evidence supporting any claim that Mr. Plunkett was granted any additional shares in MACB upon the Shumakers' infusion of additional capital into the business was ever produced in this case.

The evidence does support the likelihood that Respondent was aggrieved in the late summer of 2006 that Mr. Plunkett had not put any money into the company initially and that he lacked the wherewithal to borrow the money needed to keep the company going. Yet, it was Respondent's choice to sink significant additional capital into MACB. Obliging Mr. Plunkett to promise to pay him a quarter of a million dollars to secure Respondent Shumaker's choice to invest additional capital does not translate into a "fair and reasonable" transaction to Mr. Plunkett. That Plunkett continued to draw his salary and benefits for another five months or so is hardly a fair exchange for $250,000.00. And if no one had put additional capital into MACB and it had folded in the fall of 2006, at least Mr. Plunkett would not, as he currently does, owe Respondent $250,000.00, and Respondent would not have a deed of trust against Mr. Plunkett's property.

Glaringly absent from Respondent's explanation for the transaction is any kind of writing explaining to Plunkett that the note and deed were in exchange for additional capital contributions to MACB by the Shumakers. Such a writing is an element essential to an attorney's business transaction with a client. Mr. Plunkett believed, at the time he

signed the note and deed, that he had to do so in order to get the $2,000.00 that he needed at the time. He made no connection between the note and deed and additional capital contributions to MACB until much later, when others made the connection for him. Respondent and his witnesses expressed disbelief that anyone could believe anything so ridiculous as that Mr. Plunkett would promise to pay $250,000.00 in exchange for $2,000.00. Yet, Mr. Shumaker could have provided Mr. Plunkett, and more to the point was ethically required to provide Mr. Plunkett, a written explanation, understandable to Mr. Plunkett, disclosing all the terms of the transaction. Such a writing would have gone a long way toward dispelling Mr. Plunkett's testimony in this case, but no such writing exists.

Respondent Shumaker testified that he advised Plunkett to consult another lawyer before signing the deed of trust. The veracity of that testimony rests on his testimony that Mr. Plunkett was presented the deed on or about September 5 and that it was returned to him, signed, on September 14. That is not, of course, the way Mr. Plunkett testified it happened. Mr. Plunkett testified he may have been shown a deed earlier by Respondent's secretary, but that he signed the deed on the 12th after being confronted with the option of signing or going away empty-handed. A preponderance of credible evidence supports Mr. Plunkett's testimony that Respondent did not suggest that he seek the advice of counsel before signing the deed.

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.7(b) AND RULE 4-1.8(b) IN THAT RESPONDENT'S REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS WAS MATERIALLY LIMITED BY HIS OWN INTERESTS AND THOSE OF MR. PLUNKETT'S, RESPONDENT COULD NOT HAVE REASONABLY BELIEVED HIS REPRESENTATION OF MR. PLUNKETT WOULD NOT ADVERSELY AFFECT HIS REPRESENTATION OF THE JOHNSON CLIENTS, AND IN THAT HE USED INFORMATION RELATING TO THE REPRESENTATION TO MR. PLUNKETT'S DISADVANTAGE AFTER THE CLIENT TOLD HIM NOT TO.

Count II of the amended information charged Respondent with violation of Rules 4-1.7(b) and 4-1.8(b). In 2006, those rules read in relevant part:

> 4-1.7(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonable believes the representation will not be adversely affected;
>
> (2) The client consents after consultation.

> 4-1.8(b) A lawyer shall not use information relating to a representation of a client to the disadvantage of the client unless the client consents after consultation.

The crux of count II is this: Mr. Plunkett was Mr. Shumaker's current client in 2006 and 2007, when Shumaker began representing the Johnson investment scheme clients. The loyalty that Shumaker owed his client Plunkett materially limited his ability to represent the Johnson clients. Because Respondent did not act ethically, he took on the case and then allowed his interest in advancing the Johnson clients' interests, and his own interest in collecting what started out as a fifty percent contingency fee, overrule his obligations to Mr. Plunkett.

The rule required Respondent to analyze the conflicts before taking on the case. If his own interests (in possibly collecting a big contingent fee in the Johnson case) or the prospective clients' interests were adverse to Mr. Plunkett's, Respondent was ethically obliged not to take the case.

The rule respecting concurrent representation of clients with conflicting interests stems, once again, from the lawyer's duty of loyalty to each client. "Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation was undertaken, in which event the representation should be declined." Comment, Rule 4-1.7(2006). Even in a permissible conflict situation, a "lawyer may not represent one client whose interests are adverse to those of another current client – even if the two representations are unrelated – unless both clients consent and the lawyer believes that she is able to represent each client

without adversely affecting the other." ABA/BNA Lawyers' Manual on Professional Conduct 51:101. In the case at bar, Mr. Shumaker could not have reasonably concluded he could carry out both representations. Respondent Shumaker's obligation to diligently represent the Johnson clients was in direct conflict with the duty of loyalty he owed Mr. Plunkett. The language of the federal complaint itself, although it does not mention Mr. Plunkett by name, describes conduct that Respondent intimately knew Mr. Plunkett had engaged in, from advising Plunkett against it years before.

The federal complaint filed by Mr. Shumaker alleged that defendant Kelly was liable for the fraudulent and conspiratorial acts of his employees and agents in selling his clients the RHI lease investments. Respondent Shumaker knew full well, and had known since 2003, that Mr. Plunkett was one of those agents (notwithstanding the implication in his October 29, 2007, letter to the Johnson clients that this was a recent revelation, i.e., "It has come to my attention that he was the agent through which you purchased this lease.").

Even if Respondent could have reasonably concluded the representations would not be adversely affected, there was no timely and informed consent by the Johnson clients or Mr. Plunkett to the representations. Whatever verbal (no written consent was produced) consent Mr. Plunkett conferred by urging Respondent to file suit on the Johnson plaintiffs' behalf, he clearly withdrew when the Bixby letter was proposed to him. And, the Johnson clients did not get their letters explaining the conflict and seeking waivers until seven months after Respondent filed their case.

The Bixby letter is further evidence that Respondent Shumaker could not reasonably have believed that he could concurrently represent Plunkett and the Johnson plaintiffs. Assuming for the moment that Respondent's letter to Mr. Bixby was a legitimate probe for a deep pocket to further the interests of his Johnson clients, the fact remains that the letter had the very real potential for harming the economic interests of Mr. Plunkett, his client since at least 2003. Mr. Plunkett's refusal to consent to the lawyers' plan to "tee up" the company for which he had for years sold, and continued to sell, insurance policies, only heightens the contrast between the clients' interests. The fact that Respondent went ahead and sent the letter despite Plunkett's direction not to send it is a violation of 4-1.8(b). Respondent used information he gained from Mr. Plunkett to Mr. Plunkett's disadvantage and against his instructions.

Of course, Mr. Shumaker and Mr. Miller testified that Mr. Plunkett "directed" Respondent to send the Bixby letter, a fact Mr. Plunkett adamantly denies. It is undisputed that after Mr. Plunkett found out Respondent sent Bixby the letter, his relationship with Respondent Shumaker changed markedly. Mr. Plunkett was angry and felt deceived. He would not respond to Respondent's letters and admittedly left an angry message on Respondent's answering machine. This reaction would make no sense if Plunkett had insisted the letter be sent. This undisputed evidence substantiates Mr. Plunkett's testimony that he had not consented to the lawyers' "teeing up" scheme, and stands in direct contradiction to Respondent's testimony that he did.

There is also the question of conflict posed by Respondent's own (financial) interests in the Johnson litigation. The value of the Johnson case was only speculative at

the time the case was filed. Nevertheless, the potential for a large fee for Respondent was foreseeable. Respondent represented about fifty clients in the Johnson case. App. 468 (T. 964). Not all of those fifty clients had been sold leases by Mr. Plunkett, but Plunkett did sell about $600,000.00 worth of leases. Respondent had fifty percent contingency fee contracts with some of the clients (reduced to forty percent by court order later in the case). The Johnson clients recovered damages from a restitution fund handled by the U.S. Attorney's Office, i.e., not from funds produced by Respondent's efforts. While the case had not concluded by the time of the disciplinary hearing in this matter, Respondent's fee from it is believed to be substantial. By contrast, Respondent testified that he took Plunkett's personal injury case on an hourly fee basis (even though he ultimately retained one-third of the recovery, approximately $10,000.00).

The potential that Respondent's own interests in diligently pursuing the Johnson clients' case would materially interfere with the loyalty he owed Mr. Plunkett and his prosecution of Mr. Plunkett's case ethically precluded him from taking the Johnson matter in the first place, a violation of Rule 4-1.7(b).

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN INTEREST ADVERSE TO THE SKINTAS (WARRANTY DEED AND LEASE) ON TERMS THAT WERE NOT FAIR AND REASONABLE, NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING TO THE CLIENTS, AND TO WHICH CLIENTS WERE NOT GIVEN A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL, AND DID NOT GIVE WRITTEN CONSENT.

Respondent Shumaker is charged in Count III with violating the same rule, 4-1.8(a), discussed under Point I. Here, the rule required that the business transaction, i.e., the warranty deed and lease agreement between Respondent and the Skintas, be fair and reasonable and transmitted to the Skintas in writing; that the Skintas be provided a reasonable opportunity to seek the advice of independent counsel; and that the Skintas consent in writing to the conflict inherent in the transaction.

The attorney client relationship was established between Respondent and the Skintas on October 24, 2006, when Mr. Skinta telephoned Respondent and asked for his legal help in dealing with the looming foreclosure, and when Respondent agreed to give it. See restatement (third) of the law governing lawyers §14(1)(a). This is particularly true since Respondent had provided legal services to Mr. Skinta in the past. See Board of

Professional Ethics and (*Conduct v. Fay*, 619 N.W. 2d 321 (Iowa. 2000). Respondent did nothing, i.e., no termination of representation letter and no verbal warning that he, Respondent, considered the representation ended, that would have alerted the Skintas that Respondent did not consider his clients on October 27, 2006.

While there is a wide gap between a lot of what the Skintas testified happened between October 24 and October 27, 2006, and what Respondent testified transpired during that same time frame, there is also much evidence that is not disputed. That evidence is summarized below.

1. The Skintas' store and house lots, which they owned by the entireties, were scheduled to be sold at foreclosure on the Adair County courthouse steps on October 27, 2006, at 2:00 p.m.

2. Mr. Skinta telephoned Respondent on October 24, 2006, and asked for his legal help, which Respondent agreed to give.

3. Respondent contacted the bank that held the mortgage and was told the bank would not postpone the Skinta foreclosure. The bank vice-president to whom Respondent spoke did not realize Respondent was calling on the Skintas' behalf.

4. In a telephone conversation between Respondent and Mr. Skinta, Respondent told Mr. Skinta the bank was not willing to work with them.

5. Respondent contacted the bank and determined that he could purchase the Skintas' note for about $70,000.00, which he did by personally guaranteeing the assignment of the Skintas' $70,000.00 note to an entity in which he and his wife, and Miller Properties, LLC, owned two-thirds percent.

6. On the late afternoon of October 26, Respondent had a title lien search performed, which disclosed judgment liens on the property. One was against Mr. Skinta only; the other was against Ms. Skinta only.

7. After discussing the matter with his attorney friend, Mr. Miller, Respondent decided the Skintas' property should be conveyed to a straw party, Miller Properties, LLC, to avoid the lien issues.

8. It was always Respondent's intent that he and his wife own the property, notwithstanding what entity it was initially conveyed to.

9. Respondent prepared and the Skintas signed a warranty deed on October 27, 2006, conveying the store and house lots to Miller Properties, LLC.

10. Respondent prepared and the Skintas signed, on October 27, 2006, an agreement whereby they agreed to lease the house and store from Respondent for $700.00 a month, which was $200.00 more than the mortgage payment on which the Skintas were in default.

11. Respondent did not have the Skintas sign any kind of waiver of conflict of interest regarding the transactions.

12. Respondent did not transmit in writing to the Skintas the transaction and terms on which Respondent was acquiring ownership of the Skintas' property.

13. Respondent, or someone on his behalf, recorded the warranty deed in Adair County on November 1, 2006.

14. The property was subsequently conveyed by warranty deed from Miller Properties to Reaggy, LLC, an entity wholly owned by Respondent and his wife. The deed was recorded on March 26, 2007.

15. The Shumakers used the store and house lots in early April of 2007 to secure a bank loan in the amount of $112,500.00.

From the foregoing evidence, which either originated from Respondent, was not disputed by Respondent, or is established by court or other official records, it can be seen that Rule 4-1.8(a) was violated in the following respects. The transaction was not

transmitted in a writing to the Skintas that disclosed all its terms. The Skintas had little or no opportunity to consult with outside counsel about the transaction. No written conflict waivers were obtained from the Skintas.

Of course, signing the transaction documents does not in itself translate into "consent in writing" to the conflict. The rule's purpose is to insure that the client is aware of and acknowledges the risks and conflicts inherent in transacting business with an attorney with whom they have a fiduciary relationship. To give effect to that purpose, the client must give separate consent to the transaction, waiving the conflict. See *In re Trewin*, 684 N.W. 2d 121 (Wis. 2004).

As with the transaction with Mr. Plunkett, Respondent adamantly disputed the fairness and reasonableness of the transaction. Respondent and several of his witness testified that the Skinta property was worth far less even than the $70,000.00 note Respondent assumed (it should be noted that the Skintas received no money at all from the deal.) Respondent testified that the transaction was highly advantageous to the Skintas because there was no foreclosure sale and they got to continue to live in the house. The Skintas have, of course, paid Respondent nearly $9,000.00 rent since 2006 for that privilege.

On November 1, 2006, the Skintas owned nothing from their house and store property. And the undisputed fact is that Respondent was able to use these lots to secure a $112,500.00 loan only five months after he acquired them.

The Skintas testified that in their opinion they owned considerable equity in the property in October of 2006 – approximately $100,000.00. They also testified that the

property meant a good deal to them, that it was the basis for their retirement plans. Losing the house and store to Respondent Shumaker, who they had trusted as their attorney, was quite different than losing it at the foreclosure sale would have been.

The Skintas were confused, and probably in denial, after October 27, 2006, about what had happened. Had Rule 4-1.8(a) been followed, the Skintas could never have credibly raised the complaint that Respondent blind-sided them on October 27, 2006. A written waiver of conflict of interest would have absolved Respondent of most of the sting from the Skintas' complaint. Instead, the lack of those rule required documents lends a good deal of credibility to the factual veracity of the Skintas' complaint.

IV.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE HE KNOWINGLY AND BY SUBTERFUGE ACQUIRED OWNERSHIP OF OR INTEREST ADVERSE TO CLIENTS' PROPERTY IN THAT THE CLIENTS WERE IN VULNERABLE SITUATIONS, RESPONDENT DID NOT DISCLOSE IN WRITING THE TERMS OF THE TRANSACTIONS AND DID NOT OBTAIN WRITTEN INFORMED CONSENT TO THE CONFLICTS INHERENT IN THE TRANSACTIONS.

The Skintas' complaint was filed with the Office of Chief Disciplinary Counsel approximately one month after Respondent filed his answer to the two-count information charging Respondent with misconduct drawn from the Plunkett complaint. Similarities in the fact patterns underlying the two complaints, which were received from complainants unknown to each other, were disturbing. The alleged improper business transactions with clients occurred close in time -- September and October of 2006. Both complaints alleged Respondent was absent from his office on days when the clients were presented with documents to sign that transferred to or gave Respondent significant interests in their property. In both complaints, the clients were met at the office by Respondent's secretary, who presented them with the documents and told them they needed to sign

them. Both complaints alleged the clients were wholly unprepared, i.e., had no advance warning about what they would be asked to sign.

Mr. Shumaker's responses to the Plunkett and Skinta complaints did nothing to alleviate the concerns raised by them. For example, the response to the Skinta complaint says nothing about having worked out the whole transaction with Mr. Skinta on October 26, as Mr. Shumaker testified happened at the hearing. While the written explanation of the transaction and a written conflict of interest waiver would still have been missing from the ethics calculus, at least Respondent would have had a colorable defense that the Skintas knew what they were getting into on October 27. The response to the Plunkett complaint was no more reassuring. In that response, Respondent complains that Mr. Plunkett had never put any money into MACB and that Plunkett owed him money for past legal services. Respondent states he "loaned" MACB $300,000.00 (he called it a capital contribution in his hearing testimony). Respondent claimed Plunkett "knew full well what he was signing and its purpose," citing Plunkett's response to the question asked at the DeKraai v. Shumaker deposition, "Now did you contribute any money for that ownership interest? A: No. They have a second on my house." Mr. Plunkett's deposition testimony is hardly overwhelming evidence that Plunkett was fully informed about the terms of a "note and deed for capital contribution on your behalf" business transaction with his lawyer. Respondent produced no signed conflicts waiver or a written explanation with full disclosure of all terms of the transaction by which Plunkett obliged himself to pay Respondent $250,000.00 and signed a deed of trust to Respondent and his wife.

The hearing of this case continued for five days over a four month period. Informant produced three witnesses, the Skintas and Mr. Plunkett. Respondent produced thirteen witnesses. Absent from Respondent's prolific evidence was any acknowledgement by Respondent of any wrongdoing in his dealings with the Skintas and Mr. Plunkett. He testified repeatedly that Plunkett was not his client. See, e.g., App. 466 (T. 956), 474 (T. 987). He testified repeatedly that the Skintas were not his clients. App. 485 (T. 1033), 489-490 (T. 1049-1050), 490 (T. 1051). Mr. Shumaker insisted that the transactions were not adverse to the Skintas and Mr. Plunkett. App. 466 (T. 957) 471 (T. 974), 475 (T. 990), 485 (T. 1030), 489 (T. 1048-1049), 540 (T. 1150), 544 (T. 1166). He testified there was no conflict of interest in the transactions. App. 465 (T. 950), 467 (T. 960), 485 (T. 1032), 490 (T. 1052), 491 (T. 1154). He insisted, although the word "written" appears twice in the 2006 version of Rule 4-1.8(a), that no written conflict waiver or explanation of the transaction was required at the time. App. 466 (T. 956) 467 (T. 960, 540 (T. 1150), 544 (T. 1167). He conceded he obtained no conflict waivers and did not advise the clients seek outside legal advice before transacting business with them. App. 465 (T. 950), 466 (T. 955), 467 (T. 960), 485 (T. 1032), 540 (T. 1150), 544 (T. 1167, 1169).

Nor was there any acknowledgment of remorse. To the contrary, the hearing frequently became a platform for complainant-bashing. For example, it was a recurrent theme in Respondent's case that Mr. Plunkett sexually harassed Ms. Chadd on a MACB business trip to Las Vegas and while they were working together at MACB. Respondent Shumaker and his secretary testified things were so bad that Mr. Plunkett's actions

created “chaos” in Lenexa. App. 444 (T. 866-767), 460 (T. 932). Yet, Chris Shoemaker, who worked at the Lenexa office, had heard nothing about such allegations and had no reason to suspect anything inappropriate was going on. App. 299 (T. 434). Ms. Chadd herself testified that Plunkett did nothing sexually inappropriate toward her on the Vegas trip, that Rusty’s departure from MACB was not related to sexual harassment, and that he made no sexually inappropriate overtures toward her. App. 366 (T. 673), 367 (T. 376-377).

Similarly, both Mr. Meeks and Respondent testified that Mr. Plunkett’s insurance license had been suspended or disciplined on many occasions. App. 356 (T. 633-634), 472 (T. 978). To the contrary, Missouri Department of Insurance records reflect that the only administrative action ever taken against Mr. Plunkett’s license was the 2006 fine.

Mr. Shumaker’s testimony was frequently not credible, inconsistent, calculated to minimize his wrong doing, and inclined toward miscasting facts to present his conduct in a better light than the facts warranted. He and his secretary testified that the capital contributions put into MACB by the Shumakers came only after Plunkett signed the promissory note and deed. Yet Respondent’s Exhibit RR reflects payment starting September 1, 2006, days before the documents were signed even by Respondent’s version of events. He testified he watched Plunkett sign the note on September 5, 2006, yet the note itself is dated September 7 and he signed a letter dated September 11 enclosing an unsigned copy of the note. Respondent Shumaker testified that Plunkett handed the signed deed to him at a lunch in Lenexa on September 14 attended by Respondent, Plunkett, and Chris Shoemaker. Yet Chris Shoemaker, who had been

intimately involved in the communications about raising additional capital, saw no deed and heard no talk about a deed that afternoon. Chris Shoemaker had to ask Respondent weeks after the lunch took place why money was flowing into the company.

Mr. Shumaker and his secretary testified that Respondent paid the past due property taxes on the Skintas' third, vacant lot, which he did not own, out of concern for their welfare. Yet Respondent wrote the Skintas a letter wherein he acknowledged he paid the taxes because the Adair County Collector required he do so. Mr. Shumaker characterized his 2007 admonition as being issued for "an anonymous Internet posting about a Judge." App. 492 (T. 1058). In fact, the admonition letter states that Respondent made a series of false and misleading statements in a pleading that had been filed in the Adair County Circuit Court. App. 677-678. Mr. Shumaker, and his witnesses, several times decried what they portrayed as Mr. Plunkett's heartless conduct in bilking elderly people out of their life savings in the RHI scheme, yet Respondent acknowledged that in many cases his contingency fee contract in the RHI litigation, with those same elderly people, was fifty percent. Or, at least it was fifty percent until he filed a motion with the federal court asking for approval to lower the contingency fee percentage because it was his understanding, as he stated in his motion, that the United States Attorney's Office "either does not agree or approve of plaintiffs' counsel's fifty percent contingency fee." App. 541 (T. 1155).

Permeating every page of Respondent's testimony is Mr. Shumaker's complete lack of any kind of loyalty or acknowledgement of fiduciary duty toward people who were his clients. Instead, it is painfully obvious that to Mr. Shumaker, the Skintas and

Mr. Plunkett were fodder for business deals. Unfortunately, and unethically, he used his law license to take advantage of them in transactions that conveyed all of the Skintas' interests in their house and store lots to him and obliged Plunkett to pay him a quarter of a million dollars.

And then there is the question of the covertly taped meeting at Respondent's office in July of 2009. The Supreme Court Advisory Committee issued a formal opinion in March of 2006 reversing longstanding Missouri informal opinions holding it was unethical for an attorney to secretly record a conversation, even if the attorney is a party to the conversation. Formal Opinion 123. While Mr. Shumaker's 2009 recording of the meeting with the Skintas at his law office may not violate law or a Rule of Professional Conduct, it was sneaky. The Skintas had already filed their complaint with disciplinary counsel and Mr. Shumaker had already filed suit against them for rent and damages before the recorded meeting. Why not, under those circumstances, tell the Skintas he was recording the conversation? And if Respondent's hearing testimony regarding how the deed and lease came to be presented to them on October 27 is true, why not confront Mr. Skinta about those alleged October 26 telephone conversations? The DVD, or as much of it as is decipherable, lends credibility to the Skintas and reinforces the notion that Respondent would, and did, intentionally blindside vulnerable clients with paperwork contrary to their interests and supportive to his.

Mr. Shumaker violated duties owed to clients, the most important of the duties recognized in the ABA Standards for Imposing Lawyer Discipline (1991 ed.). The preponderance of the evidence substantiates that he knowingly engaged in business

transactions with clients adverse to their interests without obtaining waivers and without providing them a written explanation of the terms of the transactions. The harm to the clients is manifest in the note owed by Plunkett to Respondent ($250,000.00) and the angst suffered by the Skintas in losing their property and what was, in their judgment, substantial equity in the property.

The aggravating factors tip the sanctions analysis toward actual suspension. There is credible evidence that Respondent was not truthful in his explanations for his conduct. There is credible evidence that Respondent took advantage of vulnerable clients in business transactions that were blatant conflicts of interest. The sanction for violating conflicts of interest should be greater when aggravated by dishonesty.

The disciplinary hearing panel concluded that Respondent violated Rule 4-1.8(a) as consequence of his business transaction with Mr. Plunkett. The panel concluded that Respondent violated Rule 4-1.7(b) as charged under Count II. (The panel also concluded that Respondent violated Rule 4-1.7(a) under Count II, but Respondent was not charged with violating subparagraph (a) of that rule.) The panel also concluded that Respondent violated Rule 4-1.8(a) in his business transaction with Ms. Skinta. The panel recommended that Respondent be publicly reprimanded for the Count I rule violation, that Respondent be suspended for six months, with the suspension stayed for a six month period of probation for the Count II rule violation, and that Respondent be publicly reprimanded for the Count III rule violation.

Disciplinary counsel had recommended to the panel, and recommends to the Court, that Respondent's license be suspended with no leave to apply for reinstatement for two years.

CONCLUSION

Respondent's business transactions with Mr. Plunkett and the Skintas in September and October of 2006 generated gross conflicts of interest that cannot, and were not, explained by negligence or inadvertence. Rather, the preponderance of the evidence leads to the conclusion that Respondent acted knowingly in engaging in the conflicts. Respondent has not acknowledged any wrongdoing, insists his clients were not vulnerable, and has shown no remorse. Protection of the public and the integrity of the profession requires actual suspension of Respondent's license with no leave to file for reinstatement for two years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2010, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 22,776 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

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

_____
Sharon K. Weedin

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