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No. SC93992

IN THE SUPREME COURT OF MISSOURI

In re

LYLE L. ODO,

Respondent

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent does not disagree with the jurisdictional statement provided by the Office of the Chief Disciplinary Counsel.

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STATEMENT OF FACTS

Respondent offers the following additional facts:

Mr. Morrison has been convicted of, or pled guilty to, four felonies in Missouri. One of those convictions arose out of driving while intoxicated, with his very young stepson in the vehicle. App. 120, TR 153-157.

Mr. Morrison was significantly benefited by the repeated loans he requested and received from KNP, including but not limited to using some part of the funds to keep himself out of jail. App. 228-229, TR 459-464.

Respondent was aware that Mr. Morrison might use the funds borrowed from KNP for personal living expenses or to pay child support. Respondent had no control nor right of control over how Mr. Morrison spent the loan proceeds received from KNP. *Id.*

Respondent made an oral disclosure to Mr. Morrison and Ms. Ferris about his relationship to KNP, and that KNP was owned by his daughter. *Id.*

Although the loan agreements referred to a non-refundable processing fee, Mr. Morrison never paid any such fee, as KNP provided him with the full face amount of the loan each time an agreement was entered into. App. 193, TR 322.

There is no evidence in the record that Respondent coerced or persuaded Mr. Morrison to take out the initial loan from KNP.

There is no evidence that Respondent suggested or persuaded Mr. Morrison to take out the subsequent fifteen loans from KNP, particularly the one that occurred the day before Mr. Morrison terminated Respondent's representation.

There is no evidence that any information obtained by Respondent during the

course of his representation of Mr. Morrison was used at all in the lawsuit by KNP, much less to Mr. Morrison's disadvantage.

Mr. Morrison, with the advice of his counsel, entered into a global settlement of all claims between Mr. Morrison, Ms. Ferris, Respondent and KNP, for the sum of $34,000. App. 221, TR 434. A copy of the settlement agreement appears at App. 416-429. The funds from that settlement were then paid to KNP. App. 228229, TR 459-464.

The global settlement was signed by all the attorneys who represented Mr. Morrison. App. 421, 425, 426.

Respondent signed the settlement in each of his separate legal capacities, *i.e.*, as President of Lyle L. Odo, P.C. (App. 427), in his individual capacity (App. 429), and as President of KNP (App. 428).

There is no evidence in the record that the funds used to make the loan came from Respondent personally, or from Lyle L. Odo, P.C.

There is no evidence in the record to indicate that the funds for the loans came from any source other than KNP.

Respondent has admitted that he paid for two medical treatments for Mr. Morrison, *i.e.*, the epidural injections for the severe pain about which Mr. Morrison was complaining. Respondent has also acknowledged that he should not have done so. [This brief, and previous filing with the panel.]

There is nothing in the record to prove that the motive for making the payments for Mr. Morrison's pain treatments was anything other than compassion for a client who said he was in excruciating pain, and who had no funds of his own to pay for the

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treatment.

There is no evidence that any information obtained by Respondent during the course of his representation of Mr. Morrison was used at all in the lawsuit by KNP against Mr. Morrison to recover the loans which Mr. Morrison had taken out but then refused to pay.

Mr. Morrison was represented by two law firms in the attorney fee suit. Ex. BB.

There is no evidence in the record that Mr. Morrison was concerned about the confidentiality of anything in the attorney fee petition, nor that he made any attempt to seal all or any part of that record, either before or after he made his initial bar complaint.

Mr. Morrison filed a counterclaim for legal malpractice against Respondent with reference to all of the legal services provided by Respondent. Ex. BB.

Mr. Morrison's theory in the attorney fee suit was that since it was "improper" for KNP to have loaned him money Mr. Morrison was excused from repaying the loan proceeds he had accepted and spent. In addition, Mr. Morrison claimed that he should not have to pay any attorney fees or expenses incurred in the other matters for which Respondent and Mr. Morrison had agreed would be either an hourly fee or a flat fee. Ex. BB.

As a courtesy to Mr. Morrison, Respondent deferred collection of the non-contingent attorney fees until the personal injury claim was resolved. App. 123, TR 166.

Mr. Morrison made no claim in his original bar complaint that Respondent had disclosed private or confidential information.

There is no evidence in the record that the information contained in the attorney

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fee petition affected the progress of the personal injury claim towards settlement, nor is there any evidence in the record that shows that the attorney fee case had any effect whatsoever on the value of the case or the negotiation of the settlement of Mr. Morrison's personal injury claim by his subsequent counsel.

Dr. Febbo obtained a judgment against Mr. Campbell. App. 108, TR 107.

Robert Campbell registered the judgment against Mr. Morrison and in favor of Dr. Febbo in Atchison County, Kansas, in order to seek collection and enforcement of the judgment against Mr. Morrison. App. 108-109, TR 108-109.

Dr. Febbo was represented by Mr. Campbell in the debtor's examination of Mr. Morrison, and although Mr. Odo was present, he did not participate. *Id.*

There is no evidence in the record that Respondent utilized information about Mr. Morrison acquired during the course of his representation of Mr. Morrison in various matters, to Mr. Morrison's detriment in the Febbo collection matter.

There is no evidence in the record to support the assertion by OCDC that the decision of KNP to assert a lien against the personal injury settlement proceeds in the Atchison County, Kansas case, and the assertion of KNP's claim in the subsequent Platte County case was intended as "retribution" for Mr. Morrison terminating Respondent's representation of Mr. Morrison with respect to the personal injury claim.

With respect to the issue of Respondent's alleged *attempt* to obtain a portion of Mr. Morrison's medical records by subterfuge, the evidence demonstrates the following:

a. During the domestic litigation, the parties considered a settlement if Mr. Morrison would take a hair follicle test and prove that he was drug free.

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b. Mr. Morrison took the test at Northland Dependency and it came back positive for marijuana.

c. Respondent directed Mr. Morrison to destroy the lab test report.

d. In anticipation that Mr. Morrison would claim that Respondent had worked with counsel for Mr. Morrison's ex-wife and the guardian ad litem to sabotage the domestic relations proceeding, Respondent was aware that the lab test results would be relevant evidence.

e. Respondent's paralegal drafted and sent an email to counsel for Mr. Morrison's ex-wife, asking for the name of a drug testing facility in Liberty. That email contained the misrepresentation that Respondent at that time had a client who needed to be referred.

f. Respondent has acknowledged that he was responsible for the conduct of his staff, and that he erred in not reviewing the email before it was sent.

g. After receiving the name of Northland Dependency, Respondent's paralegal called Northland Dependency to ask if the record of Mr. Morrison's test still existed. *Cf.*, Exhibit 37.

h. Northland Dependency called Respondent's paralegal back several days later, to say that the records still existed but could not be released without authorization from Mr. Morrison.

i. Respondent made no *actual* attempt to obtain Mr. Morrison's lab test results, since he had no signed authorization from Mr. Morrison.

See, generally, A201, TR 352-353 and Exhibit 37, App. 560.

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There is no evidence in the record to support a conclusion that the May 20, 2011, suit filed by Respondent to recover contractual attorney fees and expenses for services already provided to Mr. Morrison, as well as making a quantum meruit claim, plus expenses, for services rendered in connection with the personal injury claim, was based on any motive other than seeking payment of earned attorney fees and reimbursement of related expenses.

There is no evidence in the record to support a conclusion that the attorney fees and expenses case was filed with an intent to annoy, embarrass, harass, disturb and/or intimidate Mr. Morrison.

At page 23 of the OCDC brief the statement is made that Respondent "admitted that the interest rate on the KNP loans to Mr. Morrison was usurious and violated Missouri law. However, Respondent then went on to testify that he had explained to both Mr. Morrison and Ms. Ferris that if the interest rate were found to violate Missouri law, then the highest applicable rate would be the highest allowed by Missouri law. App. 195-196.

At page 24 of its brief, the OCDC asserts that the loan agreements between KNP and Mr. Morrison gave KNP "control over the personal injury claim." A copy of a loan agreement appears at App. 279-283, and the document speaks for itself. There is nothing in the loan agreement which gave KNP any control over the handling of the personal injury claim, *e.g.*, what steps were taken to prepare the case; to negotiate the case; whether or when to file suit, how to conduct discovery, etc. The loan agreement only gave KNP certain rights with respect to the proceeds *after* the personal injury suit was

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over and *after* Mr. Morrison received any proceeds from the claim.

The statement of facts by the OCDC inadvertently contained only the testimony of Mr. Morrison and Ms. Ferris with reference to the issue of whether Respondent disclosed his relationship to KNP to them. Respondent contradicted that testimony with testimony of his own detailing the verbal disclosures he made to them. App. 228-229, TR 459-464.

The interest rates charged in the loan agreements with Mr. Morrison were higher than, for example, the statutory rate of interest on judgments, but those rates were consistent with rates charged by other lenders for the same type of transaction, To-wit: high-risk borrowers who have no collateral. However, each loan agreement also contained a provision that in the event any interest rate was determined to violate Missouri law, the maximum interest rate would default to 10 percent, which is consistent with Missouri law. *See* loan agreement, App. 279-283.

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REPLY ARGUMENT

REPLY POINT I

Section 1. Counts I and II

A. The Loans

The charges in Counts I and II of the information are founded on the premise that *Respondent* (or his law firm) made the loans to Mr. Morrison which are at interest in these proceedings, thus implicating Rule 4-1.8(a) and Rule 4-1.8(e). The flaw with this premise is that the evidence is clear that the lender was a corporate entity entirely separate from Respondent, the lawyer, and from his law firm. All actions taken by Respondent with respect to the loans were in his separate and distinct capacity as an officer of KNP.

It is a well-established legal principle in Missouri that one individual may wear multiple "legal hats," *i.e.*, have separate legal capacities, each of which may impose different duties and obligations. For example, if acts performed by John Doe, in his capacity as president of John Doe, Inc., cause damage, those acts do not make him liable in his individual capacity. Another example is the case of *In re Estate of Hill*, 453 S.W.2d 722 (S.D. Mo. App. 1968). There, the widow was serving as administratrix of her husband's estate, and also had a claim against the estate in her capacity as surviving spouse. When that claim was denied, she filed her appeal in her capacity as administratrix of the Estate, and not as surviving spouse. She lost because those capacities were legally distinct, and as "administratrix" she was not aggrieved by the denial of her claims as "surviving spouse."

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The record here is absolutely clear that Respondent, while managing KNP, does not own any shares in the company, is not paid by the company for any services he performs, and receives no financial benefits from KNP. The record is equally clear that none of the money used to make the loans to Mr. Morrison came from Respondent in his individual capacity, or from the law firm. KNP's assets were the exclusive source of the loan funds.

There is no question that if Respondent had made these loans with his own funds, or with funds from the law firm, whether directly (no KNP involvement) or indirectly (funneling the funds through KNP), the loans would have been improper. That is not what happened here. Indeed, logic suggests that if everything about KNP and the loan transactions were identical to the facts here, except for who was managing the company, there would be no issue. It is only Respondent's involvement, in a separate legal capacity from his capacity as attorney for Mr. Morrison, that has triggered these charges.

These charges, therefore, raise an issue of first impression in Missouri, because there is nothing in the plain language of either Rule which explicitly or implicitly prohibits the loans at issue. The OCDC has not cited any case from Missouri's appellate courts or from any other jurisdiction which are either on all fours with the facts here or analogous to them. The issue is this: Can a corporation, using its own funds, loan money to a lawyer's client, where the lawyer manages the corporation, but has no ownership interest in the corporation, is not paid by the corporation, and receives no personal benefit from the loan transaction?

In matters of first impression, this Court said in *Thummel v. King*, 570 S.W.2d

679, 687 (Mo. banc 1978) , tribunals may look to "the meaning to be derived from the language used and the most persuasive argument may be an analysis of the words used and a practical discussion of the effect of the various possible constructions."

One of the basic principles of statutory construction, the canons of which are applicable to interpretation of Supreme Court Rules, is that you look first to the plain meaning of the words used.

Attorneys are expected to know and follow the Rules of Professional Conduct, including Rules 4-1.8(a) and (e). They are obligated to be familiar with the formal and informal opinions interpreting those Rules, as well as the case law. Here there are no opinions on this issue, nor any case law from this Court or any other jurisidctionNothing in the plain language of Rule 4-1.8 bars the loan agreements between KNP and either Mr. Morrison or Ms. Ferris.

That neither the plain language of the Rule nor any ethical opinion or case prohibits the KNP loans raises an important issue in the context of this proceeding: notice.

In *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), the Supreme Court of the United States said:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing

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> of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins v. Kentucky*, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510.

Although *Connally* dealt with criminal law, the principle has been applied in other contexts. That the principle is still good law is shown by the fact the Supreme Court has recently cited *Connally* with approval in *F.C.C. v. Fox Television Stations*, — U.S. —, 132 S.Ct. 2307, 183 L. Ed.2d 234 (2012) [Federal regulations] and *Moncrieffe v. Holder*, — U.S. —, 133 S.Ct. 1678, 185 L. Ed.2d 727 (2013) [criminal law].

Whether viewed as a right of constitutional dimensions under the Due Process Clauses of the United States and Missouri Constitutions, or simply as a matter of fundamental fairness, Respondent, like every Missouri attorney, is entitled to notice of what acts the Rules of Professional Conduct permit and what acts the Rules prohibit. While no set of rules or statutes can address every conceivable fact situation there must be something in the language to provide guidance to attorneys when an issue such as this arises. Respectfully, there is no such notice in the Rules with respect to this factual situation.

The focus of the two Rules in issue is as follows: prohibiting lawyer-client transactions in which the lawyer obtains a personal benefit without first making certain disclosures, and prohibiting lawyers from *personally* providing funds to a client so that a client can pay bills, etc. Nothing in the Rules, however, prohibits an entity *separate* from

the lawyer from making loans to a lawyer's client, regardless of the use to which the loan proceeds are put.

Three of the cases cited by the OCDC serve as examples of the types of transactions prohibited by the Rules: transactions in which the attorney obtains a personal benefit.

In *In re Mills*, 539 S.W.2d 447 (Mo. banc 1976), the attorney owned land with a mobile home on it that he desired to sell. The attorney had also been appointed guardian of a veteran who had been declared incapacitated. The attorney obtained approval from the Probate Court to use the ward's funds to purchase the land and mobile home for use as the ward's home. However, the lawyer did not disclose that he was the owner of the property. This Court quite logically concluded that the fact the attorney had not made a profit was irrelevant *in the context of those facts*, for the simple reason that, profit or not, the attorney obtained a personal benefit—he no longer owned the unwanted land and mobile home.

In *In re Lowther*, 611 S.W.2d 1 (Mo. banc 1981) , the attorney drafted agreements for his clients to sign, but concealed the fact that he had a personal financial interest in the transaction.

In *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2000), the attorney drafted agreements for his clients to sign giving him a financial interest in certain property as a method to secure payment of his fee. Thus, the transaction involved a personal benefit to him.

In each of the above cases, the lawyer derived a personal benefit out of the transaction. The undisputed facts here demonstrate that neither Respondent nor his law

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firm received any benefit from any of the loan transactions, financial or otherwise. Neither Respondent nor his firm, directly or indirectly, provided any of the money which was loaned to Mr. Morrison (or to Ms. Ferris); KNP was the source of the loan funds. Respondent has had no ownership interest in KNP since 2005, and he was not paid by KNP for the services he provided in managing the corporation for his daughter.

Nothing in any of the sources an attorney would logically rely on—the language of the Rules themselves, formal or informal ethical opinions, or decisions of this Court—could have put Respondent on notice that if KNP made the loans to Mr. Morrison, Respondent would be in violation of the Rules.

The OCDC has argued that the loan agreements and the language imposing a lien on the proceeds of the personal injury claim, if and when any proceeds were obtained, violated public policy. The cases cited by the OCDC, however, do not actually support that argument and are distinguishable.

Schweiss v. Sisters of Mercy, 950 S.W.2d 537 (Mo. App. 1997), does not mention a lien at all, but addresses an actual assignment of a personal injury claim. *Huey v. Meek*, 419 S.W.3d 875 (Mo. App. 2013), involved an assignment of a personal injury claim and the statutory liens available to healthcare providers.

In *Scroggins v. Red Lobster*, 325 S.W.2d 389 (Mo. App. 2010), the issue was the assignment of personal injury proceeds to the plaintiff's health insurance company. The Southern District noted at page 392, however, that such an "assignment" was improper except in the narrow circumstance involving a potential claim and an existing creditor. Logic suggests that KNP was, as a result of the loans, an existing creditor. Nothing in the

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loan agreements assigned the entirety of Mr. Morrison's claim to KNP. The only thing the loan agreements did was to enable KNP to seek repayment of the loans from the proceeds of the personal injury claim.

The OCDC has also argued that the loan agreements gave KNP "tremendous control over the personal injury claim." The flaw in that argument is that there is absolutely nothing in the language of the agreements which supports that conclusion. Everything the OCDC discusses about KNP's rights (in the only full paragraph on page 73 of its brief) deals with KNP's rights *after* the personal injury claim is over. All of the discussion is about KNP's rights vis-à-vis the *proceeds*, *i.e.*, the rights KNP would have if and when the suit was over and there was in fact a recovery paid to Mr. Morrison. Nothing in the loan agreement terms gave KNP the right to exercise control over the course of the personal injury claim. For example KNP had no say over whether to settle before filing suit, or how discovery would be conducted, or how negotiations would be handled for a potential settlement after a suit was filed.

The OCDC argues what KNP *might* have done with respect to the loan agreements, but which in fact never happened. The OCDC glosses over the fact that, represented by counsel of his choice, in a mediation chaired by a Kansas District Court Judge, Mr. Morrison entered into a global settlement that resolved all issues between him and Respondent; including the attorney fees and expenses he owed for all the non-contingent fee work performed by Respondent, and KNP's loan claims. The settlement of $34,000 was far less than the aggregate that could have been claimed on the loans themselves. And as the OCDC acknowledges, that $34,000 was paid over to KNP.

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The OCDC has argued that Respondent should have turned over the corporate resolutions approving the individual loans to Mr. Morrison to "adequately disclose [Respondent's] connection to the lender." That argument, however, presupposes the credibility determination that Mr. Morrison told the truth when he said he was never informed about Respondent's relationship to KNP, and that Respondent lied when he testified that he informed Mr. Morrison of the facts of his relationship to KNP at the time of the first loan. By the OCDC's own argument, if showing a corporate resolution signed by Respondent to Mr. Morrison was sufficient to disclose his relationship to KNP, and thus avoid any suggestion or accusation of impropriety, or unethical conduct, then logically, a verbal explanation would have been sufficient as well. Had Respondent shown the first corporate resolution to Mr. Morrison, Mr. Morrison could just as easily have denied that that ever occurred, as he denied the verbal explanation of the relationship.

While Respondent certainly agrees that a corporation can act only through its personnel, there is nothing in this record to suggest that Respondent *intentionally* sought to do indirectly what he was not permitted to do directly. Respectfully, that appears to be an apples/oranges type of argument. The "apple" part is the prohibition on the use of his own funds or the funds of his law firm to loan money to Mr. Morrison, *i.e.*, entering into a transaction with Mr. Morrison that would benefit either Respondent himself or his law firm. The "orange" part is that the loans were made by an entirely separate entity, using its own resources, which conferred no direct or indirect benefit on either Respondent, personally, or on the law firm. Nothing in the plain language of the Rules prohibits an

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entity other than the lawyer or his law firm from making a loan to a lawyer's client, even if the lawyer is managing the entity which makes the loans. Respondent testified that he disclosed his relationship to KNP to Mr. Morrison, and that was in fact sufficient.

The OCDC has extensively argued about the relationship between Respondent's daughter (the "Kristen Nicole" of the corporate name) to the company, to reach the conclusion that she is only the "nominal" owner and not the "real" owner. There was even an argument that because Respondent did not call her to testify that her testimony would have been adverse to him. If the OCDC truly believed her testimony would be adverse to Respondent and help solidify its case against him, she could have been subpoenaed for deposition or the hearing. Respondent was open and candid about KNP and how it operates. He acknowledged that his daughter had no knowledge of the particular loan transactions at issue here. Her testimony about the corporation itself would have been cumulative. No adverse inference can be drawn from her not being asked to testify.

The OCDC appears to find dark significance in the fact that the actual owner of KNP did not participate in day-to-day operations; that she did not supervise everything; that she did not personally approve of the Morrison loans; and that no distribution has yet been made to her. The OCDC ignores the fact that there is nothing in the law which requires a sole stockholder in a corporation to do any of these things. There is nothing in the record to suggest that, as the sole stockholder, she would not have the right to take personal control at any time if she chose to do so, or that she would not have the right to require a distribution to her. Those are rights built into a corporate structure by law, and

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there is no basis for any adverse inference to be drawn from a decision not to exercise those rights prior to the hearing in this matter.

B. Payment for medical treatment and evaluation

There is also the issue of the charge that Respondent improperly paid medical bills for Mr. Morrison. The OCDC argues that payment of approximately $1000 for two epidural pain treatments for Mr. Morrison, and payment of $4079 for an MRI, violated the Rule against paying for a client's personal expenses.

Respondent has acknowledged that it was improper for him to have paid for the two pain treatments. He was faced with a situation in which his client was telling him of extreme pain that required treatment to relieve it, and he had two choices: (1) let Mr. Morrison suffer, or (2) be compassionate and provide the treatment. The first option was, of course, the proper one under the Rules, and Respondent acknowledges that he should simply have told Mr. Morrison that he couldn't be of assistance. Respondent has also expressed his regret that he violated the Rules by paying for that pain relief.

As the OCDC acknowledges, Respondent was authorized to advance litigation expenses. It needs no citation to authority to recognize that in personal injury cases, medical evaluations to determine the nature and extent of the injuries are frequently, if not always, necessary. The purpose of an MRI is diagnostic. It does not, in and of itself, help to alleviate suffering or effect a cure or bring about a change in the patient's physical condition. Respondent did not believe he was paying for medical treatment by advancing the cost of the MRI. There is nothing in the Rules, or in any authority cited by the OCDC, which says that paying for a medical evaluation as part of litigation expenses, where that

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evaluation has an actual or potential dual function of assisting in providing medical treatment to the plaintiff, is prohibited by the Rules. The MRI was a legitimate litigation expense and did not constitute any impropriety on the part of Respondent. On the other hand, Respondent has admitted candidly that he should not have paid for pain relief treatments for Mr. Morrison, and as noted above, has expressed his regret that he violated the Rule by doing so.

Respondent has not violated Rules 4-1.8(a) or 4-1.8(e), except for the payment of the two pain relief treatments for Mr. Morrison.

Section 2. Count III.

The OCDC charged Respondent with violating the ban on representing two clients with concurrent conflicts of interest, *i.e.*, representing both KNP and Mr. Morrison. There were no conflicts of interest between KNP and Mr. Morrison during the course of Respondent's representation of Mr. Morrison.

Respondent's representation of Mr. Morrison covered a variety of legal services: (a) seeking to modify child support; (b) defending a charge of non-payment of child support; (c) a municipal court theft charge; (d) preparing a power of attorney; (e) assisting in a social security claim, and (e) the personal injury claim. The contract-based legal services patently had no relationship to the loans from KNP. The only relationship between the loans Mr. Morrison sought and obtained from KNP and the personal injury claim was that it was Mr. Morrison's professed intent and agreement to repay not only the KNP loans from the proceeds of a recovery in the personal injury case, but to also use that recovery to pay the legal fees and expenses he had incurred in the non-contingent-fee

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matters.

There was, if anything, a mutuality of interest between KNP and Mr. Morrison right up to the time Mr. Morrison got a final $2,000 from KNP and then terminated the attorney-client relationship with Respondent the next day. Up to the time of termination, Mr. Morrison, KNP and Respondent all shared the same goal: (a) obtain the maximum recovery possible for the personal injury claim, and (b) to use Mr. Morrison's net share of the recovery proceeds, *i.e.*, the amount remaining after the deduction of attorney fees and expenses relating to the personal injury claim, to pay the debts Mr. Morrison had voluntarily incurred—the loans from KNP which he had spent, and the contract-based attorney fees and expenses for services he requested from Respondent. Given that Mr. Morrison was, through the KNP loans he requested, spending some $26,000 of his share of the personal injury recovery long before that recovery was even in existence, it is clear no conflicts existed.

It is also clear from the undisputed testimony of Respondent, that *if* a conflict of interest had *actually* arisen between KNP and Mr. Morrison during the course of Respondent's representation of Mr. Morrison, Respondent would—properly—have sought leave to withdraw from representing either. This is somewhat analogous to an attorney who represents two of the people entitled to share in the proceeds of a wrongful death recovery who have agreed as how the proceeds would be divided. If at some point their interests became adverse, he could not properly represent either of them. That is precisely what Respondent said he would have done had an actual conflict arisen between KNP and Mr. Morrison.

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Thus, any conflict of interest could only arise after Mr. Morrison terminated Respondent's representation of him with reference to the personal injury claim. With that termination, no attorney-client relationship existed at all between Mr. Morrison and Respondent, since all the contract-based legal services were complete as of that time.

Mr. Morrison terminated Respondent's services on the personal injury matter. He plainly demonstrated his intent to repudiate the KNP loans by arguing that he shouldn't have been loaned the money in the first place, and therefore he shouldn't have to repay them. At that point, Respondent had the unquestionable right to seek judicial determination of the fees and expenses to which he was entitled as a result of the contract-based legal services, and the right to seek a judicial determination of the quantum meruit fees and expenses he was entitled to receive for his services on the personal injury claim. Similarly, KNP had a right to seek to recover the loans it had made to Mr. Morrison.

There were no concurrent conflicts of interest during the course of Respondent's representation of Mr. Morrison and therefore no violation of Rule 4-1.7(a)(2).

Section 3. Count IV

Unless a petition in a civil suit is "bare bones" to the extent of being the equivalent of notice pleading under the Federal Rules of Civil Procedure, there is a wide spectrum of choices available to an attorney in drafting a petition that seeks recovery of contract-based fees and reimbursement of expenses. This is so regardless of whether those fees and expenses are the lawyer's own, or those of a client. Might the petition against Mr. Morrison for recovery of Respondent's attorney fees and expenses been a more "bare

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bones" petition than it was? Respondent has acknowledged that he could have done so.

There are as many ways to draft a petition on issues such as these as there are lawyers who draft them, and multiple ways any individual lawyer might draft any individual petition. That there was or might have been an alternative is not an issue here. The sole issue is whether this petition, with the particular exhibits attached, improperly disclosed information about Mr. Morrison that should have been kept confidential, *i.e.*, not included in the petition at all as a matter of law, or only filed under seal.

The OCDC acknowledges that the panel found that Respondent reasonably believed the attorney fee petition was not in violation of Rule 4-1.6(b)(3), but then scoffs at that conclusion by in turn arguing that no reasonable attorney could have believed that. The OCDC goes on to accuse Respondent of litigation tactics that violated the Rules. There is no factual basis in the record for either of those conclusions.

A careful and objective examination of the petition and exhibits can result only in the conclusion that there was no information about Mr. Morrison which was improperly disclosed.

Mr. Morrison's main complaint—in these proceedings, but not in his actual complaint to the Bar—is that the petition should have been filed under seal, and that it was a violation of the ethical rules not to do so. Mr. Morrison, however, expressed no such concerns during the course of that litigation. Mr. Morrison was represented by two presumably able attorneys from two separate law firms. Mr. Morrison and his attorneys had a remedy if they believed Respondent's Petition disclosed privileged or confidential information. They could have filed a Motion to seal the case file or portions thereof. Mr.

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Morrison did not attempt to put anything under seal. Instead, Mr. Morrison chose to fight having to pay Respondent anything at all, and filed a legal malpractice counterclaim that covered all the legal services provided by Respondent.

The Western District has said that when a client challenges prior representation by his lawyer, whether in a criminal case or by a legal malpractice suit or otherwise, the client waives the attorney-client privilege. *Johnson v. Schmidt*, 719 S.W.2d 825, 827-828 (W.D. Mo. App. 1986). Even if the disclosures made by Respondent had been improper, which Respondent does not believe to be so, Mr. Morrison's voluntary decision to counterclaim for legal malpractice not only waived his attorney-client privilege going forward, but in effect ratified any prior disclosures.

There is also another doctrine, which by analogy if not direct application, bars any claim that the disclosures in the petition were improper: the doctrine of judicial estoppel. That doctrine is summarized in *Vinson v. Vinson*, 243 S.W.3d 415, 422 (E.D. Mo. App. 2007), a case which is factually unrelated and is cited only for the principles involved. Essentially, the doctrine says that if a person takes one position in an initial legal proceeding, he cannot later change his mind and take a conflicting opposition in a subsequent proceeding.

It is axiomatic that silence where there is a duty to speak amounts to consent. If Mr. Morrison and/or his then-counsel had, in fact, believed that the disclosures in the petition were improper, they had a duty to speak up and attempt to do something about it; *e.g.*, a motion to put the petition or any other pleadings under seal. They chose silence instead, and by their silence, acquiesced in the disclosures made by the petition and

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exhibits.

There was no violation by Respondent of Rule 4-1.6(a)

Section 4. Counts V and VI

Both Count V (the Dr. Febbo lawsuit issue) and Count VI (the KNP lawsuit issue) allege violations of Rule 4-1.9(a), which prohibits representing another client in a proceeding against a former client where the matter at issue is the same as the former representation or substantially similar.

There is no authority to support the proposition that a lawyer may not refer clients to healthcare providers or experts with whom the lawyer has any acquaintance, professional friendship, or long-term or short-term relationship. Mr. Morrison has admitted that the debt he owed to Dr. Febbo was a valid one. He allowed a default judgment to be entered against him. He made no effort to have the default judgment set aside. His "excuse" at the hearing for not paying this debt—when he clearly had the financial resources to do so once he received his personal injury settlement proceeds and the global settlement was negotiated—was as follows: He would have paid Dr. Febbo if Respondent had just not gone after him to get paid the fees and expenses Mr. Morrison had contracted for, and if KNP had just not gone after him to get repayment of the loans he had voluntarily incurred and from which he had spent all the proceeds.

That is not an acceptable excuse for non-payment of a legitimate debt. It is true that Respondent represented Dr. Febbo in presenting her lien claim at the apportionment hearing before Judge Bednar. When that lien was rejected, Dr. Febbo hired other counsel (Mr. Hudnall for obtaining the judgment against Mr. Morrison, and Mr. Campbell for

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registering that judgment in Kansas) to pursue her debt recovery claim via litigation. While Respondent had some minor involvement in getting that litigation started, and appeared two times on non-merit issues when Mr. Hudnall was unavailable, lawyers other than Respondent in fact handled the Febbo debt collection case on its merits, through its conclusion and into the collection phase.

With the exception that the debt to Dr. Febbo was incurred in connection with the personal injury claim, there was no relationship between that debt and the prosecution of the personal injury claim; nor is collection of a valid debt the same or substantially similar to pursuing a personal injury claim. There is no evidence in the record that any information Respondent obtained during the course of any of the legal services he provided to Mr. Morrison were used, nor was such information of value, in the Febbo debt collection proceedings. Services were provided, charges were incurred and were unpaid. There was no conflict of interest.

Similarly, multiple loans to Mr. Morrison by a separate corporation so that Mr. Morrison could spend his personal injury recovery before he ever received it, (indeed, before there *was* a recovery), is not the same thing as Respondent's representation of Mr. Morrison in the personal injury case. Respondent was working up Mr. Morrison's claim in hopes of settling without having to file suit, or to be prepared to file suit if necessary. The only relationship between the KNP loans and the personal injury claim is that Mr. Morrison agreed to use any recovery from the personal injury claim to repay the loans. The loans are not the same as the personal injury claim, nor were they substantially similar to Respondent's representation of Mr. Morrison in the personal injury claim.

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There was no violation of Rule 4-1.9(a).

Section V. Count VII

Count VII is something of a catch-all charge against Respondent, since all of the issues it addresses, with one exception, were themselves the subject of charges in the preceding Counts.

As previously pointed out, there was no violation of the earlier-mentioned Rules, with the admitted exception of paying for injections to relieve Mr. Morrison's pain. There was also no prejudice to the administration of justice under Rule 4-8.4(d).

The sole new issue is the claim by the OCDC that Respondent used subterfuge to attempt to obtain protected health information about Mr. Morrison. This is in reference to the lab test results showing that, despite his denials of drug use in the domestic relations proceedings, Mr. Morrison had in fact been using marijuana.

Respondent has admitted that he did not adequately supervise his legal assistant so as to prevent the misstatement in the email to another attorney which requested the name of a testing laboratory in Liberty, Missouri. He has accepted responsibility for that error. However, that single sentence in an email that did not mention Mr. Morrison or anything about him, cannot be considered prejudicial to the administration of justice; particularly when no actual attempt was made to obtain the marijuana test results, by subterfuge or otherwise.

As Exhibit 37 clearly shows, once the name of the laboratory was obtained, the only thing that Respondent's legal assistant did was to ask whether the records still existed. The laboratory responded that they existed, but that they could not be released

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without an authorization. Respondent thereafter made no attempt to obtain those records.

A legal assistant's misstatement in an email to a separate attorney in an attempt to find out the name of the laboratory where the marijuana-disclosing test was done, does not rise to the level of conduct by Respondent prejudicial to the administration of justice.

There is no violation of Rule 4-8.4(d).

REPLY POINT II.

What the OCDC proposes as an appropriate sanction is harsh and excessive. It would effectively destroy Respondent's law practice, a sole practitioner.

In support of this proposal, the OCDC spends some time excoriating Respondent and depicting him as vindictive, subject to knee-jerk reactions when he is professionally disappointed and as a past and future danger to his clients and to the legal profession. The offered "proof" is that: "Within days after being fired, Respondent tried to dig up some dirt on his former client, called in the loans for immediate repayment against the client, and filed a 26-page lawsuit against the former client."

The "dirt" is, presumably, the proof that Mr. Morrison failed the drug test that he took in order to prove he wasn't taking drugs. Yet Respondent already knew about that. Although there has been a great deal of talk about Respondent's subterfuge, etc., the OCDC does not cite anything in the record to show that any attempt was, in fact, made to obtain the drug test results. A paralegal essentially asked another lawyer for the name of the lab where that testing had been done, and then inquired whether the records still existed. The lab confirmed that the records existed but could not be released without an authorization. *And then Respondent did nothing more*. He already knew the "dirt"

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existed, and since he had no authorization he made no effort to "dig it up."

His "guilt" is supposedly further shown by the fact that KNP took immediate action to recover its loans against Respondent's former client, and Respondent took immediate action to obtain payment of the attorney fees he had already earned, and to obtain reimbursement of his expenses on behalf of Mr. Morrison.

In other words, the OCDC is requesting that Respondent be severely punished for the speed with which he exercised his own rights and the rights of KNP under the law.

That is not how the law operates in this State.

In *Carlyle v. Lai*, 783 S.W.2d 925 (Mo. App. 1989), the issue was whether asking the plaintiff about the speed with which he contacted counsel after the incident giving rise to the lawsuit constituted reversible error. The Western District held that it was, saying at 929-930:

> Accessing the legal system is normally not to be discouraged and, exercising one's right to utilize the legal system within established rules and procedures should normally not to be used to attempt to discredit a litigant with a jury. The Missouri legislature and Supreme Court have established the statutes and rules which govern a person's access to the courts. The right to seek the advice of counsel is so fundamental that, absent a justifiable reason and supporting evidence, counsel risk reversal when attempting to discredit a litigant by cross-examining him about the time and circumstances of his having consulted an attorney to discuss and exercise his legal rights.

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> The questions asked at the commencement of Ms. Kramer's cross-examination and argued during summation by Mr. Turner regarding when Ms. Kramer hired plaintiffs' attorney injected into the trial an improper issue. The questions were asked to discredit the plaintiffs as avaricious because they sought the services of a lawyer soon after their son's death.

The OCDC is using the fact that KNP promptly exercised its legitimate right to recover the money it had paid out in loans to Mr. Morrison, and the fact that Respondent promptly exercised his legitimate right to recover the attorney fees and expenses he had earned, as proof of vindictiveness and retaliation for having been fired. The speed with which a plaintiff seeks access to the legal system to redress a grievance cannot be used to penalize the plaintiff, nor to paint the plaintiff as avaricious, or vindictive, or whatever other pejorative might be used. When would it have been okay for legal action to have been taken? The focus should be on the right to assert the claims as opposed to when they were asserted. If KNP and Respondent had the right to assert those claims, then it does not matter if they were filed immediately or on the last day to satisfy the statute of limitations. The tone of the OCDC's argument suggests that the "proper" time frame for KNP and Respondent to act was: never.

The facts of this case do not merit the severity of sanction sought by the OCDC.

At page 104 of its brief, the OCDC discusses several cases which, it argues, deal with the same kind of conduct at issue here and which resulted in indefinite suspension orders. Two of those, *Mills* and *Lowther*, *supra*, have been previously discussed. Both of those involved personal benefit to the lawyer. The third case, *In re Snyder*, 35 S.W.3d

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380 (Mo. 2000) (en banc), is also distinguishable. That case involved the attorney acquiring *personal* financial interests in the residences of his client by taking deeds from them to secure payment of his fees in criminal representations. Once again, that action involved a personal benefit to the attorney. There is not one scintilla of evidence in this record which would support the conclusion that Respondent obtained any personal benefit from the KNP loans.

Respondent agrees that this Court has looked to Section 3.0 of the ABA Standards for Imposing Lawyer Sanctions (Black Letter Rules) as guidelines for the imposition of sanctions. Those standards identify four factors to be considered in determining the imposition of sanctions.

Factor 1: The Duty Violated

There is one clear violation of the Rules in this matter: Respondent's payment for two pain-relieving epidural treatments for Mr. Morrison in contravention of Rule 4-1.8(e). There is also a single instance of inadequate supervision of a legal assistant that does not violate any of the Rules cited in the Information.

Factor 2: The Lawyer's Mental State

The evidence is uncontradicted that Respondent's motivation in agreeing to pay for the epidural treatments for Mr. Morrison was compassion. Mr. Odo derived no benefit from paying for this treatment. Mr. Morrison told Respondent that he was experiencing excruciating pain, that the treatments were necessary to alleviate that pain, and that he had no way to pay for the treatments. Respondent agreed to do so. It is also important to note with respect to Respondent's mental state, that he did not attempt to take advantage

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of Mr. Morrison's suffering by suggesting on either of the two occasions that Mr. Morrison take out a new loan from KNP to pay for the treatments. Instead, he made the compassionately-correct, but ethically-incorrect, decision.

There is no "mental state" to consider with reference to Respondent's desire to find out where the marijuana lab test had been done, so that he could eventually obtain those records. It was a logical for him to anticipate the need for those test results given Mr. Morrison's accusation that Respondent had conspired with his former wife's attorney, and the guardian ad litem, to sabotage the domestic relations proceedings. In fact, that is exactly what Mr. Morrison alleged in his testimony at the hearing. The test results and Respondent's advice relating to the results would naturally be relevant to proving that he had acted in Mr. Morrison's best interests in the domestic relations proceedings.

All that the evidence reveals in this matter is that a misstatement of fact was made by a legal assistant in finding out where the tests had been performed. With that knowledge, the only thing that was done thereafter was to find out if the records still existed.

As to the KNP loans, Respondent believed that he was not in violation of Rule 4-1.8(a) because he-the lawyer-was not entering into a business transaction with his client. There was no intent to violate any rule.

Likewise, Respondent did not knowingly violate Rule 4-1.6(a) should the Court conclude that a violation occurred.

There was no culpable mental state on the part of Respondent.

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Factor 3: Potential or Actual Injury to the Client

There is no evidence of any damage to Mr. Morrison from any of the events identified in the Information, other than "damage" brought on by Mr. Morrison's own decisions.

The OCDC has argued that Mr. Morrison was damaged by having to repay KNP $34,000 as part of a global settlement negotiated by his attorney. The reality is that Mr. Morrison kept on borrowing money—*spending his net recovery from the personal injury suit in advance of there actually being a recovery*—up to and including a $2000 loan from KNP the day before he terminated Respondent's representation in the personal injury suit. That termination severed the attorney-client relationship between Mr. Morrison and Respondent, because all the work on the non-contingent-fee matters had been completed. If Mr. Morrison was "damaged" by having to repay these loans, then literally every person in the country who borrows money, whether from a friend, or via credit card, or from a financial institution, is "damaged" by having to repay it. There was no damage to Mr. Morrison resulting from the loan transactions.

The OCDC has previously argued that Mr. Morrison was damaged by incurring "tens of thousands" of dollars in attorney fees defending the suit by Dr. Febbo, and the suit by Respondent to recover his contractual attorney fees and expenses, and the suit by KNP. First, there is no evidence that supports the conclusion that defense of these suits cost him "tens of thousands" of dollars—a phrase that suggests $20,000 in attorney fees or more. Second, and more important, is that the suits were brought on by Mr. Morrison's decision not to pay these debts. He could have easily acknowledged that he owed, at a

minimum, the principal balance of the loans from KNP, and since he was represented by counsel, could have entered into a settlement negotiation from the start of the KNP suit against him. Instead, he and his attorneys decided to claim he should get a free ride, and not have to repay the loans at all. Mr. Morrison's decision to try to avoid payment of his debts is what caused him to incur any attorney fees he incurred.

Nor was there any damage to Mr. Morrison from Respondent's violation of Rule 4-1.8(e). Mr. Morrison *benefitted, and benefitted substantially*, from Respondent's conduct, since Mr. Morrison obtained relief from the pain about which he complained to Respondent.

The record is clear that nothing Respondent did caused any damage to Mr. Morrison except in Mr. Morrison's own mind, *i.e.*, having to repay the loans to KNP and having to pay for the contract-based legal services and expenses.

Factor Four: Aggravating and Mitigating Circumstances

ABA Standard 9.22 sets out eleven potential aggravating circumstances to be considered.

There was one prior admonition of Respondent, on facts unrelated to the issues raised in this proceeding. (9.22(a)). There is no evidence of any selfish or dishonest motive on the part of Respondent. (9.22(b)). There is no pattern of misconduct. (9.22(c)). There are "multiple offenses" only to the extent Respondent paid for two epidural pain-relieving treatments for Mr. Morrison, and one incident of inadequate supervision of a legal assistant. (9.22(d)). There was no bad faith conduct on the part of Respondent in these proceedings. (9.22(e)). There was no submission of false evidence in these

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proceedings. (9.22(f)).

There was no refusal to admit the wrongful nature of his conduct. (9.22(g)). Respondent correctly admitted that he should not have paid for the epidurals for Mr. Morrison. Although the OCDC strenuously argues that Respondent's "failure" to admit impropriety with respect to the KNP loans is an aggravating circumstance, a good faith belief that the conduct at issue did not violate an ethical rule cannot be considered an aggravating circumstance. Respondent was faced with a Hobson's choice when questioned at the hearing by OCDC's counsel. He was asked whether he acknowledged improper conduct in making the loans on behalf of KNP, as well as the other alleged violations. If he says yes, he has admitted a violation. If he says no, the OCDC argues that he is not contrite.

Had Respondent entered into the same loan agreements with Mr. Morrison, using a corporation he owned and using his own funds, the conclusion might have been otherwise. But the facts are what they are: KNP is a separate corporation, owned by Respondent's daughter although managed by Respondent, and all of the funds used to make the loans to Mr. Morrison came from KNP's resources, and not directly or indirectly from Respondent. There was no impropriety on the part of Respondent in refusing to agree that his conduct involving a first-impression issue constituted a violation of the ethical rules.

There was no "vulnerability" on the part of Mr. Morrison in the context of the facts underlying this proceeding. Mr. Morrison had the terms and conditions of the loans from KNP fully explained to him at the time of the first loan. (9.22(h)). There were

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fifteen more loans taken out by Mr. Morrison, each and every loan being made because he voluntarily sought to borrow more money, not because Respondent persuaded or coerced him into doing so. Nor was there any vulnerability on his part when he asked for and received help in obtaining relief from pain through Respondent's payment for the two epidurals. Rather than being "vulnerable," Mr. Morrison actually benefitted from Respondent's actions.

While it is true that Respondent has substantial experience in the practice of law (9.22(i)) that is not actually an aggravating circumstance in this factual setting, since Respondent's conduct either benefitted Mr. Morrison, *cf.* the pain relief payments, or consisted of conduct he could have had no reasonable way of knowing would or might be considered a violation of the Rules of Professional Conduct, *i.e.*, the KNP loans.

There is no issue of restitution here (9.22(j)), since Mr. Morrison utilized the services of an attorney to negotiate a global settlement. While Mr. Morrison might or perhaps certainly does regret having to pay Respondent fees and expenses for Respondent's contract-based services, or having to repay KNP's loans, those were debts he owed. There is, therefore, no "restitution" that could or should be made here. There is also no illegal conduct at issue in these proceedings. (9.22(k)).

There are also mitigating circumstances. Those include the absence of any dishonest motive on the part of Respondent; his full and free disclosure of information and his cooperation throughout these proceedings; his undisputed good character and reputation in the legal community; his genuine remorse for having let his compassion outweigh compliance with the Rules by paying for Mr. Morrison's pain-relieving

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epidural treatments; his acknowledgment of responsibility for the inadequate supervision of a legal assistant, and the fact that the prior admonition is remote in time, and unrelated to the issues raised by this Information.

Probation with conditions or a one year suspension with supervised probation would be the appropriate punishment.

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SUMMARY AND CONCLUSION

KNP, acting through Respondent, made a series of loans to Mr. Morrison. There is conflicting testimony as to whether Respondent verbally disclosed his relationship to KNP at the time of the first loan. Those loans were made by a separate legal entity, using its own resources to provide the funds. No money or other resources from Respondent or his law firm were used to make the loans. Respondent obtained no personal benefit from his unpaid work for KNP, whether from the loans to Mr. Morrison or otherwise. There is nothing in the Rules which prohibits a separate entity, using its own resources, from making loans to a lawyer's client, regardless of the use to which those loans are put. Respondent acted in a good faith belief that what he did was not a violation of the Rules.

Respondent paid for an MRI to medically evaluate Mr. Morrison, which could have had a dual effect of being an aid to Mr. Morrison's treatment. Respondent has admitted he erred in paying for Mr. Morrison's pain relief injections.

There was no concurrent conflict of interest, nor was there a conflict of interest in relation to a past client for the Febbo matter. Dr. Febbo was represented throughout the collection action against Mr. Morrison by independent counsel. Respondent did not improperly disclose confidential client information when he filed suit to recover his earned attorney fees and expenses, nor did he engage in any conduct prejudicial to the administration of justice.

There are no facts in this record to show that Respondent, who has had an essentially unblemished legal career for more than thirty years, will ever—particularly

after undergoing this ordeal—do anything similar to the conduct he was either accused of or has admitted to (pain relief payments and inadequate supervision of his staff). He has cooperated openly, candidly and fully with these proceedings.

Discipline is warranted. Respondent has admitted to violating Rule 4-1.8(e). Respondent did not knowingly violate any other rules. Respondent recommended probation with conditions or suspension with probation to the hearing panel, and makes the same recommendation to this Court.

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CERTIFICATE OF SERVICE

A copy of the above and foregoing was electronically served, via the Court's electronic filing system on June 10, 2014, on:

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CERTIFICATE OF COMPLIANCE

I hereby certify the following:

1. This brief is in compliance with the requirements of Mo. R. Civ. P. 55.03.

2. This brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b).

3. This brief contains 10,338 words, exclusive of the cover, signature block, certificate of service, and certificate of compliance. This brief was prepared using Microsoft Word.

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