

IN THE SUPREME COURT OF MISSOURI

IN RE:

GREGORY DAVID WILLIAMS,

RESPONDENT

Case No. SC93305

RESPONDENT'S BRIEF

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

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SUMMARY OF THE CASE

The Information herein charges the Respondent in a single count with five separate violations of the Rules of Professional Conduct arising from a single transaction involving Respondent's fee agreement with a prospective new client which was secured by a deed of trust on real estate.

The Complainant, Robert Boothe, contacted Respondent's law firm while incarcerated in the Camden County jail on charges of possession of a controlled substance. Initially, he spoke to Dana Martin, an associate, and advised her he had no cash with which to pay a retainer, but that he did own real estate, which he offered to secure payment of the anticipated fees. Ms. Martin referred the matter to Respondent, who contacted Mr. Boothe by telephone at the jail to discuss possible terms of a fee agreement.

Respondent later that same day went to the jail to meet with Mr. Boothe, and negotiated a written Minimum Fee Agreement and an Installment Fee Agreement. On the Installment Fee Agreement, a handwritten notation was added that "Lot 9 of Kip's Cove given as collateral for this note."

Mr. Boothe subsequently executed a Deed of Trust granting Respondent a lien on Lot 9 of Kip's Cove. Mr. Boothe admits that he signed the Deed of Trust, although the precise date and location that he signed it is unclear from the record. One of Respondent's employees, Jennifer Jackson, notarized the document, and she did not keep a record of notarizing the document. Further, the evidence suggests that Mrs. Jackson improperly dated her notarization. However, there is no evidence that Respondent was

aware of Mrs. Jackson's errors with respect to the notarization of the document, or that he failed to properly train or supervise her.

Respondent thereafter represented Mr. Boothe with respect to the criminal charges against him, obtained a negotiated plea acceptable to Mr. Boothe, entered the plea with the Court, and withdrew as counsel for Mr. Boothe upon completion of the plea. There was no allegation or evidence in this case that the taking of the Deed of Trust interfered in any manner with Respondent's representation of Mr. Boothe.

Mr. Boothe never made any payment to Respondent for the fees incurred in the case, and ultimately Respondent foreclosed on the Deed of Trust.

The bulk of the evidence at the hearing in this case revolved around two issues: (1) when and where the Deed of Trust was signed; and (2) what was the value of the real estate that was subject to the Deed of Trust. The first issue is not essential to the determination of the key issues in this case. The second issue goes to the harm, if any, which Mr. Boothe suffered.

Respondent acknowledges that inadequacies in the manner of preparation of the fee documents and the processing of the same in his office, particularly the notarization of the Deed of Trust, allowed the issue as to when and where the Deed of Trust was signed to arise.

Respondent admitted in his Answer to the Information herein that he obtained a Deed of Trust from Mr. Boothe to secure payment of the future legal fees to be incurred in his representation, and that Respondent did not process the paperwork as a business transaction with a client subject to Rule 1.8(a); rather, the paperwork is structured as a

Fee Agreement subject to Rule 1.5 with a Deed of Trust to secure payment of the fees and costs incurred in the case as permitted by Rule 1.8(i). Respondent disagrees with the Informant's analysis of the applicable rules, case law, and the appropriate sanction, if any.

If this Court concludes that the transaction was subject to the requirements of Rule 1.8(a), then Respondent wishes to express remorse for violating the applicable rules, and willingly accepts such sanctions as this Court deems appropriate under the circumstances.

STATEMENT OF FACTS

Informant's Statement of Facts omits important and material facts which bear on the legal issues in this case, and includes only those facts which support Informant's legal analysis. For this reason, Respondent has included a more thorough Statement of Facts in this Brief.

PARTIES

Respondent

The Respondent is Gregory D. Williams, an attorney licensed to practice law in the State of Missouri since 1984, and whose license is presently in good standing. (Tr., p. 60, LL. 11-16, A42¹). Respondent graduated from the University of Missouri Law School in Columbia, Missouri, cum laude. He is a member of the Order of the Coif, served on the Board of Editors of the Missouri Law Review, and was the editor of the Missouri Journal of Dispute Resolution. (Tr., p. 297, LL. 13-21, A101). He maintains a general law practice in Sunrise Beach at the Lake of the Ozarks. The practice includes real estate law and litigation, and in the past included title work. (Tr., p. 61, LL. 3-13, A42). Respondent has also served as the City Attorney and City Prosecutor for the Village of Sunrise Beach since 1988. (Tr., p. 298, LL. 4-16, A102).

In addition to practicing law, Respondent manages his law firm, which employed as many as five attorneys prior to the recession, employed three attorneys during the time

¹ For the Court's convenience, Respondent has included citations to the Appendix filed with the Informant's brief, which contains the transcript and exhibits.

frame involved in the complaint herein, and presently has two attorneys in the firm. (Tr., p. 298, L. 22 – p. 299, L. 19, A102).

Complainant

Robert Boothe is 46 years old. He grew up in Roanoke, Virginia, and presently lives near Camdenton at the Lake of the Ozarks. (Tr., p. 159, LL. 17-22, A67). He graduated from Franklin County High School in Virginia, and completed 19 credit hours at Virginia Western Community College within the past 5 years. (Tr., p. 159, L. 25 – p. 160, L. 8, A67). He moved to Missouri in 2008. (Tr., p. 160, LL. 1-10, A67). Mr. Boothe has several criminal convictions. He was convicted in Virginia of Statutory Rape in 1985, and is registered as a sex offender in Missouri. (Tr., p. 160, LL. 20-25, A67; p. 162, LL. 3-6, A68). He was convicted of strong-armed robbery in 1990 while “hooked on cocaine.” (Tr., p. 161, LL. 6-15, A67). He was also convicted in Virginia of a “couple of petty larcenies, drinking and driving, couple of others.” (Tr., p. 162, LL. 13-20, A68). Mr. Boothe testified that he is “diagnosed the manic side of bipolar” and “schizophrenic tendencies,” and received Social Security disability payments. (Tr., p. 163, L. 17 – p. 164, L. 4, A68). He was on felony probation at the time of the hearing in this case. (Tr., p. 196, LL. 14-21, A76). He has been in jail at least ten different times. (Tr., p. 197, LL. 9-11, A76).

Mr. Boothe admits to lying to law enforcement officers during an investigation. (Tr., p. 200, LL. 14-16, A77). He also testified to participation in what he believed was the bribing of a judge in connection with a case where he was charged with driving 125 miles per hour in town. (Tr., p. 199, LL. 3-17, A77).

DISCUSSIONS PRIOR TO SIGNING FEE DOCUMENTS

Respondent's first communication regarding the Robert Boothe matter was from Dana Martin, an associate attorney in his firm, who relayed by email that she had spoken with Mr. Boothe, who had no money but wanted to pledge his real estate to secure payment of legal fees. (Tr., p. 62, LL. 9-17, A43; Ex. HH, A412). Dana Martin testified that Mr. Boothe contacted her while in custody and said that he did not have cash, was in desperate need to retain counsel, and owned property that he wished to discuss using as security for a retainer or for fees. (Tr., p. 268, LL. 8-18, A94). Thereafter, Respondent spoke with Mr. Boothe by telephone prior to meeting him at the jail. (Tr., p. 79, L. 19 – p. 80, L. 13, A47). During that conversation, Mr. Boothe suggested giving a lien on his property to secure payment of legal fees, as he did not have any cash. *Id.*

Dana Martin testified that granting of a lien on real estate to secure fees in criminal defense cases is a common practice at the Lake of the Ozarks. (Tr., p. 277 LL. 18-23, A96).

Execution of Fee Documents

Boothe's Testimony

Mr. Boothe has provided several inconsistent descriptions of the facts and circumstances surrounding his execution of the Minimum Fee Agreement (Ex. 1, A167), the Installment Fee Agreement (Ex. 2, A171), and the Future Advance Deed of Trust (Ex. 3, A172).

On December 29, 2010, Mr. Boothe made a report to the Camden County Sheriff's Office asserting that Respondent had forged a document pertaining to his property. He

reported that the handwritten portions of Exhibit 2 were not on the document when he signed the paper. Mr. Boothe provided a written statement to the Sheriff's Office. (Ex. S, A316; Ex. T, A326).

On March 29, 2011, Mr. Boothe made a complaint to the Informant to which he attached a written narrative statement (Ex. Q, A309). Mr. Boothe alleged that Respondent "brought a girl w/ him who said she was a relative who worked w/ Mr. Williams. She was there a day or so before he brought 5 pages of papers for me to read and sign." (Ex. Q at p. 2, A311). At the hearing, on cross-examination, Mr. Boothe identified the "girl" as Jennifer Jackson. (Tr., p. 202, LL. 22-25, A78).

On June 2, 2011, Mr. Boothe wrote another letter to Informant in which he stated: "He brought that document to me in jail. The supposed notery (sic) public was not even present and a family member to Mr. Williams." (Ex. R, A315)

On July 16, 2011, Mr. Boothe filed a verified Petition with the Circuit Court of Camden County wherein he alleged in Paragraph 6 that he signed the Installment Fee Agreement (Ex. 2) and the Future Advance Deed of Trust (Ex. 3) on September 8, 2009. (Ex.U, ¶¶ 6, 15; A328-A331). His Petition was dismissed with prejudice on February 15, 2012. (Ex. V, A348).

At the hearing, Mr. Boothe testified on direct examination that he met with Respondent twice at the jail, and signed Exhibits 1, 2 and 3 at the second meeting. (Tr., p. 176, L. 9 – p. 178, L. 11, A71-A72).

Respondent's Testimony

Respondent, in his Answer and at the hearing, maintained that he only met with Mr. Boothe once at the Camden County jail, in person, and without anyone else present, and that Mr. Boothe executed Exhibits 1 and 2 at that time, and that Exhibit 3 was executed at a later date in Respondent's office. (Answer to First Amended Information, ¶ 7, A30; Tr., p. 67, LL. 5-25, A44). Mr. Boothe had indicated to Respondent before their conference at the jail on September 8, 2009, that he might be able to come up with some money, and so Respondent had prepared and took with him his usual Fee Agreement and Installment Fee Agreement. (Tr., p. 65, LL. 20-24, A43).

Respondent maintains that Mrs. Jackson, who is not his niece or otherwise related to him, improperly completed the acknowledgment of the Future Advance Deed of Trust by dating the same September 8, 2009, when in fact the document was not signed by Mr. Boothe on that date. (Answer to First Amended Complaint, ¶ 9, A31). Respondent testified that he went through a number of questions and answers with Mr. Boothe before he signed the documents, and that Mr. Boothe seemed satisfied with the answers he received. Mr. Booth and Respondent discussed when Mr. Boothe could pay for Respondent's fees, how much he could pay, and where he was going to get the money. (Tr., p. 119, L. 11 – p. 120, L. 1, A57).

Respondent produced a facsimile transmission from the Camden County Recorder of the Warranty Deed under which Mr. Boothe took title to the real estate he pledged under Exhibit 3. (Ex. II, A413). The transmission was received at 2:15 p.m. on September 10, 2009. *Id.* Respondent also produced printouts from his office computers

showing that the Minimum Fee Agreement and Installment Fee Agreement were prepared on September 8, 2009, but that the Future Advance Deed of Trust was prepared on September 10, 2009. (Ex. UU, A458, Ex. VV, A459 and Ex. WW, A460).

Respondent testified that Boothe executed the Deed of Trust in the conference room of Respondent's office in Sunrise Beach, Missouri, shortly after his release from custody on September 14, 2009. (Tr., p. 83, LL. 2-6, A48). Respondent and Jennifer Jackson were present in the conference room when Boothe executed the Deed of Trust. *Id.*

Boothe testified that he did not read the Lawyer-Client Minimum Fee Agreement, the Installment Fee Agreement, or the Deed of Trust prior to signing the documents, and had not read the documents at the time of the hearing held herein. (Tr., p. 211, L. 20 – p. 212, L. 13, A80).

Boothe had bought and sold real estate several times, without the assistance of an attorney or real estate agent. (Tr., p. 210, LL. 21-25, A80). Boothe testified he was familiar with the value of his real estate and did not need assistance in evaluating the property which he owned. (Tr., p. 211, LL. 1-7, A80; p. 216, L. 12 – p.217 L. 2, A81). Boothe has deeds of trust outstanding on two other real estate properties he owns on which he presently makes monthly payments. (Tr., p. 168, L. 23 – p. 169, L. 5, A69).

Notarization of Deed of Trust

Respondent admits that the Deed of Trust was not correctly notarized by his employee, Jennifer Jackson. (Answer to First Amended Information, ¶ 9, A31).

Respondent was not aware of her error until the investigation in this matter was conducted by the Informant. (Tr., p. 89, L. 17 – p. 91, L. 24, A49-A50).

Jennifer Jackson testified that she dated the Deed of Trust and the notary block on the Deed of Trust to match the date of the Lawyer-Client Minimum Fee Agreement and the Installment Fee Agreement. (Tr., p. 249, LL. 10-13, A89).

Respondent has always had a policy in his law firm that documents may not be notarized unless the notary either witnesses the document being signed or the person who signed the document is present and acknowledges their signature before the notary. (Tr., p. 244, L. 17 – p. 245, L. 4, A88). Mrs. Jackson has never been asked by Respondent to notarize a document without witnessing it or without obtaining the proper acknowledgment from the person who signed it, and she has never notarized a document where she did not witness the signature or obtain an acknowledgment. (Tr., p. 245, LL. 5-13; p. 250, LL. 2-5, A88-89). She does recall meeting Mr. Boothe at Respondent's office, but has no specific memory regarding her notarization of the document. (Tr., p. 245, L. 20 – p. 256, L. 14, A88-89). She would not have notarized the document unless she saw Mr. Boothe sign it, or he acknowledged his signature to her. (Tr., p. 249, L. 14 – p. 250, L. 1, A89-90). Mrs. Jackson has never been to the Camden County jail. (Tr., p. 246, LL. 15-17, A89). She is not related to the Respondent, and is not his niece. (Tr., p. 250, LL. 6-9, A90).

Jennifer Jackson successfully completed the online training and examination for notary publics on the Secretary of State's website, which requires a 100% correct score for passing. (Tr., p. 244, LL. 2-16, A88; Ex. QQ, A431). Jennifer Jackson did not record

the notarization of Robert Boothe's signature in her notary log book. (Tr., p. 252, LL. 12-19, A90).

TERMS OF THE FEE DOCUMENTS

Boothe was not Respondent's client prior to the time that he entered into the Minimum Fee Agreement, Installment Fee Agreement, and the Deed of Trust, and had never previously been Respondent's client. (Tr., p. 116, LL. 12-20, A56). The Minimum Fee Agreement provides that the Agreement "will not take effect, and Lawyer will have no obligation to provide legal services until Client returns a signed copy of [the] Agreement and pays the initial deposit called for under Paragraph 5." (Ex. D, A247). The initial deposit required by the Minimum Fee Agreement was \$3,000.00. *Id.* Boothe did not pay \$3,000.00 in cash, but rather executed an Installment Fee Agreement secured by a Deed of Trust. (Ex. E, A251; Ex. F, A252).

The Minimum Fee Agreement also provides in Paragraph 9 on Page 3 thereof that "Client hereby grants Lawyer a lien on any and all claims or causes of action that are the subject of the representation under this Agreement. The lien will be for any sums owing to Lawyer at the conclusion of services performed. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise." (Ex. D at p. 3, A249).

The Installment Fee Agreement (Ex. E, A251) is a form agreement utilized by Respondent's law firm with blanks to allow the terms of payment for each specific client to be filled in to meet their individual needs and financial situation. (Tr., p. 67, LL. 13-24, A44). Respondent filled in the blanks on this form during his conference with Mr.

Boothe at the Camden County jail on September 8, 2009. (Tr., p. 70, L. 24 – p. 80, L. 11, A45). The form provided for a retainer of \$3,000.00, which matches the amount of the minimum fee due under the Minimum Fee Agreement, and in lieu of installment payments, provided that the sum was “Due in full in 6 months.” (Ex. E, A251). The form contains a handwritten provision at the bottom that “Property at Lot 9 Kip’s Cove given as collateral for this note.” *Id.*

None of the documents executed by Boothe contain a written provision advising Boothe of the desirability of seeking and being given a reasonable opportunity to seek the advice of independent counsel regarding the transaction. (Tr., p. 70, LL. 2-10, A45) Respondent’s Fee Agreement form (Ex. D, A247) is a customized version of the Missouri Bar’s Client Keeper forms that were downloaded from the Missouri Bar’s website. (Tr., p. 67, LL. 13-20, A44; Ex. EE, A371). Respondent has now included a written provision regarding the desirability of seeking independent counsel in his form fee agreements. (Tr., p. 137, L. 22 – p. 138, L. 7, A61-A62).

Respondent discussed the terms and conditions of the fee arrangement with Boothe, and advised Boothe he could seek other counsel if he did not like the terms offered by Respondent. (Tr., p. 117, L. 10 – p. 118, L. 3, A56).

Respondent’s Representation of Robert Boothe

Respondent’s representation of Mr. Boothe commenced on September 8, 2009, and terminated on June 23, 2010. (Ex. D, A247; Ex. TT, A456).

Robert Boothe was arrested on September 5, 2009 (Labor Day) by the Missouri State Water Patrol for possession of a controlled substance, Xanax, which was a

prescription medication in a prescription bottle not in his name, and possession of a burnt marijuana roach cigarette. (Tr., p. 172, LL. 24-25, A70; Ex. G, A256; Ex. H, A258, Ex. I, A263). He was charged with the Class C felony of possession of a controlled substance, with enhanced punishment to that of a Class B felony as a persistent offender. (Ex. J, A265).

Boothe was served with a warrant in Case 09CM-CR01814 on September 6, 2009, while in custody in the Camden County jail. (Ex. TT, A454). A Probable Cause Statement was filed September 8, 2009. *Id.* Mr. Boothe appeared for arraignment on September 9, 2009, and advised he was seeking to retain Respondent as counsel. *Id.* On September 14, 2009, Mr. Boothe appeared with attorney Dana Martin, who presented a Stipulation for Bond Reduction, which was granted. *Id.* On October 20, 2009, Mr. Booth appeared with Respondent, and the case was set for preliminary hearing on December 7, 2009. *Id.* On that date, however, the preliminary hearing was continued to February 4, 2010, at the State's request for lack of a lab report, and was continued again at the State's request on February 4, 2010, March 23, 2010, April 7, 2010, and May 6, 2010. *Id.*

On May 11, 2010, a warrant was issued for Mr. Boothe's arrest on the State's Motion for a Bond Violation, and he was arrested and returned to the Camden County jail on May 22, 2010. *Id.* A case review was held on May 24, 2010, June 3, 2010, and June 21, 2010. *Id.* at A452. On June 23, 2010, Mr. Boothe waived the preliminary hearing in the matter and entered a guilty plea pursuant to a negotiated plea agreement. (Ex. TT, A456; Ex. N, A277).

Respondent's work, and the work of the other employees and attorneys of his law firm, is set out in detail in the Attorney Daily Report submitted as Exhibit FF, found at A392. Respondent met with Mr. Boothe at the jail on September 8, 2009, and met with an employee of the Prosecuting Attorney's Office, Tom Schlatter, to request a copy of the available discovery documents in the case. *Id.* at A395. Respondent met with Mr. Boothe at his office on October 7, 2009. *Id.* at 396. On April 27, 2010, Respondent was advised by telephone conference with Mr. Boothe that he had been arrested for possession of marijuana the preceding week. *Id.* at A398.

On May 4, 2010, Respondent spoke with the Camden County Prosecutor, Brian Keedy, as to why Mr. Boothe was being held at the Mid-Missouri Mental Health Center, and spoke to Mr. Boothe regarding this issue by telephone on May 7, 2010. *Id.* at A398-A399. Respondent met with Mr. Boothe in Respondent's office on May 14, 2010, and on May 24, 2010, in the Camden County jail. *Id.* at A399-A400. On June 2, 2010, Respondent met with a private investigator regarding attempting to locate Bobby Brooks, a person identified by Mr. Boothe as the owner of the controlled substance. *Id.* at A401. On June 23, 2010, Respondent appeared with Mr. Boothe to enter his plea of guilty, and withdrew from further representation of Mr. Boothe. *Id.* at A403.

Boothe testified that he was satisfied with the work Respondent performed on his behalf. (Tr., p. 167, LL. 6-10, A69).

Fees Charged and Payments Made

Respondent sent Boothe monthly statements for services rendered and court reminder letters advising him of the next court date on his case and current balance due on his account. (Tr., p. 121, LL. 12-25, A57; Ex. XX, A461-A466).

Boothe advised respondent by telephone call on April 7, 2010, that he had been arrested again for possession of marijuana the preceding week. (Ex. FF, p. 7, A398). Respondent recorded the Deed of Trust on May 6, 2010, approximately eight months after he began representing Boothe. (Ex. CCC, ¶ 26, A504). If Boothe had conveyed the property to someone else prior to that date, it would have been conveyed free and clear of Respondent's Deed of Trust. (Tr., p. 132, LL. 11-20, A60).

Boothe was delinquent in payment of his obligations under the Lawyer-Client Minimum Fee Agreement and the Installment Fee Agreement on May 6, 2010, as the sum of \$3,000.00 was due to be paid by March 8, 2010, and Boothe never paid that sum. (Ex. D, A247; Ex. E, A521).

Respondent sent Mr. Boothe a court date reminder letter on May 7, 2010, on which he handwrote "Robert – You need to bring in some money. GDW." (Ex. XX, A461). A warrant was issued for Mr. Boothe's arrest for violation of his bond conditions for possession of marijuana on May 11, 2010, and he was arrested on that warrant on May 22, 2010. (Ex. TT, p. 2, A453).

On July 19, 2010, Boothe wrote Respondent and acknowledged that he was late in payment of his bill to Respondent. (Ex. W, A349). On September 10, 2010, Respondent advised Boothe by letter that his account was overdue in the amount of \$9,682.20, and

that collection action, including foreclosure of Lot 9 Kip's Cove, Phase 1, would commence on September 30, 2010. (Ex. Y, A351). On September 27, 2010, Boothe wrote Respondent acknowledging Respondent's request for payment on September 2, 2010, which included a reference to foreclosure of the collateral for the fee arrangement, and stated Boothe would begin sending payments of \$100.00 per month. (Ex. X, A350). Boothe never made any payment to Respondent, at any time. (Tr., p. 183, LL. 20-22, A73).

On December 7, 2010, Boothe received and signed for the Notice of Trustee's sale mailed by Respondent on December 6, 2010. (Ex. CC, A359). A foreclosure sale under the Deed of Trust was held on January 7, 2011. (Ex. JJ, A415-A418). Respondent's law firm, a professional corporation, was the purchaser at the foreclosure sale with a bid of \$5,000.00. *Id.* The foreclosure sale price did not exceed the balance due under the Installment Fee Agreement. (Ex. CCC, at No. 33, A505).

On April 4, 2011, Respondent notified Boothe by letter to remove his personal belongings from the foreclosed real estate. (Ex. KK, A422). Respondent resold the foreclosed real estate on May 26, 2011, for the sale price of \$15,000.00. (Ex. PP, A429). Boothe had not paid the 2009 or 2010 real estate taxes on the foreclosed real estate, and the same were paid by Respondent in the amount of \$746.31 on June 3, 2011. (Exhibit LL, A423).

Boothe's Complaints Regarding this Transaction

In his Voluntary Statement to the Camden County Sheriff's Office on December 29, 2010, Mr. Booth claimed the document was "forged" and had been "altered from a

mere \$3000 retaining fee to a \$75,000 debt.” (Ex. T, A326). Mr. Boothe wrote, “Originally the note was not completed I distinctly recall questioning the matter when score marks were drawn threw an area about due date and payment amounts. I was told we would fill that out later.” *Id.* In that statement he also wrote, “He waited until he demanded payment in full to ever send the Forged note for me to see the ‘Added facts’ ‘Due in 6 months’ had been added and at the bottom ‘lot 9 of Kips Cove was given as collateral for this note’ also added to that \$3000 retainer agreement we were supposed to file out later. I never saw either document until just before the auction of my property was scheduled Jan 7 2011. Altering the document is by Code Forgery.” *Id.* at 2. (*quotations in original*).

In the Verified Petition in the civil suit filed by Boothe on July 16, 2011, against Respondent, Boothe swore that “the handwriting on the Installment Fee Agreement that states: ‘Due in Full in 6 months, and Property at Lot 9 Kip’s Cove given as collateral for this note,’ was not on the document signed by [Boothe], is not [Boothe]’s handwriting, and was placed on the document by the [Respondent] without notice to or approval from [Boothe].” (Ex. U, at ¶ 13, A331) (*quotations in original*).

In the Information filed herein, the Informant alleged that “Boothe agreed to those handwritten additions to the typed document but did not initial them.” (Ex. P, ¶ 8, A286). In his initial written complaint to the OCDC on March 29, 2011, Mr. Boothe claimed he had never seen the note. (Ex. Q, p. 4, A313). Mr. Boothe testified at the hearing that the handwriting on the bottom of Exhibit 2 was not present when he signed the document. (Tr., p. 231, LL. 6-15, A85). He also testified that he did in fact sign the Minimum Fee

Agreement, Installment Fee Agreement, and Future Advance Deed of Trust. (Tr., p. 177 LL. 10-20, A71). During the hearing, Mr. Boothe explained his inconsistent statements by stating that he was not under oath when he wrote some of them. (Tr., p. 204, LL. 21-25; p. 205, LL. 1-9, A78).

Value of Collateral

The Contract executed by Boothe when he purchased the foreclosed real estate contained in “Attachment A” a provision acknowledging that “all utilities will be in place for the development, at a date as yet to be determined in the future, and will be available for hookup to Buyer at a cost for all lot owners at that time.” (Ex. DDD at A515). “Specific dates for completion of utilities are not possible at the present state of construction.” *Id.* The Camden County Planning & Zoning Commission approved the development of Kip’s Cove with the limitation that “prior to the recording of any phase as a final plat, the associated public improvements must either be installed and approved by the appropriate entity or financially secured using the County procedures.” (Ex. FFF at A527).

No water, sewer, electric or telephone utilities systems have been installed in Kip’s Cove subdivision that are available for the foreclosed real estate. (Tr., p. 77, L. 21, A46; p. 109, LL. 20-22, A54; p. 111, L. 23 – p. 112, L. 5, A55). The violation of the requirements of the Camden County Planning & Zoning Commission and the lack of installation of water, sewer and other utilities, or completion of the road system, make it impossible to obtain a building permit for the construction of a house on the foreclosed real estate. (Tr., p. 282, LL. 18-20, A98; p.113, LL. 25 – p. 114, L. 2, A55).

The market value of the foreclosed real estate in its present condition cannot be appraised as there is no established market for residential building lots for which a plat has been recorded in violation of the Camden County Planning & Zoning requirements and for which building permits may not be obtained. (Tr., p. 283, L. 23 – p. 284, L. 10, A98). The property in its current condition has minimal value, perhaps four or five thousand dollars. (Tr., p. 285, LL. 5-9, A98). A sale of the property for \$15,000.00 is not an unreasonably low number. (Tr., p. 286, LL. 2-4, A99). Whoever sold the lot to Mr. Boothe took advantage of him. (Tr., p.291, LL. 12-16, A100).

Respondent did not obtain any appraisal information regarding the property on which the Deed of Trust was granted, or check the Camden County Assessor's Office regarding its valuation for tax purposes. (Tr., p. 64, LL. 11-17, A43). Although the hearing was continued to allow Informant to adequately disclose a certified real estate appraiser as an expert witness, Informant did not call the appraiser he had disclosed to testify at the hearing. (Tr., p. 57, L. 13, A41). Informant did present testimony from the Camden County Assessor about his tax valuation of the property, but the Assessor testified he was not a licensed fee appraiser, and that he did not examine comparable sales within a two year period prior to the date of his evaluation in order to establish the market value of the property. (Tr., p. 153, LL. 5-10, A65).

INCONSISTENCIES IN DISCIPLINARY HEARING FACTUAL FINDINGS

Some of the factual findings made by the DHP in its decision (A564-A589) are inconsistent with or unsupported by the evidence at the hearing.

First, in Paragraph 5, the DHP found that Respondent practiced law in Springfield, Missouri until 1988. (DHP Decision at A565). Respondent has practiced law in Sunrise Beach at the Lake of the Ozarks since October of 1984. (Tr., p. 60, LL. 19-25, p. 61, L. 1, A42).

Second, in Paragraph 28, the DHP found that the record is silent as to whether Respondent was aware of the Camden County Assessor's assessed value in September 2009. (DHP Decision at A568-A569). Informant made specific inquiry of Respondent on direct examination as to whether Respondent had checked at the assessor's office, and was told that neither Respondent nor his associate, Mr. Andrew Curley, had done so. (Tr., p. 64, L. 11 – p. 65, L. 13).

Third, in Paragraph 44, the DHP found that Respondent “did not look at the property until on or about January 11, 2011.” (DHP Decision at A573). Respondent testified, “I was out there in December of 2010.” (Tr., p. 105, LL. 13-17, A53).

Fourth, in Paragraph 46, the DHP found that “Respondent testified at trial that the document only was recorded because Boothe had been arrested and his bond revoked. The Panel specifically finds this testimony not to be credible.” (DHP Decision at A573). Respondent has reviewed the transcript of the trial herein numerous times looking for his specific testimony the DHP found to not be credible. It does not appear anywhere in the record. The only testimony by Respondent on this point was elicited on redirect by Informant, who asked Respondent to read Exhibit GG. The testimony is as follows:

Tr., p. 135

22 Q. Hand you GG. Is that a note from Debbie

23 Williams, who I assume is this Debbie Williams sitting
24 back here? She's saying we found the deed of trust. Why
25 don't you just read into the record what it says?

Tr., p. 136

1 A. Found the deed of trust in the file. Jen
2 notarized it and did not record it because no one directed
3 her to. She's mailing it to the recorder today. And the
4 date is May 6, 2010.

The DHP appears to have made a specific finding of fact that purported testimony by Respondent was not credible, when that testimony does not appear anywhere in the record.

Fifth, in Paragraph 61, the DHP found that Respondent testified that the actual amount bid at the sale was \$3,000.00, and that the expenses of sale were \$2,000.00, and that Respondent "gratuitously" testified that he typically charges a \$3,000.00 attorney's fee to perform a foreclosure, and that Respondent indicated no breakdown of the expenses attributed to the foreclosure sale existed. The actual testimony, in response to questions from the Chair of the DHP, is as follows:

Tr., p. 138

11 Q. Is it my understanding based upon questions
12 and answers that were given previously that it's your
13 belief that the deed of trust, the future advance deed of
14 trust was secured by a promissory note that you're

15 referring to as Exhibit No. 2 in the amount of \$3,000?

16 A. Yes, sir.

17 Q. And so you paid 5,000 at foreclosure?

18 A. Yes, sir.

19 Q. What did you do with the rest of the money?

20 A. Applied it to the cost of the sale.

Tr., p. 139

16 Q. So you had \$2,000 in the cost of sale

17 associated with this?

18 A. Yes, sir.

19 Q. What were those costs?

20 A. Attorney's fees, publication costs and

21 costs of certified mail.

22 Q. Is that -- are they broken down someplace?

23 I mean, I don't know if they are or not. Are they broken

24 down anyplace?

25 A. No one's asked that question before, and I

Tr., p. 140

1 haven't really broken them down. We would have all that

2 information, but I can't tell you sitting here today what

3 those numbers are.

4 Q. How would the attorney fees be calculated?

5 A. I normally get \$3,000 for a foreclosure
6 sale.

7 Q. Is there any title work done?

8 A. Would have done a title search, yes. I
9 don't know if I did that in house or if we ordered it
10 done.

11 Q. Okay. Then have you continued to bill
12 Mr. Boothe for the balance due on the account?

13 A. No.

14 Q. At some point did you write it off or why
15 not?

16 A. Yes, we did just write it off.

17 Q. When did you write it off?

18 A. It would have been shortly after the
19 foreclosure sale. I did not look for a deficiency or
20 anything of that sort.

Respondent never testified that the actual amount bid at the sale was \$3,000.00. Respondent's testimony was in response to a direct question by the Chair of the DHP as to the manner of calculation of a fee for a foreclosure sale. However, the DHP characterized it as "gratuitously added."

In addition, the Informant had admitted prior to trial that "The foreclosure sale price of \$5,000.00 on January 7, 2011 did not exceed the balance due under the

Installment Fee Agreement on said date plus the reasonable costs and expenses of the foreclosure proceeding.” (Ex. CCC, Admission 33, A505).

Sixth, in Paragraph 62, the DHP made the finding that “[Respondent] intended to purchase the property for a gross amount of \$5,000 without regard to the expenses of sale but given the fact that the Installment Fee Agreement was capped at \$3,000, he tailored his testimony to justify his conduct. Given the totality of the Respondent’s testimony at the hearing, the two recitations of the foreclosure sale price are inconsistent.” As noted above with regard to Paragraph 61, the calculation of the foreclosure price and its application was not an issue in dispute at the hearing, the DHP finding is in direct conflict with the Admission of the Informant prior to commencement of the hearing, and there are not two different foreclosure sale prices recited in the transcript.

Seventh, in Paragraph 63, the DHP made a finding that “The two undersigned lawyers have each practiced law in excess of 20 years, each with several firms. Neither has ever considered taking an interest in a client’s property as security for future legal services, nor, to our knowledge, has anyone with whom we are or have been associated.” (DHP Decision at ¶ 63, A578). This finding of fact is not supported by any evidence in the record. To the extent it suggests Respondent’s fee arrangement with Boothe is unusual, it is further in direct conflict with the testimony of Dana Martin, who stated other lawyers in the Lake of the Ozarks area do engage in that practice. (Tr., p. 277, LL. 18-23, A96).

POINTS RELIED ON

I. RESPONDENT DID NOT ENGAGE IN A PROHIBITED BUSINESS TRASACTION WITH HIS CLIENT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT BECAUSE CONTRACTUAL LIENS SECURING THE PAYMENT OF ATTORNEYS FEES AND EXPENSES ARE AUTHORIZED BY RULE 1.8(i).

Rule 4-1.8(i)

Rule 4-1.5

Restatement (Third) of the Law, The Law Governing Lawyers,

ABA Ethics Committee Informal Decision 593 (Oct. 25, 1962)

II. RESPONDENT DID NOT ENGAGE IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND DID NOT FAIL TO MAKE REASONABLE EFFORTS TO ENSURE THAT HIS SECRETARY'S CONDUCT WAS COMPATIBLE WITH THE RESPONDENT'S PROFESSIONAL OBLIGATIONS BECAUSE RESPONDENT DID NOT PERMIT, AUTHORIZE OR KNOW THAT HIS SECRETARY BACKDATED THE NOTARIZATION OF THE FUTURE ADVANCE DEED OF TRUST AND COMMITTED NO OFFENSE WITHIN THE SCOPE OF CHAPTER 575, RSM_o PERTAINING TO OFFENSES TO THE ADMINISTRATION OF JUSTICE.

Rule 4-5.3

Rule 4-8.4

In re: Nancy S. Wallingford, 799 S.W. 2d 76 (Mo. 1990)

III. SUSPENSION IS NOT AN APPROPRIATE SANCTION IN THIS CASE AS RESPONDENT DID NOT ENTER INTO A BUSINESS TRANSACTION WITH HIS CLIENT ON UNFAIR OR UNREASONABLE TERMS, BUT RATHER ENTERED INTO A WRITTEN FEE AGREEMENT WITH SAID CLIENT ON TERMS THAT WERE FAIR, REASONABLE, AND FULLY DISCLOSED TO THE CLIENT AND WHICH MET ALL OF THE REQUIREMENTS OF RULE 4-1.5 AND RULE 4-1.8(i).

ABA Standards for Imposing Lawyer Sanctions

LEGAL ARGUMENT

I. RESPONDENT DID NOT ENGAGE IN A PROHIBITED BUSINESS TRANSACTION WITH HIS CLIENT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT BECAUSE CONTRACTUAL LIENS SECURING THE PAYMENT OF ATTORNEYS FEES AND EXPENSES ARE AUTHORIZED BY RULE 1.8(i).

A. Objection to Improper Argument by Informant

As an initial matter, Respondent must object to the line of argument by the Informant being raised, for the very first time, in its first point relied on in the Supreme Court. Point Relied On I in Informant's Brief asserts that the terms of the fee arrangement between Respondent and Boothe were exploitive, unfair, and unreasonable, and benefited Respondent at the expense of Boothe's financial interest.

The First Amended Information filed by Informant, upon which this case was tried, does not contain any allegation that the fee arrangement is exploitive, unfair, or unreasonable, or that it violates in any manner Rule 4-1.5, which prohibits "an unreasonable fee." (*See* First Amended Information at A23-A29). Informant is injecting an argument for the first time before this Court which was not pled, not answered, not the subject of discovery, and which was not fully developed at the evidentiary hearing before the Disciplinary Hearing Panel.

In particular, these allegations were not fully developed at the hearing because Informant objected to testimony at the Hearing regarding the condition of the real estate at issue (Tr., p. 103, LL. 17-25, A53), to the Respondent's testimony as to the value of

the real estate at issue (Tr., p. 109, LL. 24-25, A54), to Respondent's testimony as to whether a building permit could be obtained for the real estate (Tr., p. 113, LL. 16-18, A55), to Dana Martin's testimony regarding the quality of the result obtained by Respondent for Boothe (Tr., p. 273, L. 11 – p. 274, L. 19, A98-A96), and to testimony by Respondent as to whether the transaction was structured in a manner to obtain ownership of Boothe's property. (Tr., p. 136, LL. 9-13, A61). While not all of those objections were sustained, for the Informant now to argue that the terms of representation were exploitive, unfair, and unreasonable based on a record that was never fully developed on that issue is unfair, unreasonable, and improper.

Respondent suggests that the Court should decline to issue any sanctions on this point for this reason alone. Nonetheless, Respondent will address them to the extent possible, with the limited record on these issues from the hearing.

B. The Fee Arrangement in Question was Requested by Boothe, Not Suggested by Respondent, and the Total Fee was Reasonable

Respondent was requested by Boothe to undertake representation of him in his criminal case, and to rely on Boothe's real estate to secure payment of the fees and expenses that would be incurred in this representation, as Boothe had no liquid assets with which to make payment. (Tr., p. 62, LL. 9-17, A43; Ex. HH, A412). The uncontested evidence at the hearing was that this fee structure was Boothe's idea, rather than Respondent's. There was no evidence that Respondent "duped" Mr. Boothe or schemed to obtain his property.

Further, at various points throughout this proceeding, Informant has conflated the concept of receiving a security interest in Boothe's property with the idea that somehow Respondent bargained for Boothe's property. Informant has now asserted that Respondent "harmed" Boothe by taking a property worth in excess of the fee. The argument advanced by Informant fails to acknowledge or recognize the substantial legal difference between a security interest in real estate, and a possessory interest in real estate.

Boothe and Respondent did not bargain for the property. Respondent expected to be paid at his hourly rate, with a minimum fee of \$3,000.00. All Boothe had to do to keep his property was pay Respondent the money that he promised, multiple times, that he would pay. Boothe still does not dispute that he owed the money. Boothe acknowledges he received effective representation. Nowhere in the Information charges against Respondent has it been alleged that the fee charged was unreasonable. Nor did Informant produce any evidence at the hearing that Respondent's total fees of \$9,682.20 were unreasonable for the services performed.

C. Respondent's Fee Agreement with Boothe was a Permissible Contractual Lien to Secure a Fee, and Benefitted Boothe.

Lawyers have a long history of using contractual liens to secure the payment of legal fees. Section 43 of the *Restatement (Third) of the Law, The Law Governing Lawyers*, in Comment H, describes the theoretical framework for contractual liens in situations similar to this as follows:

- i. Other security for attorney fees and disbursements.* Under Subsection (4), a lawyer may obtain a consensual security interest in a client's property not otherwise involved in the representation, such as a mortgage on the client's land, a pledge of the client's stocks or an escrow arrangement. This Section does not prohibit such security arrangements. They are typically created by a writing that informs the client of the obligations secured. Typically they are used when the client's ability or willingness to pay is questionable, and they thus aid such a client (for example, a criminal defendant with nonliquid assets but no money) to obtain counsel.

The fee arrangement in question in this case was to Boothe's benefit. Boothe had no cash with which to hire a lawyer, and because of his property, did not qualify for a public defender. He was charged with a serious felony, facing 5 to 15 years of punishment in the Department of Corrections, and was currently being held in the Camden County jail on a \$40,000.00 bond. In this instance, Respondent's willingness to accept a contractual lien enabled Boothe to obtain counsel at a time when he had no liquid assets and could not provide a cash deposit for legal fees and expenses. As a result of the arrangement, Boothe received a bond reduction, representation by counsel of his choice, and a satisfactory outcome to the criminal charges against him.

Respondent agreed to Boothe's request, and attempted to do so in compliance with Missouri law and the Rules of Professional Conduct. Contrary to arguments advanced by

the Informant herein, Respondent did not set out to obtain Boothe's real estate, or to otherwise take undue advantage of Boothe.

Respondent had never represented or met Boothe prior to September 8, 2009. Mr. Boothe did not have an existing attorney/client relationship with Respondent or any attorney associated with Respondent's firm at the time he began negotiations to obtain representation. Mr. Boothe suggested the use of his real estate to secure payment of the fees for his case.

Under the applicable law and ethical rules, attorneys are allowed to secure payment of fees and costs with a lien – either a statutory lien in a case where a recovery may be made (*see Drake Dev. & Constr. LLC v. Jacob Holdings, Inc.*, 366 S.W.3d 41 (Mo. Ct. App. 2012)), or with a contractual lien such as a deed of trust or security agreement. These types of transactions in a fee agreement with a new client are permitted under Rule 4-1.8(i).

Rule 4-1.5 governs fee agreements. It prohibits in Paragraph (a) unreasonable fees. It requires in Paragraph (b) that the scope of representation and the rate of the fee and expenses be communicated to the client, preferably in writing. There was no evidence in this case that Respondent charged an unreasonable fee, and no argument by Informant that Respondent charged an unreasonable fee, until the Informant's Brief in this Court. It is without question that the scope of representation and the rate of the fees and expenses were communicated to Boothe, as they were part of the written Minimum Fee Agreement which he executed. *See Exhibit D, A247.*

Comment (4) to Rule 4-1.5 addresses payment of a fee in a manner other than cash, stating:

A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 4-1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 4-1.8(a) because such fees often have the essential qualities of a business transaction with a client.

Respondent did not accept a fee paid “in property instead of money.” He did not obtain a possessory interest in Boothe’s real estate in exchange for legal services. Respondent accepted a promise to pay money, secured by a lien on real estate. Conspicuously absent from Rule 4-1.5 and its comments is any indication that where a fee agreement is secured by collateral that the transaction is subject to Rule 4-1.8(a). The key issue in this case is not whether or not the Rules prohibit a contractual lien, but rather, what paperwork is required to secure a fee agreement with a contractual lien and comply with Rule 4 where the transaction is with a prospective new client.

D. Applicable Supreme Court Rules

Rule 4 of the Missouri Rules of Professional Conduct begins with a Preamble consisting of 13 paragraphs, followed by a Scope consisting of 8 paragraphs. In order to understand the language of the Rules, it is important to first review both the Scope and Preamble, as they provide key guidance as to the intent of the Rules. The provisions of

paragraphs 14, 17, 19, and 21 of the Scope are pertinent to this proceeding, and provide as follows:

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. **Some of the Rules are imperatives, cast in the terms "shall" or "shall not."** These define proper conduct for purposes of professional discipline. **Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.** Other Rules define the nature of relationships between the lawyer and others. The Rules are, thus, partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. **Many of the Comments use the term "should."** Comments do not add obligations to the Rules but provide **guidance for practicing in compliance with the Rules.**

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. **Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has**

agreed to do so. But there are some duties, such as that of confidentiality under Rule 4-1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[19] **Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.** The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[21] **The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.** The Preamble and this note on Scope provide general orientation. **The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.** (*Emphasis added.*)

These provisions from the Scope define the relative importance of the Rules in comparison to the Comments to the Rules, and which provisions of the Rules are mandatory (“shall or shall not”), and which are permissive and discretionary (“may”). The Comments are explanatory, and do not add obligations to those contained in the Rules. As the Scope clearly states, violation of a mandatory provision of a Rule is grounds for disciplinary action, but no disciplinary action arises from discretionary acts, and no disciplinary action arises from violation of a Comment.

RULE 4-1.8: CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

This Court has adopted a slightly modified version of the ABA Model Rules of Professional Responsibility Rule 4-1.8. The only modification that Respondent has been able to identify in the Missouri Rule 4-1.8 is that the caption of the rule has been changed. The Model Rule is titled “Rule 1.8 Conflict of Interest: Current Clients: Specific Rules.”

The Missouri Rule is titled “Rule 4-1.8: Conflict of Interest: Prohibited Transactions,” which is the same caption Rule 4-1.8 had before the 2007 amendment to the Rule. It appears from its caption that Model Rule 4-1.8 as drafted by the ABA and the comments for that Rule, were only intended to apply to transactions with a current client, and the language of the Rule was not drafted to apply to a fee arrangement with a new client. It is unclear whether this Court intended to extend the scope of Rule 4-1.8 beyond transactions with existing clients when it adopted the current version of Missouri Rule 4 on July 1, 2007, or whether the retention of the prior caption to Rule 4-1.8 was a clerical oversight. The Court’s Order adopting the Rule is silent on this issue.

Rule 4-1.8(i)

Rule 4-1.8(i) expressly addresses the issue as to whether a secured fee arrangement with a new client is a business transaction with a client subject to Rule 4-1.8(a), in that it provides:

4-1.8(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses;

This provision clearly permits an attorney to acquire and enforce the statutory attorney's lien which is granted by Sections 484.130 and 484.140 RSMo. However, the Rule goes well beyond simply allowing the statutory lien, as it permits an attorney to obtain a "lien authorized by law." Comment 16 to Rule 4-1.8 explains the scope of Rule 4-1.8(i) as follows:

Rule 4-1.8(i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law, and liens acquired by contract with the client. (emphasis added).

This comment suggests that contractual liens, such as a deed of trust or a security interest in personal property, including the Deed of Trust acquired by Respondent in this case, are to be considered a "lien authorized by law" and "may" be "acquired" to "secure

a lawyer's fees or expenses." Contractual liens have long been recognized as an ethical means to secure payment of fees and costs.

The ABA Ethics Committee issued an informal decision in 1962 regarding the use of a Mortgage Note to Secure a Future Fee under the Canon of Professional Ethics then in force, stating as follow

Informal Decision 593

Mortgage Note to Secure Future Fee

October 25, 1962

You state that you represent the defendants in an action to foreclose a mortgage on defendants' residence and place of business which mortgage was given to secure a note which their attorney took to insure the payment to him of his future fees. You further state that the fees were only partially paid and the attorney instituted his action to foreclose.

You have inquired: "Does an attorney who obtains from a client (a) a promissory note and/or (b) a mortgage on the client's real property to secure a fee to be earned and not yet established, thereby violate any of the Canons of Professional Ethics?"

The Committee stated in its headnote to Opinion 27, May 5, 1930:

"Fees - The amount of the fee which a lawyer deducts from his client's funds presents no ethical question unless it be so flagrantly excessive as to amount to misappropriation."

There is nothing inappropriate in a lawyer setting in advance of the performance of the work a lump sum as his fee nor in requiring payment of the fee in advance. **It is not *per se* improper for an attorney to take security for the payment of a fee earned or to be earned.** (*Emphasis added*)

On May 31, 2002, The ABA Standing Committee on Ethics and Professional Responsibility issued its Formal Opinion 02-427 under the Model Rules of Professional Conduct adopted by the ABA House of Delegates in February of 2002 entitled “Contractual Security Interest Obtained by a Lawyer to Secure Payment of a Fee.” In that Opinion, the ABA noted that, “In Informal Opinion 593, this Committee, interpreting the ABA Canons of Professional Ethics, stated that ‘[I]t is not *per se* improper for an attorney to take security for the payment of a fee earned or to be earned. . . . we reaffirm Informal Opinion 593 and discuss further issues under the Model Rules on the subject of securing payment of a fee.’”

In Footnote 2, the ABA wrote “Taking a security interest for the payment of a reasonable fee is not itself reason to call into question the reasonableness of the fee under Model Rule 1.5.” The ABA mentioned in Footnote 6 that “There is limited case law or opinion on a lawyer's taking a security interest to secure a fee under the Code of Professional Responsibility.” The ABA went on to discuss former Model Rule 1.8(j), which was in force in Missouri until adopted of the new rules in 2007, as follows:

We next address under what circumstances, if any, a lawyer may take a security interest in client property when the property is the subject of

litigation in which the lawyer represents the client. Model Rule 1.8(i)—formerly Rule 1.8(j)—prohibits a lawyer from acquiring a proprietary interest in the subject matter of litigation, although it permits the lawyer to acquire a lien "authorized" by law to secure the lawyer's fees or expenses. By use of the word "authorized" in place of the word "granted" under former Rule 1.8(j), Rule 1.8(i) is intended to permit any legally recognized lien to secure fees to be acquired in property that is the subject of litigation. Comment [16] to the Rule provides: ". . . [L]iens . . . authorized by law . . . may include liens granted by statute, liens originating in common law and **liens acquired by contract with the client.**" Sources of authorization also may include court rules and orders of a court, subject to applicable law. The revision of this rule resolves previous uncertainty in applying former Rule 1.8(j) evidenced by conflicting lines of court decisions, state and local bar opinions, and commentary.

We conclude that former Rule 1.8(j) should not be applied to prohibit acquisition of an otherwise legally and ethically obtained lien and that Rule 1.8(i) expressly permits such a lien to be acquired. As indicated by Comment [16], it is the intent of Rule 1.8(i) to permit a contractual lien in the subject of litigation to be acquired independently of Rule 1.8(a), as long as acquiring such a lien is not inconsistent with an applicable statute or rule. Rule 1.8(a) should not be regarded as a rule this inconsistent with Rule

1.8(i) and we conclude that it does not apply to the acquisition by contract of a security interest in the subject of litigation for fees. (*Emphasis added*)

The Opinion goes on to conclude that “A lawyer may acquire a security interest in client’s property to secure a fee. A security interest may secure a fee meeting the requirements of Rule 1.5. Acquisition of such a security interest must meet the requirements of Rule 1.8(a) **or** Rule 1.8(i)” (*emphasis added*).

E. Applicable Case Law

There are no Missouri cases that expressly discuss these issues in depth, with the possible exception of *In Re Snyder*, 35 S.W.3d 380 (2000). For brevity, *Snyder* will not be discussed here, as it is discussed at length later in the brief. There is, however, persuasive support from other jurisdictions holding that taking a security interest in a client’s property to secure the payment of fees is a permissible fee arrangement.

In the case of *Skarecky & Horenstein, P.A. v. 3605 North 36th Street Company*, 170 Ariz. 424, 825 P.2d 949 (Az. App. 1991), which was decided before the ABA promulgated the current version of the Model Rules in 2002, the Court found that a lien acquired by a law firm through assignment of the beneficial interest in a deed of trust to secure payment of its fees did not violate Rule 1.8 of the Arizona Rules. The *Skarecky* court cited a 1991 Iowa opinion, *Committee on Professional Ethics and Conduct v. McCullough*, 468 N.W.2d 458, 461 (Iowa 1991), where the Iowa Supreme Court held that “taking a contractual security interest to secure payment of attorney’s fees does not constitute entering into a business transaction with a client in violation of DR 5-104(A).”

In a 2007 decision regarding the application of Rule 1.8 to the acquisition of a promissory note from a former client, the Washington Court of Appeals held that Rule 1.8 applies to transactions between a lawyer and a current client, and does not apply to transactions between a lawyer and a former client once the representation has terminated. *Perkins Coie LLP v. Madison Group, Inc.*, (2007 Wash. App. Lexis 2208).

Similarly, in an unreported 2009 opinion in the case of *Kelly v. Kelly*, 2009 Conn. SuperLexis 2188 (Aug. 2009), the Connecticut Superior Court addressed a motion to disqualify an attorney for a party in a dissolution action because the attorney had obtained a promissory note secured by a mortgage from his client as part of the fee arrangement. The Superior Court noted that there was a conflict among various decisions in Connecticut pertaining to secured fees, with some decisions finding the arrangements subject to Rule 1.8, and others finding the arrangements are not subject to Rule 1.8.

The *Kelly* court found on the facts of that case that the attorney had not acquired a proprietary interest in property which was the subject of the pending litigation and denied the motion for disqualification. The *Kelly* opinion illustrates that there is not a simple or clear answer as to whether a secured fee arrangement is subject to Rule 1.8.

In *Petit-Clair v. Nelson*, 344 N.J. Super. 538, 782 A.2d 960 (App. Div. 2001), during the course of representation an attorney persuaded his clients in 1989 to grant him a mortgage on their personal residence to secure his attorney's fees. Eight years later, after the case was concluded, the former clients defaulted and the attorney initiated a foreclosure proceeding. *Id.* at 963. The Court held that under Rule 1.8(a), because the attorney failed to give the required notice, the mortgage was unenforceable. *Id.* at 964.

This case was decided under the Model Code, as it involved facts in 1989 and was decided in 2001, before the 2002 adoption of the Model Rules by the ABA. No sanctions were imposed on the attorney other than the loss of the mortgage.

F. Comments to Rule 4-1.8

While Rule 4-1.8(i) allows a contractual lien to secure payment of fees and expenses, Comment 16 does provide:

[16] . . . When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of Rule 4-1.8(a).

This comment, depending on how it is interpreted, may suggest that when taking a contractual lien on a prospective client's real estate to secure fees and expenses in a criminal case, that the attorney should give the Rule 4-1.8(a) notice. It certainly would suggest a 4-1.8(a) notice should be given to a **client**. However, there was no evidence in this case that Boothe was a client before signing the fee agreement documents. In fact, the competent evidence was to the contrary – the Minimum Fee Agreement clearly states: “This Agreement will not take effect, and Lawyer will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit called for under Paragraph 5.” (Ex. D, A247).

Candidly, Respondent was not aware of this comment before Informant filed this action, and if he had been aware of it, he would have included a 4-1.8(a) notice. He concedes it would have been better to include the 4-1.8(a) notice in this transaction, and

he has since added the notice to his fee agreement form, and gives it to all prospective clients. (Tr., p. 137, L. 22 – p. 138, L. 7, A61-A62).

However, as stated in the Scope Paragraph 14 above, “*Comments do not add obligations to the Rules.*” Failure to comply with Rule 4-1.8(a) as to a lien to secure fees and costs which is permitted under Rule 4-1.8(i) does not violate any of the Rules. The text of Rule 4-1.8(i) does not require compliance with Rule 4-1.8(a).

In other words, if it is a requirement to give the Rule 4-1.8(a) notice when taking a security interest for fees and costs, Rule 4-1.8(i) should simply say so in the text of the rule, rather than burying the requirement in the middle of Comment 16, particularly if a sanction such as suspension of Respondent’s license could occur for failing to give such a notice.

G. RULE 4-1.8(a) – Business Transaction with a Client

Informant has alleged that this transaction was not governed by 4-1.5 as a fee agreement, or 4-1.8(i) as a contractual lien authorized by law to secure the payment of fees and expenses, but rather that this was a business transaction with a “client” and governed by 4-1.8(a). As an initial matter, Respondent has conceded from the beginning of this matter that his fee agreement paperwork with Boothe did not contain a 4-1.8(a) notice, and that he treated this transaction as a fee agreement transaction, not as a business transaction. If Respondent was in error in doing so, he has freely admitted it from the beginning. *See Answer to First Amended Information at ¶ 10, A31.*

Rule 4-1.8(a), generally referred to as the “business transaction rule” provides as follows:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

This Rule clearly contemplates that the transactions described are between the lawyer and a “client.” Nothing in the Rule suggests that it is to apply to transactions with a prospective or potential client, or to a former client, or to a fee agreement. This is a reasonable limitation on the scope of the business transaction Rule, as virtually everyone who ever speaks with a lawyer is potentially a client. This limitation is consistent with Paragraph 17 of the Scope, which states in part: “Most of the duties flowing from the

client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.”

Comment 1 to Rule 4-1.8(a) further explains the purpose of the Rule stating:

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.

This Comment was drafted for the Model Rule 1.8(a), which is expressly limited in its scope to transactions with current clients, and was not intended to apply to fee agreements with new clients.

In the absence of an **existing** attorney-client relationship, there is no reason for a potential client to expect the same level of trust and confidence that exists when an attorney has been representing a client in a matter. The possibility of overreaching, i.e., abuse of the client’s trust and confidence, simply does not exist. In this case, Respondent never met Mr. Boothe prior to the date on which the fee agreement was negotiated. Boothe had no reason to expect that Respondent would be representing Boothe during the fee negotiation. Respondent was, and is, required by Rule 4-1.5 to enter into a fair and reasonable fee arrangement with clients, and did so in this case. Boothe had reason to expect that the fee arrangement would be fair and reasonable, and it was. Boothe made no effort to make any payment of the legal fees he incurred, and it was fair and

reasonable for Respondent to enforce the collateral arrangement Boothe proposed when he requested representation.

This Court should find that the terms of the fee agreement between Respondent and Mr. Boothe are fair and reasonable to Boothe, and were fully disclosed and transmitted in writing to him and in a manner which could be reasonably understood by him. Boothe had no liquid assets to hire an attorney. He had real estate. He offered the real estate to secure payment of the fees he expected to incur. He obtained the legal services he requested, and is satisfied with Respondent's work, and does not dispute that the fee charged was reasonable. He has never made any voluntary payment toward those fees.

The Fee Agreement clearly set forth the terms upon which Respondent was hired to represent Mr. Boothe. It set forth the hourly rates, expenses, and billing arrangements. Boothe could not make the initial deposit required. He executed an Installment Agreement which provided he would do so within six months. On the Installment Agreement is a handwritten provision pledging his real estate as collateral for payment of the fees, stating "Property at Lot 9 Kip's Cove Given as Collateral for this Note." The handwritten provision is in simple terms which are easily understood. It is hard to imagine how they could have been written any clearer.

Boothe does claim at various places that the handwritten additions were not present when he signed the document. He maintains that position even though he also claims to never have read the documents, even as of the date of the hearing in this matter. However, a review of his various letters to the OCDC and his statements to the Camden

County Sheriff will illustrate that he was familiar with the contents of all three documents. Boothe's only explanation for his inconsistencies is that he was not under oath when he made some of the statements, but was under oath when he made others. (Tr., p. 204, LL. 21-25; p. 205, LL. 1-9, A78). The DHP panel specifically gave little weight to his testimony. (DHP Decision at A578).

No effort was made to enforce the Deed of Trust or otherwise collect the fees owed by Mr. Boothe until the representation had been concluded on terms acceptable to him.

Informant makes the statement in his brief that "No written explanation of the transaction was presented to his client." (Informant's Brief, p. 24). This assertion is not supported by a citation to the transcript or exhibits herein. In fact, there was a written Fee Agreement, an Installment Fee Agreement, and a Deed of Trust, all of which were presented to Mr. Boothe and signed by him.

Informant also states that,

Respondent never explained the material risks of the transaction to his client, including the fact that the subject property had a fair market value far in excess of the attorney's fee and expenses to be incurred by Respondent and that the property could be foreclosed upon and sold to the highest bidder without any further court proceedings.

(Informant's Brief, pp. 29-30). The evidence in this case does not support this statement.

The Deed of Trust itself explains the procedure by which the property would be sold in the event of non-payment of the Installment Fee Agreement, i.e.,

[I]f default be made in the payment of the principal or interest of said indebtedness shall be become due and the Trustee at the request of the holder of said indebtedness or any part thereof shall sell said property or any part thereof at public auction to the highest bidder for cash at the Front Door of the Camden County Courthouse in Camdenton, Missouri . . .”

(Ex. F, p. 3, A254).

Similarly, the Installment Fee Agreement said “Property at Lot 9 Kip’s Cove given as collateral for this note.” (Ex. E, A251). These written explanations were in fact given to Mr. Boothe, as his signature appears on both documents, and they adequately explained the transaction in terms understandable to a reasonable person in Boothe’s situation. His understanding of the transaction is reflected in his Complaint to the Informant of March 30, 2011 (Ex. Q, A309), where he states, “He came and we discussed the fact that he wouldn’t have to worry for his pay. That I owned more than one property. I told him in effect that if ‘push came to shove’ he may end up w/my land even.” This statement clearly lays out in simplified terms an understanding on the part of Mr. Boothe of how a pledge of real estate to secure legal fees works.

Comment 1 goes on to clarify that Rule 4-1.8(a) “*does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 4-1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.*”

Comment 4 to Rule 4-1.5, states that:

A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 4-1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 4-1.8(a) because such fees often have the essential qualities of a business transaction with the client. (emphasis added).

These two comments, read together, make it clear that when an attorney agrees to accept property in payment for services as part of a fee agreement, then the transaction should be treated as a business transaction and Rule 4-1.8(a) must be complied with. However, that is not the case before this Court. The fee agreement in this case was not paid in property instead of money. Respondent obtained a promise from Boothe to pay money, secured by a lien on Boothe's real estate. Respondent did not accept the real estate as payment of the fees and expenses incurred in representing Boothe. Respondent enforced the lien. He only owned the property for a brief time because no other bidders appeared at the foreclosure sale, and therefore, he was the high bidder. This was a fee agreement that provided for payment of the fees and expenses in money, not in property.

These Comments also raise an issue as to whether the fee arrangement between Respondent and Mr. Boothe was an "ordinary fee arrangement" to which Rule 1.8(a) does not apply. Dana Martin testified that secured fee arrangements are common in criminal defense cases at the Lake of the Ozarks, and that "there are a lot of requests for that." (Tr., p. 277, LL. 7-23, A96). The two attorney members of the DHP report that

they have never entered into a secured fee arrangement with a client, and are not aware of any attorney who has. (DHP Decision at ¶ 63, A578). Respondent vehemently objects to the Court's consideration of this finding. It is an improper injection into the record of the panel's personal experiences, and evidences that the DHP's decision was not based solely upon the evidence before it in an impartial manner. Respondent was not afforded the opportunity to cross-examine the attorney members of the panel on this finding. Nor was Respondent provided notice of the need or opportunity to provide rebuttal evidence.

Respondent happens to know that neither of the attorney panel members practice in the area of criminal defense at the Lake of the Ozarks, and neither provided any testimony or information as to whether their practice includes representation of criminal defendants who are charged with crimes that may involve a long term of imprisonment. The only competent evidence in the record on this subject is the testimony of Ms. Martin, which supports a finding that taking a security interest in real estate to secure a fee is an ordinary fee arrangement for a criminal defense representation on a serious felony within the market area in which Respondent practices.

Further, the burden in this proceeding is on the Informant. The Informant produced no evidence that these types of fee arrangements are not "ordinary fee agreements" in the Lake of the Ozarks area. Although Respondent nonetheless did his best to disprove that particular item, the burden is not his to carry.

The Court should also note that this Comment 4 to Rule 4-1.5 uses the word "may" rather than "shall" or "is," making it clear that this is a permissive and discretionary explanation of the application of Rule 4-1.5, and is not a mandatory

provision which can result in disciplinary sanctions. Since “*Comments do not add obligations to the Rules,*” and Rule 4-1.5 does not expressly require that Rule 4-1.8(a) apply to fee agreements paid in property instead of money, failure to follow Rule 4-1.8(a) in such a transaction cannot result in discipline. Even if this Court decides that taking a deed of trust to secure payment of a fee in some manner constitutes accepting property in payment of a fee, no discipline should be imposed because the comments make it clear that giving of the Rule 1.8(a) notice under these circumstances is discretionary, rather than mandatory.

H. Informant’s Cited Authorities are Inapposite

*In Re Snyder*²

Informant relies on *In Re Snyder*, 35 S.W.3d 380 (Mo. 2000), for its argument that Respondent should be disciplined, and the DHP expressly quotes from the *Snyder* case in its opinion. No Missouri case has directly addressed the issue as to whether it is an ethical violation to secure a fee arrangement with a *prospective* client with a deed of trust on real estate owned by the client, or any other security arrangement for fees. The Missouri Supreme Court *indirectly* addressed this issue in the two opinions issued in the

² Respondent cites to two separate *In Re Snyder* decisions. The first decision is found at 35 S.W.3d 380 (Mo. 2000), and was a 4-3 decision imposing a suspension. Subsequently, Snyder requested rehearing, and on rehearing, the Court issued a unanimous opinion in favor of a suspension. The second opinion can be found at 2001 Mo. LEXIS 14 (Mo. 2001). Both opinions contain language that is instructive.

Snyder case. To Respondent's knowledge, the *Snyder* decisions are the only reported cases addressing Rule 1.8 in the context of an attorney disciplinary proceeding.

The *Snyder* decisions were handed down over seven years before this Court adopted the current version of Rule 4-1.8, and before the ABA promulgated the Model Rules. The language of the Rule has changed significantly. The prior rule, which was based on the ABA Model Code, did not contain the same language as is now found in Rule 4-1.8(i), as it only allowed an attorney to obtain a lien "granted by law" and did not use the broader language of "authorized by law" now found in Rule 1.8(i).

The *Snyder* case arose from two separate fee arrangements with two different clients, and was charged in two separate counts. In Count 1, Snyder had obtained two quit claim deeds to real estate owned by his current client in payment for his attorney's fees, which the client had already incurred. *Id.* at 381-382. Because the fee arrangement involved a transaction where both the attorney and the client retained interests in the client's property, the Court found that Rule 4-1.8(a) applied, and that the attorney failed to comply with the requirements of that rule. *Id.* at 383.

The facts found in Count 1 of the *Snyder* case would clearly fall under the notice requirements of current Rule 4-1.8(a), because although it was a fee arrangement, payment of the fee was made with property rather than with money. *Id.* Count 1 differs from this case as Count 1 in the *Snyder* case did not involve a lien to secure payment of fees and costs.

In Count 2, Snyder had accepted a promissory note secured by a deed of trust on his client's home in satisfaction of his fees in a criminal tax evasion case. *Id.* at 381-382.

During the pendency of the tax evasion case, Snyder convinced his client to file a Chapter 7 bankruptcy proceeding to avoid foreclosure of the house securing his promissory note. *Id.* at 382. In the bankruptcy proceeding, Snyder sought to claim the entire proceeds from the sale of the house for his legal fees, and exhausted the bankruptcy estate by litigating disputed issues regarding his lien on those proceeds, earning himself sanctions from the Bankruptcy Court initially in the amount of \$1,000.00, and then from federal district court in the amount of \$4,352.00, and finally from the Eighth Circuit Court of Appeals in the amount of \$7,093.00. *Id.* at 382. The bankruptcy estate incurred fees of \$21,500.00 in defending Snyder's claim for attorney's fee against his client. *Id.*

The Missouri Supreme Court did *not* find Snyder in violation of Rule 4-1.8(a) in Count 2 as a result of his *initial* fee arrangement in the criminal tax evasion case which involved a promissory note secured by a deed of trust. *Id.* at 383-384. However, the Court found that when Snyder became a named party to the bankruptcy proceeding and attempted to impose a lien on the proceeds of the sale of his client's house and argued that his fee arrangement for the criminal tax evasion case should apply to his fees for filing the bankruptcy proceeding, his interests diverged from his client's. *Id.* The Court found Snyder violated Rule 4-1.7(b) because his claim for attorney's fees in the bankruptcy proceeding was adverse to his client. *Id.* at 384. The Court also found Snyder violated Rule 4-1.8(a) because he acquired an adverse pecuniary interest in the bankruptcy proceeding and failed to fully disclose in a contemporaneous writing how he would pursue securing his fees *for the new and additional services* being provided during

this ongoing fiduciary relationship. *Id.* at 384 (emphasis added). The Court said with respect to Count 2:

[Snyder] followed this proceeding with frivolous appeals to the United States District Court, Eastern District, and the Eighth Circuit Court of Appeals resulting in further sanctions. The Eighth Circuit determined that [Snyder] was advancing legal arguments in direct conflict with his client's interests that were not supported by the law or a good faith modification for change in the law. *Snyder v. Dewoskin*, 131 F.3d 750, 759-60 (8th Cir. 1997). Respondent's frivolous legal actions ultimately depleted the entire bankruptcy estate from costs incurred in the defense against [Snyder]'s claims.

[Snyder]'s pursuit of his attorney's fees materially limited his representation of his client's interests in violation of Rule 4-1.7(b). No reasonable lawyer could believe that Mahendra's representation would not be adversely affected, and there is no evidence to suggest that Mahendra consented to [Snyder]'s actions after receiving consultation as to the potential conflict of interest created by diverting estate assets away from other bankruptcy creditors.

Having acquired an adverse pecuniary interest **in the subject matter of the bankruptcy proceeding**, Respondent became obligated under Rule 4-1.8(a) to fully disclose, in a contemporaneous writing, how he would pursue securing his fees for the **new and additional services** being

provided during this ongoing fiduciary relationship. [Snyder] should have disclosed his intent to file a lien on the proceeds from the sale of the property prior to initiating the bankruptcy proceedings. He also should have ensured that Mahendra had a reasonable opportunity to seek independent advice of counsel by advising him to pursue such and should have obtained written consent prior to proceeding.

Id. at 384; *In Re Snyder*, 2001 Mo. LEXIS 14, 11-12 (Mo. 2001) (emphasis added).

Significantly, the Court in *Snyder* did *not* find that obtaining a promissory note and deed of trust as part of a fee arrangement in Count 2 at the commencement of the representation violated Rule 1.8(a). It was only after the client filed bankruptcy and Snyder's interests diverged from his client's interests that the conflict of interest arose, the notices required by Rule 1.8(a) needed to be given.

Here, as in Count 2 of *Snyder*, Respondent entered into a secured fee agreement with Mr. Boothe. This Court did not find that *Snyder* violated Rule 4-1.8(a) by obtaining a note and deed of trust from his client to secure his original fee arrangement, and it would therefore follow that Respondent also did not violate Rule 4-1.8(a). Unlike Count 2 of *Snyder*, Respondent completed his representation of Mr. Boothe in a timely, diligent and competent manner, and obtained results that were satisfactory to Mr. Boothe. After the representation was concluded, and the promised payment of the fees and expenses was not forthcoming, Respondent proceeded with enforcement of the lien. The validity of the lien and its foreclosure has already been judicially determined in favor of Respondent. (Ex. V, A348).

The facts of this case differ greatly from those of *Snyder*. There is no evidence in this case that Respondent accepted or agreed to accept payment of his fees in property. Respondent obtained a deed of trust, which gives a security interest, without a 1.8(a) disclosure; Snyder was disciplined in Count I for obtaining a quit claim deed, which gives a possessory interest, without a 1.8(a) disclosure. Further, Snyder obtained those deeds *during the course of the representation*. Snyder made his deal in the course of an ongoing attorney-client relationship. Respondent, when he negotiated the terms of his representation, did not yet represent Boothe. There was no attorney-client relationship, and so a 1.8(a) disclosure was not required.

There is no evidence in this case that the secured fee arrangement in any way limited Respondent's representation of Mr. Boothe in the criminal proceeding. There is no evidence in this case that Respondent acquired an adverse pecuniary interest in the subject matter of his representation of Mr. Boothe. Finally, there is no evidence in this case that Respondent demonstrated a lack of competency in his representation of Mr. Boothe.

While *Snyder* is the closest case on point to the issues in this case, in that it is the only reported case involving a sanction for failure to comply with Rule 4-1.8(a), it is not truly on point, and certainly is not controlling. The facts are materially different, and the facts in *Snyder* which are most similar to the facts in this case, specifically the fact that Snyder took a deed of trust to secure his fees in the tax evasion case in Count II, did not result in the imposition of sanctions on Mr. Snyder. *Snyder* was decided under a prior version of Rule 4, and the facts herein differ significantly. The law that governs

Respondent's conduct in this case is the current version of Rule 4, not the prior version, and not the holding in *Snyder*.

In Re Miller

Informant also cites *In the Matter of George H. Miller*, 568 S.W.2d 246 (Mo. 1978), in his brief. In that case, the attorney before the Court had abused the authority given to him under a general power of attorney given by his client by engaging in transactions by which he appropriated and treated for his own and availed himself of the use of approximately \$30,000.00 of his client's funds. *Id.* at 248-250. The Court in that case noted that the Respondent's violations of the disciplinary rules related solely to his derelictions as a fiduciary, and issued a public reprimand to the Respondent, and directed that he comply with certain specific requirements of the Court to cease to act in a fiduciary capacity for a period of two years. *Id.* at 254-255.

The facts in this case do not involve a breach of a fiduciary duty on the part of Respondent. There was no attorney-client relationship between Respondent and Mr. Boothe at the time of negotiation and execution of the fee agreements. The Minimum Fee Agreement expressly states that the attorney-client relationship "will not take effect, and Lawyer will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit." (Ex. D, A247). Informant argues that a fiduciary relationship existed when the fee arrangement was negotiated, but the documents unequivocally show that the parties agreed it did not.

Mr. Miller received a public reprimand for an ongoing breach of fiduciary duty to his client while holding a general power of attorney over a span of several years. *In Re*

Miller does not support Informant's requested sanction of suspension of Respondent's license in this case.

In Re Lowther

Informant also cites the case of *In Re Lowther*, 611 S.W.2d 1 (Mo. 1981), for the proposition that an attorney acquiring personal interest in a client's property requires that the Court hold the attorney to the highest of standards. The facts in that case involved an attorney who served as a shareholder, director, and attorney for a publicly held corporation, and who utilized his position as a director and attorney for the corporation to extract a personal benefit from a transaction contemplated by the corporation. *Id.* at 1-2. While there are a number of ethical concerns in such a transaction, the case did not involve a fee agreement between an attorney and his client, but rather involved a breach of fiduciary duty by the attorney with his corporate client, and self-dealing through the use of the corporate resources to obtain a personal benefit. Mr. Lowther also diverted retainers for his legal work from his law firm partnership to his personal bank account, in essence depriving his partners of their share of the fees from the client. *Id.* at 1-2.

The Court therein stated,

The matter before the Court illustrates the inherent danger of becoming personally involved with the affairs of clients, self dealing with clients, and of "taking a piece of the action." The attorney, with his superior knowledge and education, can pursue this course only at his peril. It is an area wrought with pitfalls and traps and the Court is without choice

other than to hold the attorney to the highest of standards under such circumstances.

In Re Lowther at 1-2. The Court suspended Mr. Lowther with leave to reapply after one year. *Id.* at 17.

The *Lowther* case involved an attorney involved in a business transaction with his client while also a member of the board of directors of the client, who also utilized his position as a director for his financial profit to the detriment of the corporation, and who was less than honest with his partners in the practice of law. It did not involve a secured fee agreement between an attorney and client. While the principles of law set out in the *Lowther* opinion are sound, they have little bearing on the issues in this case, and do not support Informant's request for suspension of Respondent's license.

Laspy v. Anderson

Informant cites the case of *Laspy v. Anderson*, 361 S.W.2d 680 (Mo. 1962), for the proposition that a conveyance from a client to an attorney is presumptively fraudulent, and the attorney bears the burden of proving the transaction, as well as the conveyance itself, was fair and reasonable in all respects. However, the *Laspy* case was not an attorney discipline case, but rather a civil suit to set aside the deed in question.

In *Laspy*, the Plaintiff brought a civil suit to set aside a deed conveying a piece of her real estate to her attorney's son. After the Plaintiff had retained the attorney to defend her in a murder case, the attorney prepared a deed transferring some of the Plaintiff's property to the attorney's son. *Id.* at 681. The attorney apparently notarized the deed himself. *Id.* The Plaintiff admitted that her signature appeared on the deed, but

denied acknowledging it, and claimed to have no memory of signing the document. *Id.* The Court held under these circumstances, the burden was on the Defendant (the son) to show the deed was not fraudulent, and that the Defendant failed to meet that burden. *Id.* at 681-682. The Court noted that the son would have a particularly difficult time meeting that burden, as his father, the attorney, had passed away. *Id.* at 682.

In Respondent's case, Boothe did file a civil suit against Respondent attacking the validity of the Deed of Trust, asserting, among other allegations, that the documents had been changed by the Respondent, and the transaction was fraudulent. (*See* Ex. U, A328). The civil suit was resolved in favor of Respondent. (*See* Ex. V, A348). Respondent has already met the burden of proving the transaction, including the execution of the Deed of Trust, was fair and reasonable in all respects. Boothe raised those issues in the civil case, and that case was resolved in favor of Respondent.

Informant appears to be suggesting that somehow its burden to prove Respondent has violated Rule 4 has now been shifted to Respondent. That certainly was not the holding in *Laspy*. To shift that burden in the context of a disciplinary hearing would be improper. *See* Rule 5.15(c). Finally, the Informant has not alleged nor proven that the transaction in question was fraudulent. *Laspy* is simply not applicable to this case.

The Law of Lawyering

Informant cites *The Law of Lawyering* 262, Geoffrey C. Hazard, Jr. and W. William Hodes (2d ed. 1990), for the proposition that a contract is construed against the drafter and against the one with superior knowledge. Respondent concedes that these are valid principles of law. The current edition of that publication is *The Law of Lawyering*,

Third Edition, Geoffrey C. Hazard, W. William Hodes (3d Ed. 2012), which has been updated to reflect the 2002 and 2004 amendments to the ABA Model Rules. Several sections of that treatise are instructive in analyzing the facts of this case.

In Section 2.3, the authors discuss “Duties to Prospective Clients,” noting that:

A lawyer’s profession responsibilities toward another person (or toward an organization) depend primarily on whether that person or organization is or is not a client. If the other person is a client, the client is entitled to the lawyer’s loyalty, confidentiality and zealous or diligent service. A person who is not a client generally must instead be held at arm’s length. ... The Model Rules as promulgated in 1983 did not deal explicitly with prospective clients, although there was near unanimous agreement that at least some of the basic duties are also owed to prospective clients during the period of uncertainty. In 2002, Rule 1.18, dealing with prospective clients specifically, was added.

Missouri had adopted Model Rule 1.18 as Rule 4-1.18. It defines the relationship between Respondent and Mr. Boothe before the execution of the fee agreement which established the attorney client relationship between them. It does not provide for a fiduciary duty between attorneys and prospective clients with respect to the negotiation of fee agreements. Such a duty would make it virtually impossible to negotiate any fee agreement with a prospective client.

The Law of Lawyering, in Section 12.11, also discusses briefly the history of utilizing liens to secure payment of fees and costs, stating:

DR 5-103(A) broadly prohibited the acquisition of an interest in a client's cause of action (champerty), while DR 5-103(B) prohibited lawyers from advancing or guaranteeing financial assistance to a client in most situations (maintenance). Under DR 5-103(A), a lawyer could still employ traditional liens to secure payment of a fee and could still obtain a contractual interest in a matter in the form of a contingent fee. These exceptions – rarely controversial - were carried forward into Model Rule 1.8(j) in 1983, which became Rule 1.8(i) in the 2002 Revisions.

Respondent admits that it would have been much better, and little additional trouble, to give the Rule 4-1.8(a) notice to Mr. Boothe in the Minimum Fee Agreement. Like most attorneys, Respondent relies on the use of standard forms for routine transactions, and the Minimum Fee Agreement and Installment Fee Agreement are standard forms which Respondent has prepared for use in a variety of fee arrangements with clients.

The Minimum Fee Agreement was drafted based on forms prepared by the Missouri Bar. The Installment Fee Agreement form was prepared because of the frequent request, particularly from criminal defendants, to make installment payments for their fees because they lack the funds to pay the amount in full. Neither form was drafted for the purpose of entering into a secured fee arrangement with a client.

Respondent was aware that Rule 4-1.5 governs fee agreements, Rule 4-1.8(a) governs business transactions with existing clients, and that Rule 4-1.8(i) permits taking

security for fees and costs. Respondent was not aware of the complexity of the interrelationship between these rules.

Respondent's assistant, Mrs. Jackson, generated the Minimum Fee Agreement and the Installment Fee Agreement before Respondent met with Mr. Boothe at the jail. Because he was unable to enter into any regular installment payment plan, the Installment Fee Agreement was modified to show the minimum fee was due in full in six months, and language about the collateral for the fee was added at the bottom. The Future Advance Deed of Trust was drafted two days later, when the Recorder's Office faxed Respondent a copy of the deed where Mr. Boothe obtained title to the property. It would have been better to have prepared all of the fee documents at the same time, and to have had Mr. Boothe sign all of them at the same time. That would have eliminated much of the uncertainty about whether and when Mr. Boothe signed the various documents, and what they contained when he did sign them.

On the other hand, Respondent believes that Rule 4-1.8(i) does allow an attorney to obtain a collateral agreement to secure fees and costs as part of a fee arrangement, and that the transaction with Mr. Boothe falls within the scope of that Rule. The practice of securing a future fee with a promissory note and deed of trust has long been recognized as an ethically proper arrangement, as evidenced by the 1962 Informal Decision 593 of the ABA cited above, and as noted by the *Restatement (Third) of the Law, The Law Governing Lawyers*, Section 43, Comment i, is an aid to obtain counsel to a client whose ability or willingness to pay is questionable, such as a criminal defendant like Mr. Booth with non-liquid assets but no money. Respondent did make every effort to comply with

Rule 4-1.5 by utilizing a written fee agreement, executing the same at the earliest opportunity in the representation, and charging a fair and reasonable fee for the services rendered.

Respondent would also maintain that the fee arrangement was prepared as a secured fee at Mr. Boothe's request, not at Respondent's request. The arrangement placed a financial burden on Respondent to pay and/or finance the cost of representation, and granted a corresponding benefit to Mr. Boothe. Without the security interest, Respondent would not have agreed to represent Mr. Boothe.

Finally, Mr. Boothe repeatedly asserted the fee documents were "forged." Exactly what he meant by that remains unclear to Respondent, and whether or not he intended to maintain that assertion at the evidentiary hearing is unclear. He did admit to executing all three of the documents at the evidentiary hearing. Respondent did not forge Mr. Boothe's signature on any of the documents, or alter the documents in any manner after they were signed by Mr. Boothe.

I. RULE 4-1.8(a) – LACK OF INFORMED CONSENT

There was little evidence at the hearing which addressed Informant's allegation that Respondent failed to obtain a written document signed by Mr. Boothe wherein he gave informed consent to the essential terms of the transaction which granted Respondent a security interest in the real estate at issue. To the contrary, the evidence was that Respondent provided Mr. Boothe with a written Lawyer-Client Minimum Fee Agreement, a written Installment Fee Agreement, which included a handwritten provision that "Property at Lot 9 Kips Cove given as collateral for this note," which is

easily understood language indicating that the property would serve as collateral for Mr. Boothe's obligations, and the Future Advance Deed of Trust itself. The purpose of the Minimum Fee Agreement was to provide Mr. Boothe with the terms and conditions upon which Respondent was willing to offer legal services, so that he would be informed and could make an informed decision as to whether to enter into the fee arrangement.

Under Rule 4-1.0(e), "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." The fee documents in this case communicated adequate information to Mr. Boothe, although he testified he chose not to read the documents, ever. Respondent did discuss the terms and conditions of the fee arrangement with Boothe, and advised Boothe he could seek other counsel if he did not like the terms offered by Respondent. (Tr., p. 117, L. 10 – p. 118, L. 3, A56).

Boothe chose to sign the documents, evidencing his determination that he felt adequately informed, and that he desired to enter into the fee arrangement. Boothe's various letters evidence his understanding. In Exhibit Q, page 2, A311, Boothe indicates that he contacted Respondent "after a bondsman told me he may work with me on financial arrangements," i.e., that he understood he would have to pay, but the timing of payment might be negotiated; that "[Boothe] owned more than one property," i.e., that property would be a part of the financial arrangements; and that "[Boothe] told [Respondent] in effect that if 'push came to shove' he may end up w/ my land even," i.e., that he stood to lose his real estate if he did not pay Respondent's legal fees.

Mr. Boothe's correspondence indicates that he understood the essential terms of his fee arrangement with Respondent, whether he read the documents or not. Boothe testified that he had completed high school and attended 19 credit hours of college. (Tr., p. 159, L. 25 – p. 160, L. 8, A67). Informant presented no evidence at trial that Boothe's consent as evidenced by his signature on the documents was not informed.

Informant's position seems to be that there should be some other written document, signed by Mr. Boothe, which reflects that he understood the documents he was signing. Respondent is not aware of any requirement of the Rules that informed consent be contained in a separate document. Informed consent denotes agreement to a course of conduct after the lawyer has communicated adequate explanation about the risks and reasonably available alternatives to the proposed course of action. (Rule 4-1.0(e)). Execution of the fee documents after discussing their content with Respondent, and Respondent advising Boothe that he was certainly welcome to hire someone else if he did not like the terms offered, does constitute informed consent by Boothe to the fee arrangement. All of the terms of the fee arrangement were conveyed to Boothe, in writing, and all of his questions were answered, and his options discussed. His option was to hire someone else to help with his legal problem.

J. CONCLUSION ON RULE 4-1.8 ISSUES

The DHP opinion framed the issue to be decided as follows: "The question is whether taking a security interest in real estate owned by the client for a fee that is yet to be earned violates Rule 4-1.8?" The DHP concluded, "We find that it does and that a lawyer practicing in observance of our Rules should have known that in 2009."

Conspicuously absent from the DHP's decision is any finding that Boothe was Respondent's client prior to the time of execution of the relevant documents, or that Rule 4-1.8(a) applies to fee agreement transactions with prospective clients. Further, in its analysis, the DHP makes no mention of Rule 4-1.8(i).

Rule 4-1.8(i) expressly permits an attorney to obtain a "lien authorized by law to secure the lawyer's fee or expenses." This was modified in 2007 from what Rule 4-1.8 previously provided, which permitted an attorney to obtain a "lien granted by law to secure the lawyer's fees or expenses." The broader language is intended to authorize contractual liens as well as a statutory attorney's lien. Rule 4-1.8, Comment 16. Because Rule 4-1.8(i) authorized Respondent to take a security interest in real estate owned by Mr. Boothe to secure the fees and costs to be incurred in his representation, the Information against Respondent should be dismissed.

The evidence in this case is that Mr. Boothe was not a client of Respondent's at the time they negotiated the fee arrangement in this case, including the Minimum Fee Agreement, Installment Fee Agreement, and Deed of Trust, and this is clearly stated in the Minimum Fee Agreement. Because Boothe was not an existing client of Respondent when the fee arrangement was negotiated, and had never before been Respondent's client, there is no basis for a claim that Respondent engaged in overreaching based upon the trust and confidence existing in the relationship between Boothe and Respondent. There was no relationship between Boothe and Respondent when the fee arrangement was negotiated. This was not a transaction between Respondent and his client which would be subject to Rule 4-1.8(a); rather, it was a fee arrangement subject to Rule 4-1.5.

Because Rule 4-1.8(a) does not apply to fee arrangements with prospective clients, the Information against Respondent should be dismissed.

Informant did not allege that the fee arrangement violated Rule 4-1.5, and made no attempt at trial to carry its burden to prove that allegation, but nonetheless now argues that the fee arrangement is exploitive, unfair and unreasonable. The fee arrangement was for the payment of Respondent's fees and expenses in money, not property. Because the terms of the fee arrangement provided for payment in money, not in property, the suggestion in Comment 4 to Rule 4-1.5 does not indicate that the transaction was subject to Rule 4-1.8(a). Because the fee arrangement was an ordinary fee agreement for criminal representation commonly used in the Lake of the Ozarks area, Comment 1 to Rule 4-1.8(a) suggests that Rule 1.8(a) does not apply, and the transaction is governed by Rule 4-1.5. The Information against Respondent should be dismissed.

Rule 4-1.8(i) clearly permits a lawyer to acquire a lien authorized by law to secure the lawyer's fees and expenses. The comments make it clear that this includes contractual liens, such as a deed of trust. Because the Deed of Trust is permitted under Rule 4-1.8(i), and Rule 4-1.8(i) does not require that any notice be given under Rule 4-1.8(a), Respondent did not fail to give a required notice to Boothe, and the Information against Respondent should be dismissed.

Mr. Boothe signed his name to three written documents which set forth the terms and conditions of his fee agreement with Respondent. His letters indicate he understood the essential terms of those documents. His informed consent to the terms of the transaction with Respondent is set forth in a writing signed by him.

If this Court determines that the Rule 4-1.8(a) notice was required for the fee arrangement between Mr. Boothe and Respondent, it should also find that Respondent was at most negligent in failing to give the notice, and that it was an isolated instance, in that Respondent has already modified his fee agreements so that the Rule 4-1.8(a) notice will always be given. This Court should dismiss the Information against Respondent, or find that at most an admonition is the appropriate sanction to be imposed on these facts.

Finally, Respondent would ask the Court to note that the current version of the Missouri Rules of Professional Conduct adopted on July 1, 2007, was intended by the ABA to materially alter the requirements for a lawyer to take security for the payment of fees. The ABA Model Rules as drafted are less than clear that secured fee agreements are now intended to be subject to Model Rule 1.5 and Model Rule 1.8, rather than just Model Rule 1.5, and represent a departure from the ABA's long held opinion on the propriety of secured fee arrangement as expressed in its 1962 Informal Decision 593.

Respondent's fee arrangement with Mr. Boothe was prepared so as to comply with Rule 4-1.5 – it is in writing, the basis and the rate of the fees and expenses was communicated at the time that representation commenced, and there is no dispute in this case that the services rendered were worth the fee charged, and that the secured fee agreement did not interfere with Respondent's representation of Mr. Boothe. Rather, it allowed Boothe to obtain counsel of his choice at a time when he lacked any other financial means to do so.

If this Court wants to impose the requirements of Rule 4-1.8, whether 4-1.8(a) or 4-1.8(i), on secured fee agreements, or any other types of fee agreements, it need only

include such a requirement in the language of Rule 4-1.5, the rule on fee agreements. Respondent made every effort to comply with the Missouri Rules of Professional Conduct in his representation of Mr. Boothe, and any non-compliance that this Court might find occurred under Rule 4-1.8(a) arose solely from a lack of understanding of the rather convoluted inter-relationship between Rule 4-1.5 and Rules 4-1.8(a) and 4-1.8(i) that may now exist since adoption of the Model Rules of Professional Conduct in 2007 to replace the Model Rules in force prior to that time.

Given the totality of all of these circumstances, Respondent hopes that he has proven that he has done his best to be an ethical, effective advocate to Boothe.

K. Violation of Rule 4-3.4(b)

Although the DHP did not find that Respondent violated Rule 4-3.4(b), Informant charged Respondent with a violation of that rule by falsifying evidence by “having executed and recorded a document purportedly to have been signed in the presence of a Notary when that was not the case.” Because this Court reviews the evidence *de novo*, Respondent will address the evidence, or lack thereof, regarding this charge.

Rule 4-3.4 governs Fairness to Opposing Party and Counsel. Subpart (b) provides as follows:

A lawyer shall not:...

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

Respondent admits, and so admitted in his Answer herein, that a member of his staff, Jennifer Jackson, improperly dated the notary certificate on the Deed of Trust

executed by Mr. Boothe. Respondent was not aware of this prior to the commencement of this proceeding, and there was no evidence presented at the hearing herein that would indicate that Respondent was aware of the improper completion of the notary certificate or that Respondent participated in the improper completion of the notary certificate.

There was no credible evidence at the hearing in this case that Respondent had the Deed of Trust executed and recorded knowing that it was not signed in the presence of a Notary. Again, it was Informant's burden to prove its allegations on this point. Boothe testified he saw Jennifer Jackson at the jail a day or two before he signed the Deed of Trust at the jail, but that only the Respondent, and not Mrs. Jackson, was present when he signed the document. Mr. Boothe also testified that Mrs. Jackson was Respondent's niece. Neither of these statements by Boothe are credible.

First, Mrs. Jackson is not Respondent's niece, and has never been to the Camden County jail. Second, Mr. Boothe was arrested on September 6, 2009, and first contacted Respondent by telephone on September 8, 2009. It is not reasonable to believe that Respondent and Mrs. Jackson were at the jail and met with Mr. Boothe on the day he was arrested, or on the day before he called Respondent, or that Respondent would bring Mrs. Jackson to the jail on a day when no documents were to be executed, and not bring her on the day that the documents were in fact executed.

Apparently, Mr. Boothe does recall meeting with Mrs. Jackson, and the only reason he would have done so is for the purpose of signing or acknowledging the Deed of Trust in her presence so she could notarize it. Boothe is clearly confused, has a poor memory, or is simply lying. Boothe admitted to lying to Respondent, to the arresting

officers, and has made inconsistent statements to the Informant in this matter that cannot all be true. His only explanation for his inconsistencies was that some of his statements were made under oath, while others were not, which implies he feels free to lie when he is not under oath. This Court should give no weight to the credibility of Mr. Boothe's testimony.

Respondent made every effort to gather every piece of evidence available regarding his representation of Mr. Boothe, and the extensive number of exhibits tendered by Respondent are the result of that effort. This evidence indicates that the Deed of Trust was first prepared on September 10, 2009, and was executed by Boothe at Respondent's office in Sunrise Beach after his release from custody the following week, that Mrs. Jackson was present when he signed the Deed of Trust, and that Mrs. Jackson improperly dated the notary block on the document to match the date of the Fee Agreement.

The exact date and time of execution of the Deed of Trust are irrelevant as to validity of the document. In order to be valid, the Deed of Trust must have been executed by Mr. Boothe, and thereafter either acknowledged by him, or proved and certified as provided in Chapter 442, RSMo. Section 442.130, provides as follows:

Execution of deeds and other conveyances.

442.130. All deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed by the party granting the same, or by his lawful agent, and shall be acknowledged or proved and certified in the manner herein prescribed.

Basically, Section 442.130 requires that Mr. Boothe “subscribe,” or sign the Deed of Trust, and that he either acknowledge it, or that it be “proved and certified.” The statute does not require that he sign the document in front of a notary public in order for it to be a valid document.

There is nothing about these facts which suggests in any manner that Respondent falsified evidence, counseled or assisted a witness to testify falsely, or offered an inducement to a witness that is prohibited by law. The Deed of Trust is not “falsified evidence.” It is a document which creates a lien on real estate. Respondent did not counsel Mr. Boothe to testify falsely with respect to the acknowledgment, as Boothe has admitted executing the Deed of Trust, and Respondent has not offered any inducement to Mr. Boothe or to Mrs. Jackson that is prohibited by law. Clerical errors, while regrettable, do happen, and they are not ethical violations. For these reasons, the facts do not support a determination by this Court that Respondent has violated Rule 4-3.4(b).

Based on this evidence, the DHP correctly concluded that Respondent did not violate Rule 4-3.4(b) as alleged by the Informant.

II. RESPONDENT DID NOT ENGAGE IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE AND DID NOT FAIL TO MAKE REASONABLE EFFORTS TO ENSURE THAT HIS SECRETARY'S CONDUCT WAS COMPATIBLE WITH THE RESPONDENT'S PROFESSIONAL OBLIGATIONS BECAUSE RESPONDENT DID NOT PERMIT, AUTHORIZE OR KNOW THAT HIS SECRETARY BACKDATED THE NOTARIZATION OF THE FUTURE ADVANCE DEED OF TRUST AND COMMITTED NO OFFENSE WITHIN THE SCOPE OF CHAPTER 575, RSMo PERTAINING TO OFFENSES TO THE ADMINISTRATION OF JUSTICE

Violation of Rule 4-5.3(b)

The Informant charged Respondent with failing to properly supervise his support staff in violation of Rule 4-5.3(b) by failing to assure that a member of his support staff, Jennifer Jackson, only would notarize a document that had been signed in her presence.

Rule 4-5.3 provides as follows:

Rule 4-5.3: Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer *orders or*, with the knowledge of the specific conduct, *ratifies* the conduct involved; or

(2) the lawyer is a partner, or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person and *knows of the conduct* at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(emphasis added).

Respondent has admitted that Mrs. Jackson did not properly perform her notarial duties, in that she did not record the notarization of the Deed of Trust in her notary logbook. In addition, she dated the notary certificate on the Deed of Trust to match the date of the Minimum Fee Agreement and the Installment Fee Agreement. These actions on her part have created a great deal of confusion in this case regarding the time and place of signing of the Deed of Trust.

Mr. Boothe was in the Camden County jail on September 8, 2009, and Mrs. Jackson was not. The Deed of Trust was prepared on September 10, 2009, and signed by

Mr. Boothe sometime thereafter. Respondent's law firm failed to properly document the execution of the Deed of Trust. However, the evidence at the hearing was uncontroverted that Mr. Boothe did in fact sign the Deed of Trust, and, by all accounts, signed it in Respondent's presence.

Mrs. Jackson's improper dating of the notary block was not an intentional deception on her part, and there was no evidence at the hearing that Respondent, required, directed or was aware that the notary block was improperly completed before the foreclosure sale took place. She testified that she thought that all of the dates on the Deed of Trust needed to be the same, and that the date of the Deed of Trust needed to match the date of the fee agreement. There was no evidence that Respondent in any way falsified the document, or that Respondent failed to take reasonable efforts to ensure that Mrs. Jackson properly executed her duties as a notary public.

Indeed, the evidence at the hearing failed to reveal what nefarious motive Respondent may have had for causing or permitting Mrs. Jackson to improperly date the document. He gained no advantage by having it improperly dated. Mr. Boothe admitted to signing the document. There is no reason to believe the notary issue is anything other than a clerical mistake.

Respondent admits that Mrs. Jackson made an error when she filled in the date of the acknowledgment to match the date of the document. The date of the document is the date that Mr. Boothe and Respondent agreed would be the effective date as shown by handwritten language on the Installment Fee Agreement. Mrs. Jackson did not

understand the difference between the date of a document, and the date of the acknowledgment of the document.

The DHP found that “whether Boothe’s signature was witnessed by or acknowledged to the Notary is unclear.” (DHP Decision at p. 18, ¶ 7, A581). While Respondent believes it should be clear that Mr. Boothe’s signature was witnessed or acknowledged by Mrs. Jackson, and it is certainly Respondent’s obligation to educate and supervise his employees, the burden is on Informant to show by a preponderance of the evidence that Respondent violated Rule 4-5.3(b). *See* Rule 5.15(c). If the critical evidence on this point is unclear, then this Court cannot find such a violation.

There was no evidence which would suggest that Mrs. Jackson was not properly qualified and appointed as a notary public by the Missouri Secretary of State, or that she was not authorized by law to take Mr. Boothe’s acknowledgment of his signature on the Deed of Trust. Respondent has a personal and office policy that his employees, including Mrs. Jackson, who serve as notaries public, are not to notarize documents without either witnessing the signature, or, in the case of an acknowledgment, having the person who executed the document personally appear before them and acknowledge signing the document and providing adequate proof of their identity. Mrs. Jackson testified that she was aware of this policy. Respondent’s office pays for the employee’s notary training, bond, and the cost of their notary seal and journal.

The Information appears to assert a higher standard of conduct than the law requires for a notary public, i.e. that the notary witness each and every signature prior to notarizing a document. This is not now, and to Respondent’s knowledge never has been,

required by Missouri law. If Missouri law allows an acknowledgment, then allowing Mrs. Jackson to take an acknowledgment without witnessing a signature is not a violation of Rule 4-5.3(b).

The Informant did not present any evidence that would show that Respondent failed to “make reasonable efforts to ensure that” Mrs. Jackson’s “conduct is compatible with the professional obligations of the lawyer.” Respondent did make reasonable efforts to ensure that Mrs. Jackson was duly qualified, insured, and equipped to perform her duties as a notary public while working in Respondent’s office in a manner compatible with Respondent’s professional obligations. The Rule does not require that Respondent’s efforts to ensure that Mrs. Jackson properly notarizes documents be completely successful, only that Respondent make “reasonable efforts” to ensure her conduct is compatible with the professional obligations of Respondent. Respondent did make such reasonable efforts. Respondent has complied with Rule 4-5.3(b).

In addition, Rule 4-5.3(c) specifies the circumstances under which the conduct of a non-lawyer assistant can be the basis for disciplinary action against a lawyer, and provides as follows:

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner, or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

There was no evidence at the hearing that Respondent had knowledge of the improper notarization of the Deed of Trust, or of Mrs. Jackson's failure to record her notarial act, prior to Mr. Boothe's complaint to the Informant. Respondent did not have such knowledge. There was no evidence at the hearing that Respondent ordered or ratified Mrs. Jackson's conduct. Respondent did not order or ratify her conduct. There was no evidence at the hearing that Respondent knew of her conduct prior to the filing of Mr. Boothe's complaint, and certainly not prior to the foreclosure of the Deed of Trust. Respondent did not have such knowledge. The burden of proof was on Informant to prove this evidence, by a preponderance.

Finally, the only consequence of her conduct is that the correct date of execution of the Deed of Trust cannot be easily determined. Mr. Boothe testified that he did in fact sign the document, and based upon that sworn testimony, the Deed of Trust was validly executed and given by him.

Without evidence that brings Mrs. Jackson within Rule 4-5.3(c), her conduct cannot be a basis for imposing disciplinary action against Respondent herein, and no such evidence was presented at the hearing in this case. Comment 2 to Rule 5.3 states that "Rule 5.3(a) requires lawyers with managerial authority within a law firm to make

reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct.”

Mrs. Jackson testified to Respondent’s internal policies and procedures, and that she was aware of the same. Rule 4-5.3(c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. The circumstances specified in Rule 4-5.3(c) do not exist in this case. To the extent that Mrs. Jackson’s conduct in improperly dating the acknowledgment on the Deed of Trust was a violation of the Rules of Professional Conduct, Respondent is not responsible in a disciplinary sense for her misconduct, as Respondent did not order or, with knowledge of her conduct ratify her conduct, and was not aware of her conduct at a time when its consequences could have been avoided or mitigated.

Violation of Rule 4-8.4(d)

The Informant also charges Respondent with a violation of Rule 4-8.4(d) by engaging in conduct prejudicial to the administration of justice by recording and foreclosing an improperly notarized deed of trust.

Rule 4-8.4(d) provides as follows:

RULE 4-8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

...

(d) engage in conduct that is prejudicial to the administration of justice;

The only comment to Rule 4-8.4(d) that addresses conduct within the scope of Subparagraph (d) is comment 2, which provides:

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Chapter 575, RSMo., contains specific charges that constitute criminal offenses against the administration of justice. Respondent has not been charged, tried, or convicted of any of these offenses against the administration of justice, and Informant has failed to identify any offense with Chapter 575, or otherwise, which Informant asserts that Respondent has committed.

Informant asserts that Respondent violated Rule 4-8.4(d) by recording and foreclosing the Deed of Trust because it had not been properly notarized, based upon Informant's position that Mr. Boothe had to sign the document in Mrs. Jackson's presence. Recording and foreclosing a deed of trust with an improper notarization is not one of the offenses against the administration of justice set forth in Chapter 575. Further, Informant is simply wrong about the legal requirements for notarization of a deed of trust.

It is clear from the evidence that Respondent knew that Mr. Boothe executed the Deed of Trust, as both Respondent and Boothe testified that Respondent was present when Boothe signed the document. Respondent testified it was at his office in his conference room, while Boothe testified it was at the jail, but both testified that Boothe signed the document in Respondent's presence. Respondent testified at the evidentiary hearing that Boothe signed the Deed of Trust. Respondent testified that Mrs. Jackson was present in the conference room at the time of execution, and Mrs. Jackson testified that she recalled seeing Mr. Boothe at Respondent's office, but did not specifically recall witnessing his signature. Mrs. Jackson further testified she would not have notarized the document unless she witnessed his signature, or he acknowledged his signature to her.

Informant failed to present any evidence that enforcement of the Deed of Trust through foreclosure in any way was prejudicial to the administration of justice. The reported cases invoking conduct prejudicial to the administration of justice involve some disruption of the Court or interference with a court proceeding, which are offenses under Chapter 575, and no such conduct is alleged on the part of Respondent. *See In Re West*,₂

348 Mo. 30 (Mo. 1941); *In Re Madison*, 282 S.W.3d 350 (Mo. 2009); *Indirect Crim. Contempt Proceedings v. Rennau*, 619 S.W.2d 848 (Mo. Ct. App. 1981). Respondent did not engage in such conduct. Respondent merely enforced a contractual right granted by Mr. Boothe.

Respondent did not violate Rule 4-8.4(d).

RELEVANT CASE LAW – NOTARY ISSUE

Respondent is aware of only one disciplinary action case involving a notary act, *In Re: Nancy S. Wallingford*, 799 S.W.2d 76 (Mo. 1990). The *Wallingford* case arose under the Rule of Professional Conduct in force in Missouri prior to 2007, rather than the current version. In that case, the attorney admitted that she had signed her client's signature to an affidavit she prepared after receiving his authority to sign it on his behalf, and then undertook to notarize the signature. *Id.* at 77.

In other words, the attorney signed her client's signature to an affidavit, which contains a "jurat" that it was subscribed and sworn to before the notary public, and then, as the notary, notarized the signature knowing it was not her client's signature on the document. In addition, the attorney filed a certificate of service with the Court indicating that certain papers in the proceeding had been served on the opposing party by a California sheriff. *Id.* at 77. In that case, the attorney was found to have violated Rule 4-3.3(a)(1), by knowingly making a false statement of material fact or law to a tribunal, both as to the improperly notarized affidavit, and as to the certificate of service. *Id.* at 78. In that case, the attorney received a reprimand from the Court. *Id.* at 78.

The facts alleged herein differ materially from those in *Wallingford*. In *Wallingford*, the attorney was also the notary public. There was no question therein that the attorney knew she was notarizing an affidavit which her client not only did not sign in front of her, but had never signed at all, and certainly had not sworn under oath that the facts contained therein were true. The form of the notarial act was a jurat, rather than an acknowledgment as in this case.

In this case, Respondent was not the notary. The document was actually signed by Mr. Boothe. The notary public was present when he signed and/or acknowledged signing the document. The notary public put the wrong date in the acknowledgment. The acknowledgment is incorrectly dated, but the document was actually signed by Mr. Boothe. Respondent did not fill out the dates in the Deed of Trust or the acknowledgment contained therein, and was unaware that the dates were incorrect at the time the document was recorded, or at the time the foreclosure sale was conducted.

In *Wallingford*, the improperly notarized affidavit was used by the attorney in a court proceeding, with knowledge that the signature thereon was not her client's signature. To compound the issue, the attorney also filed a false certificate of service in the court case in an attempt to gain an advantage over the adversary party. Use of a false affidavit is an Offense Against the Administration of Justice under Section 575.050, RSMo. Recording a Deed of Trust with an incorrectly dated acknowledgment is not a crime under Chapter 575, and is not an offense against the administration of justice.

In this case, the Deed of Trust was properly executed by Mr. Boothe, with the intent and for the purpose of securing payment for the legal service he desired, and

actually obtained from Respondent. Boothe did not pay, or make any attempt to pay, for any part of the services he received. The improperly completed acknowledgment was not performed by Respondent, and it was not used in a court proceeding to gain an advantage over Boothe. The Deed of Trust was utilized by Respondent solely for the purpose for which Boothe executed the document – to enforce his promise to pay for the legal services he received.

CONCLUSION ON NOTARY ISSUES

The facts in this case are simply not as alleged in the Information. While it is debatable whether the facts alleged would actually constitute a violation of the Rules cited in the Information, it is clear from the evidence at the hearing that at most there is a clerical error on the part of Mrs. Jackson in the manner in which she filled out the dates on the Deed of Trust and in her failure to complete her notary log book. While regrettable, this does not show, establish, or support, or in any way evidence, a deliberate or even negligent violation of any of the Rules of Professional Conduct by Respondent, particularly in light of Mr. Boothe's testimony acknowledging to this Court that he did in fact sign the Deed of Trust. For this reason, the Court should dismiss the alleged violations of Rules 4-3.4(b), 4-5.3(b) and 4-8.4(d) set out in the Information herein.

III. SUSPENSION IS NOT AN APPROPRIATE SANCTION IN THIS CASE AS RESPONDENT DID NOT ENTER INTO A BUSINESS TRANSACTION WITH HIS CLIENT ON UNFAIR OR UNREASONABLE TERMS, BUT RATHER ENTERED INTO A WRITTEN FEE AGREEMENT WITH SAID CLIENT ON TERMS THAT WERE FAIR, REASONABLE, AND FULLY DISCLOSED TO THE CLIENT AND WHICH MET ALL OF THE REQUIREMENTS OF RULE 4-1.5 AND RULE 4-1.8(i).

ABA STANDARDS FOR SANCTIONS

The Court in *In Re Snyder* referred to the American Bar Association's Standards for Imposing Lawyer Sanctions (the "ABA Standards") in order to determine the appropriate level of sanctions to be imposed. If the Court in this case concludes that the taking of a Deed of Trust as security for fees and costs was subject to Rule 4-1.8(a), and not permitted by Rule 4-1.8(i), then obtaining the same without compliance with the notice requirements of Rule 4-1.8(a) is a violation of the Rule. This Court must then determine what sanction, if any, should be imposed on Respondent as a result of the violation.

ABA Standard 4.3 applies to "Failure to Avoid Conflicts of Interest." However, each of the subparagraphs thereunder appear to describe representation where a known or potential conflict of interest with the lawyer or another person exist, are not disclosed to and consented to by the client, and result in an adverse effect on the client as a result of the representation. There is no allegation in this case that the secured fee arrangement

posed or created a conflict of interest that adversely affected Respondent's representation of Mr. Boothe, or even had the potential of adversely affecting that representation.

There was no evidence that a conflict of interest created by the secured fee arrangement in any way caused harm to Mr. Boothe. The DHP concluded that "the extent of Boothe's injury is fairly debatable." (DHP Conclusions of Law, ¶ 8, A581). Rather, the secured fee arrangement allowed Mr. Boothe to obtain the legal services he desired without immediately liquidating assets to come up with a cash deposit for fees.

As a result of the services he obtained by the secured fee arrangement, Mr. Boothe was released on bond pending trial and obtained an advantageous plea arrangement which allowed him to avoid long term incarceration. The DHP found that Mr. Boothe suffered injury by the ultimate loss of real property. Respondent suggests there was no harm to Boothe in the sense of the term as used in the ABA Standards. The only negative consequence Boothe suffered as a result of Respondent's representation was the existence of a lien on his property, which Boothe bargained for, and which he could have paid off at any time. His failure to pay Respondent as agreed was the proximate cause of the loss of the property.

Further, the DHP made no comparison of the value received by Mr. Boothe through the secured fee arrangement with the value of the property he ultimately "lost" as a result of the secured fee arrangement. The evidence was clear that Mr. Boothe received valuable services, and lost a parcel of real estate of questionable value.

There was no evidence of intentional deception of Mr. Boothe by Respondent. At most, the evidence might be construed as a failure to provide the client with accurate or

complete information, i.e., the Rule 4-1.8(a) disclosure. However, the lack of the disclosure did not in itself cause any harm to Boothe, as Boothe requested that Respondent agree to accept his property as collateral for payment of fees and costs. Boothe further testified he never read any of the documents comprising the fee arrangement, and so it naturally follows he would not have read the 4-1.8(a) disclosure.

It is worth contemplating at this point how someone in Boothe's position (a person in jail with enough property so as to not qualify for a public defender, and no money), could obtain a "reasonable opportunity to seek the advice of independent legal counsel on the transaction." *See* Rule 4-1.8(a)(2). The question is whether Boothe could find a lawyer who would go to the jail, for free, to evaluate the value of the felony case, the value of the collateral, and the ability of the prospective lawyer. Regardless, the evidence supports a finding that the lack of a written 1.8(a) disclosure did not make any difference in Boothe's decision to sign the fee documents.

Respondent also testified that he has already modified his standard fee agreements to give the Rule 4-1.8(a) disclosure, whether it is required or not. Therefore, it is clear that this is an "isolated instance," and not a pattern of conduct that is likely to continue in the future.

Standard 4.34 would appear to be the most applicable standard, and indicates that at most an admonition would be appropriate under the facts presented in this case, if sanctions are imposed.

Informant argues for a suspension of Respondent's license, and cites as a basis therefore cases where attorneys engaged in self-dealing with their clients. There is no

evidence of self-dealing in this case. Respondent obtained a security interest in Mr. Boothe's property as a condition of representation. Boothe executed the Deed of Trust; Respondent did not execute it on his behalf. Respondent did not abuse his relationship with Boothe, but rather, Respondent undertook representation of Mr. Boothe on financial terms that were advantageous to Boothe.

After representation had ended, with the successful entry of a guilty plea and a suspended imposition of sentence (no felony conviction) with five years of probation, and the agreed upon payment for services was not forthcoming, Respondent, 10 months after payment was due and delinquent, enforced the lien given by Mr. Boothe. There is no question as to whether Respondent still represented Boothe at the time of foreclosure – Respondent had withdrawn on the record at the conclusion of the guilty plea, and further representation was not within the scope of the fee agreement executed by the parties.

Informant also argues that the circumstances of the foreclosure sale demonstrate a need for "heightened scrutiny" of the transaction with his client. Informant's argument fails to consider the process of a foreclosure sale and how it works. Respondent did not "take" Mr. Boothe's property; rather, it was sold at a public auction, as is required for a foreclosure under Missouri Law. This was not a forfeiture of Mr. Boothe's property in Respondent's favor. It was a sale, at auction, for cash. Anyone could have purchased the property at the foreclosure sale, for any sum of money that they wished to offer for it. Any amount over the amount due under the Installment Fee Agreement, plus the costs of the foreclosure sale, would have been refunded to Boothe. That no one was interested in

purchasing it for more than Respondent's \$5,000.00 opening bid gives a very clear indication as to the perception of the value of the property by the general public.

This Court in the case of *First Bank v. Fischer & Frichtel, Inc.*, 265 S.W.3d 216 (Mo. 2012), held that:

Missouri and many other states in which the method of measuring deficiencies is governed by the common law traditionally have followed a different approach, however. These states require a debtor to pay as a deficiency the full difference between the debt and the foreclosure sale price. They do not permit a debtor to attack the sufficiency of the foreclosure sale price *as part of the deficiency proceeding* even if the debtor believes that the foreclosure sale price was inadequate.

This does not mean that Missouri does not give a debtor a mechanism for attacking an inadequate foreclosure sale price. Rather, a debtor who believes that the foreclosure sale price was inadequate can bring an action to void the *foreclosure sale* itself. [cite omitted] If the sale stands, then it has been thought fair to require the debtor to pay any deficiency remaining based on the foreclosure sale price. (*emphasis added*).

Mr. Boothe did exercise his right to challenge the adequacy of the foreclosure sale price by filing his civil suit in the Circuit Court of Camden County. That suit was resolved against Mr. Boothe, allowing the foreclosure sale to stand. Informant's challenge to the adequacy of the foreclosure sale price in this proceeding is not only inconsistent with applicable Missouri law, but also amounts to a collateral attack on the

judgment in the circuit court proceeding. Under applicable law, Respondent had the right to sue Mr. Boothe for the difference between what was owed for legal services, and what the property brought at the foreclosure sale, a right which Respondent chose not to exercise.

Informant also misstates the evidence regarding Respondent's efforts to re-sell the property. Respondent asserts that Respondent did not advertise the property for sale, did not have a realtor, did not list the property for sale on the internet or in the newspaper and did not have the property appraised before selling it. Respondent's testimony at the hearing on this issue was as follows:

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8 Q. Did you list the property with a realtor
9 for sale?

10 A. I talked to some realtors about it. They
11 were not interested in listing it.

12 Q. You didn't list it. Did you put it on the
13 open market or try to sell it yourself?

14 A. Mr. Schaeperkoetter, in the spring of 2010,
15 real estate of that type and nature was not selling
16 anywhere at the Lake of the Ozarks for any amount of
17 money, and the realtors were not interested in listing it.
18 I did not spend a great deal of effort to try to sell it.

19 It also has some very significant problems

- 20 with marketability because it is not properly platted.
- 21 The utilities have not been installed. You know, it
- 22 basically is not in a condition that you can put it on the
- 23 open market and solicit buyers.

Informant also argues that the sale price exceeded Respondent's attorney's fee and foreclosure expenses, and that Respondent profited from the re-sale of the property. Respondent is not aware of any legal authority in the State of Missouri that requires an accounting for the proceeds from resale of property after a foreclosure, and Informant cites none. No effort was made in this case to develop an evidentiary basis which would allow this Court to determine whether Respondent received proceeds in excess of the amounts to which he was entitled under his fee agreement with Mr. Boothe.

In an effort to narrow the issues to be decided at the hearing in this case, Respondent submitted requests for admissions to Informant, including Request No. 33, which requested an admission that the foreclosure sale price of \$5,000.00 on January 7, 2011, did not exceed the balance due under the Installment Fee Agreement on said date, plus the reasonable costs and expenses of the foreclosure proceeding, and Informant admitted that request. (Ex. CCC at A505). Informant never requested documentation as to the actual balance due on Mr. Boothe's account at the time of foreclosure, or as to the actual costs and expenses incurred in the foreclosure of the property, or as to the actual costs and expenses associated with the resale of the property, and none of that documentation is in the record in this case. Respondent did not offer such evidence

because there were no allegations in the First Amended Information which asserted that the fee received by Respondent for his services to Mr. Boothe was unreasonable.

Respondent did provide a listing of the time and expense charges on Mr. Boothe's account, but primarily for the purpose of establishing a timeline for activity on his case. In addition to time and expense charges, Mr. Boothe agreed by the terms of the fee agreement to pay interest at the rate of 1.5% per month on unpaid balances (Ex D, ¶ 5, A247-A248). Respondent's testimony at the hearing as to the balance due for services was not that it was \$9,682.20, but rather that it was "at least that much." (Tr., p. 74, LL. 12-18, A46).

Respondent has scoured the record to identify other costs and expenses associated with the foreclosure and resale of the property, but simply put, it was not a litigated issue and the record does not contain a full accounting. Respondent does not believe that the net proceeds of a full accounting of the proceeds after resale would show a significant recovery in excess of the actual balance due on Mr. Boothe's account, but the record is simply not sufficient to establish this. Had Informant raised his allegation that the transaction was exploitive, unfair, and unreasonable prior to the evidentiary hearing, the record would contain a full accounting of the funds.

Informant also asserts in his brief that the property at issue "was valued far in excess of the amount paid by Respondent at the foreclosure sale." (Informant's Brief, p. 39). Simply put, Informant failed to present any competent and credible evidence as to the value of the real estate. This is a proceeding to which the Rules of Evidence apply, and those rules require that valuation of real estate be provided by expert testimony.

Informant attempted to disclose an appraiser to testify in this proceeding the day before the hearing was to commence, and Respondent objected to the late disclosure. The hearing was continued, over Respondent's objection, to allow further discovery. (Tr., Vol. 1, A4-A12). Although the hearing was continued, and although Respondent did depose the appraiser identified by Informant as an expert in the case, Informant did not present any expert testimony from his designated expert appraiser as to the value of the property.

Respondent also timely objected by Motion in *Limine* and a continuing objection to the testimony of the Camden County Assessor as to the value of the property, as he had not performed an appraisal of the property, but rather had merely prepared a "mass appraisal" for ad valorem tax purposes, which is an estimate of the average value of an average parcel of property in an area for real property tax assessment purposes, and is not the determination or estimate of the fair market value of any particular piece of property in that area. (Tr., p. 152, LL. 10-23, A65). Mr. Whitworth did not prepare a market value appraisal of the property at issue. (Tr., p. 153, LL. 5-10, A65).

Respondent did solicit expert witness testimony from a certified real estate appraiser, Jim Daniels, at the hearing. Mr. Daniels testified that because of the lack of required utilities and unfinished road system, there is not a market for real estate in the condition of the subject property because building permits are not available for property in that condition, and that in his opinion it might be worth as little as \$4,000.00 or \$5,000.00 in its current condition. (Tr., p. 284, L. 11 – p. 285, L. 9, A98). Mr. Daniels also provided an appraisal report which established that the market value of the property,

if the road and utilities were completed and a building permit was available, at \$24,500.00, but acknowledged that it was a hypothetical assumption on his part that a building permit could be obtained. (Tr., p. 285, LL. 10-21, A98).

In *Rigall v. Kensington Place Homeowners' Association*, 103 S.W.3d 839 (Mo. App. E.D. 2003), the Missouri Court of Appeals reversed the trial court for allowing into evidence testimony relating to the value of real estate which was not properly supported, stating:

Therefore, an expert's opinion must be founded upon substantial information, not mere conjecture or speculation, and there must be a rational basis for the opinion. The restriction on speculative testimony by expert witnesses is not a technical rule of evidence but rather a needed protection against evidence of improper measures of damages being presented to the jury. The potential significant impact on a non-expert jury of expert testimony in the complex field of land appraisal seems to warrant extreme caution in the admission of such testimony.

The comparable sales approach consists of comparing voluntary sales of similar properties from the same general location which occurred close in time to when the subject property was taken. An expert testifying on the value of property in a condemnation proceeding may base his opinions in part upon his investigation and his inquiry concerning other sales, however he should make careful inquiry into the facts concerning

similar sales upon which he bases his opinion as to land values. (*Internal citations omitted*)

The only expert opinion testimony as to the value of the real estate at issue in this case which had a proper foundation is that of Jim Daniels that the property was worth between \$4,000.00 and \$5,000.00 in its condition at the time of foreclosure. This Court should disregard the other unsupported opinion testimony as to the value of the property. Mr. Daniels also testified, upon inquiry by the Chief Hearing Officer, that whoever was involved in the sale of the real estate to Mr. Boothe at the time he purchased it took advantage of him based upon the purchase price of the property and that manner in which it was offered on the open market with representations that infrastructure and utilities were in place. (Tr., p. 291, LL. 12-22, A100).

In other words, if Mr. Boothe really paid \$63,500.00 when he purchased Lot 9 of Kip's Cove, that was a bad decision, because the lot was not worth that much without the infrastructure and utilities required in order to get a building permit for a home on the property. When the lot was foreclosed, Mr. Boothe did not lose \$63,500.00, he lost the value of the lot, which was worth between \$4,000.00 and \$5,000.00. Respondent got the lot, not \$63,500.00. The transaction from start to finish between Respondent and Mr. Boothe was not exploitive, unfair, or unreasonable. The transaction between Boothe and the subdivision developer may very well have been exploitive, unfair, and unreasonable, but that transaction did not involve the Respondent.

Finally, the Informant alleges Respondent's prior admonition for violation of a rule relating to conflict of interest dated May 2, 2001, is grounds for enhancing any

punishment Respondent may receive. That prior admonition, approximately 11 years prior to the filing of the case at bar, involved a violation of Rule 1.9(a), involving a duty to a former client. The facts involved bear no similarity to this case, and do not establish any kind of a pattern of misconduct.

Further, Respondent has been a licensed, full-time, practicing attorney for over 29 years. He has handled countless matters for countless clients. He regrets his actions that led to his admonition in 2001, but feels that his history in practice has established it to be an isolated incident.

In light of the ABA Standards and the less-than-clear state of the law with respect to the interaction of Rule 4-1.5, 4-1.8(a) and 4-1.8(i), Respondent suggests that if this Court deems some level of sanction is appropriate, it should be an admonition, or at most a reprimand. Should this Court determine that a suspension of Respondent's license is appropriate, Respondent would request that any suspension be stayed, and Respondent be placed on probation. Respondent offers his personal assurances to the Court that he will never enter into another transaction like this again.

If the Court is not inclined to grant such a stay, Respondent would request that the suspension not commence until after completion of the scheduled trial in Case 09MG-CC00064, as Respondent has been working on said case for the Defendants since 2009, and the matter is set for a two week jury trial commencing August 26, 2013. While Respondent has other trials set which would certainly be affected by a suspension of his license, Respondent is particularly concerned about his personal participation in this case, as his clients have paid for extensive preparation of the case for almost four years, and it

would be manifestly unjust and burdensome for them to obtain alternate counsel at this point in the case.

CONCLUSION

WHEREFORE, Respondent prays for judgment of this Court finding that Respondent did not violate the Missouri Rules of Professional Conduct as charged in the Information filed herein and dismiss the same, or, if a violation is found, that said violation was unintentional, negligent, and was not the cause of any injury, and that an admonition is the appropriate discipline to be imposed.

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned certifies that on this 3RD day of June, 2013, this brief was filed electronically in the ECF system, causing copies to be served upon all parties and counsel of record. Furthermore, the undersigned certifies that:

(1) This brief complies with the length limitations contained in Rule 84.06, because excluding the cover, and the certificate of service and 84.06 compliance, signature block and appendix, it contains fewer than 27,900 words, in that there are 26,275 words in this brief as calculated by the software used to prepare it;

(2) This brief was prepared using Microsoft Word 2007 and Adobe Acrobat 9.

Respectfully Submitted,

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