IN THE SUPREME COURT

STATE OF MISSOURI

IN RE:	)	
	)	
SETH SHUMAKER,	)	Case No. SC91076
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

Respondent makes the following additions and corrections to the Informant's Statement of Facts. These are not intended as a full and complete account, but as a supplement. (NOTE: References are periodically made to documents contained in Informant's Appendix filed simultaneous with Informant's Brief. Any such reference shall be indicated by use of "IA" followed by the Appendix page number).

The initial Information filed by the OCDC was based upon the complaints of Rustyn Plunkett. The advisory counsel found Rustyn Plunkett to be largely incredible. An amended Information filed by the OCDC added a complaint by Andy Skinta and Dot Skinta. The advisory counsel found the Skintas to be largely incredible.

MACB, LLC

Mid-America Credit Bureau, LLC (MACB) was the brainchild of Rustyn Plunkett. Its business was the collection of unpaid credit card accounts, largely those obtained from other agencies whose initial collection efforts had failed. MACB was based in Lenexa, Kansas. Its attorneys were the lawyers of the firm of Meeks and Klutman, who, unlike respondent, were licensed in Kansas. (Tr. 552-553, Tr. 559, Tr. 409). Respondent did not represent MACB. (Tr. 554, Tr. 558). Erik Klutman testified that Respondent's initial role in the company was as an investor only (Tr. 556) and his status as an investor only never changed, (Tr. 569-570).

In 2006, at the urging of Rustyn Plunkett, respondent invested $200,000 as part of the start up capital of MACB. Mr. Plunkett expressed a desire to operate the collection business, because he "was tired of selling insurance." (Tr. 373). Mr. Plunkett had been

the subject of numerous official complaints in the insurance business between 1992 and 2006, (RA8-RA9, Exhibit O).

Mr. Plunkett brought Brad Dekraai into the company, (Tr. 644-645). Mr. Dekraai had experience and contacts in this particular form of collections business, (Tr. 645). Under Article VIII Section 8.3 of the Operating Agreement prepared by Meeks and Klutman, and signed by Mr. Plunkett, the company was to be taxed as an S corporation, (IA982, IA988). Mr. Klutman testified that for the members to be taxed as partners, rather than as a corporation, ownership interests would have to be paid for in cash rather than sweat equity, (Tr. 554).

Mr. Plunkett made no initial investment of capital, because he had no money to invest, but he was given an ownership share and the position of chief executive officer (Tr. 408). Mr. Plunkett testified that he obtained his ownership share through sweat equity, (Tr. 254). It was Mr. Klutman's understanding that in order to obtain this ownership share, Mr. Plunkett would either guarantee some debt or put money into the business (Tr. 558) or that Mr. Plunkett would make his capital contribution in the future, (Tr. 566, Tr. 593-594). Respondent testified that Plunkett's initial involvement or contribution would be sweat equity, "….but there was always the indication by Erik Klutman to him [Plunkett] and the other owners, including myself, that capital contributions would have to be made," (Tr. 928).

By August 2006 MACB was out of cash, (Tr. 410). MACB's Chief Financial Officer, Chris Shoemaker, (no relation to respondent), was concerned that Mr. Plunkett's salary and company expenses were being paid out of client accounts. (Tr. 415-416). Mr.

Shoemaker was brought in because "something was going on with the money," (Tr. 408). Mr. Shoemaker believed an additional $230,000 to $270,000 in cash was needed to keep the company alive, (Tr. 410).

A meeting between Mr. Shoemaker, Mr. Plunkett and respondent to discuss the financial condition of the company was held at respondent's office in August, 2006, (Tr. 409-411, Tr. 940-941). Mr. Shoemaker testified Mr. Plunkett kept trying to push respondent to put more money into MACB, (Tr. 410). Respondent told Mr. Plunkett it was easier for him [Plunkett] to be optimistic, because he had "no skin in the game." Tr. 413) Lorrie Mallory, respondent's paralegal since 1999 and an employee of MACB as well, testified that Mr. Plunkett told her "That he would put up his house if he had to, whatever he had to do to get more capital into the business," (Tr. 863).

Mrs. Malloy also testified that during a meeting in August 2006 between Chris Shoemaker, MACB's Chief Financial Officer, Mr. Plunkett and respondent, she overheard Mssrs. Shoemaker and Plunkett say the company was broke and needed more cash, (Tr. 857-858). She testified:

> Rusty said that he would put money into the business, but he did not have money to put in the business; that he would borrow money, but nobody, a bank, would loan him any money. . . .Chris said that he was not putting any more money in the business. He put all the money in the business that he was going to; and Rusty said that he could not get a loan, that he would put up his house, or do whatever, because it was going to make it if we just had

more capital to put into it. . . .It's a for-sure deal Seth. It is a for-sure deal. It can make it. It just needs a couple of hundred thousand, $250,000 more. (Tr. 858-859).

Chris Shoemaker testified that in that August 2006 meeting, Mr. Plunkett said he would consider putting up his house to provide an infusion of $250,000 of needed capital. (Tr. 442). Respondent later consulted Mr. Klutman as to respondent making a loan to Mr. Plunkett, secured by a deed of trust, with the loan proceeds being used as an infusion of capital on Mr. Plunkett's behalf, (Tr. 944). A note and deed of trust for $250,000 were signed by Mr. Plunkett, (Exhibits 18 and 19 IA659-IA664).

Mr. Shoemaker became aware in September that the transaction had been made when money was coming into the business, (Tr. 413).

Q. And in September of 2006 did you come to know that Mr. Shumaker made an additional contribution to MACB?

A. Not in the early part of the September. No. It was later on that the money was coming in and the business was being funded extra money; and if I remember right, I called Mr. Shumaker, and he said that Rusty did put up a second on his house which is the reason why he went ahead - -well, I would say the major reason that it solidified his opinion that Rusty felt that it would make difference and progress the company on, so basically Rusty put skin in the game in the company. (Tr. 413).

Mr. Klutman testified that respondent paid $250,000 into the company as Mr Plunkett's capital contribution, (Tr. 598). Mr. Meeks testified that that payment represented Mr. Plunkett's only capital contribution to the company, (Tr. 614-615).

Attorney Danieal Miller testified that during a subsequent meeting between himself, Mr. Plunkett and respondent at the Tinderbox Cigar Shop Mr. Plunkett bragged that he put up his house as security for this capital infusion. (Tr. 723). Mr. Miller testified: "There was a discussion wherein the idea that he put up his house was discussed, and it was actually kind of funny. It was kind of in a bragging sense of, in essence, you know, 'I have got the ultimate skin in game. You know, I have got my house in there," (Tr. 723). Respondent later testified that the meeting at the Tinderbox occurred on July 11, 2007 as shown by a receipt from a purchase there, (Tr. 967-968).

Mr. Meeks testified that the management group was to keep track of capital contributions, (Tr. 630). Mr. Plunkett was CEO (Tr. 256, 408). Mr. Klutman testified The Operating Agreement listed Mr. Plunkett's initial interest at 25%, even though no contribution had yet been made by him, but Mr. Klutman testified that this was just a starting point and that the operating agreement was not amended each time capital positions changed, (Tr. 566-567). In a deposition, Mr. Plunkett testified he owned 18 percent, (IA 832 depo. pg 9 lines 2-4, 20-22). As to Mr. Plunkett's ownership interest and capital contribution, Mr. Klutman testified:

> He had, approximately, anywhere from 18 percent to, at one point, 25 percent ownership in this company. Based on the amount of money put into this, of capital accounts of the partners at this time, tax-wise, you

cannot justify that ownership interest with anything less than at least $100,000 either being put in or being liable for at that time. That is by personally guaranteeing loans or being responsible for that loan if the company did not pay it back. (Tr. 564). . . .

Q. After Mr. Plunkett gave the deed [of trust] of the property to Mr. Shumaker and signed the $250,000 note, was there capital infusion into the business?

A. Yes. Even beyond the two hundred fifty thousand. . . .

Q. So Mr. Shumaker made this capital contribution to MACB on Rusty's behalf because he pledged his house and signed the note?

A. That was [the] understanding. Yes. (Tr. 565-566).

And Mr. Klutman testified that the reason he did not go back and change Mr. Plunkett's percentage of ownership on the basis of that contribution was because at the inception of the company, it was expected that he would make such a contribution to the business in the future, (Tr. 566).

Mr. Klutman also testified, without objection, that Mr. Plunkett was aware that the $250,000 contribution made by respondent on Mr. Plunkett's behalf subsequent to the execution of the deed of trust was for Mr. Plunkett's contribution to the business in spite of confusing deposition testimony in DeKraai v. MACB, (Tr. 573). Mr. Klutman testified:

Q. You think he [Mr. Plunkett] did not think that was his contribution?

A. He did. I just think the way he answered this – my understanding is that I talked to Mr. Plunkett; he was aware that the two hundred fifty thousand was going to be brought up in this [Dekraai v. MACB] case, and he was aware that was going to be his contribution to the business. (Tr. 573]).

On page nine of that deposition Mr. Plunkett testified he owned 18 percent, (IA832):

Q. Yeah. You said you've got 18 per cent in Mid-America right now?

A. Right. (IA832)

And on page 293 of that deposition Mr. Plunkett acknowledged that he had given a second deed of trust on his house in payment for his ownership share. (RA2)

Q. And we discussed you having ownership interest in Mid-America Credit Bureau?

A. Yes.

Q. Now, did you contribute any money for that ownership interest?

A. No. They have a second on my house. (RA2)

Attorney Meeks testified that MACB suffered cash flow problems from the first day even though it was generating huge amounts of collections, (Tr. 630). In addition to the cash drain on the company, Meeks testified that it was later discovered that Dekraai stole respondent's identity, obtained a credit card using it, charged thousands of dollars in personal expenses to the card and forged promissory notes in respondent's name. (Tr. 643).

Mr. Meeks testified, without objection, that he concluded that Dekraai and Mr. Plunkett were in bed together and that they had figured out a way to take respondent for his entire nest egg, (Tr. 624). Mr. Plunkett brought Brad Dekraai into the company, (Tr. 644-645]). Mr. Meeks testified that Mr. Plunkett's deposition testimony in litigation between Dekraai and MACB was entirely different from what he had said to Mr. Meeks and Mr. Klutman in preparation the previous day. (Tr. 610-611), that it was so inexplicable that Mr. Meeks concluded that Mr. Plunkett and Brad Dekraai were colluding, (Tr. 619), {see also Klutman's testimony regarding the deposition preparation at (Tr. 574)}. And when Meeks and Klutman suggested investigating Dekraai, Mr. Plunkett recommended hiring a particular private investigator, who it was later discovered had been charged with felony drug offenses which reduced or ruined the credibility of his findings with law enforcement authorities, (Tr. 624-625).

Regarding the deposition testimony in Dekraai v. MACB, Mr. Meeks testified that Mr. Plunkett was designated corporate representative of MACB because he was next in command after the dismissal of Dekraai, (Tr. 628).

The $2,000 MACB Loan

In August and September 2006, Mr. Plunkett sought a personal loan from MACB of $2,000 for him to travel to Texas to visit family, (Tr. 560-561). The loan was made on a MACB check, (Ex. 20 IA665).

Count I of the Information alleges, among other things, that Respondent had Mr. Plunkett sign a deed of trust for $250,000 in exchange for a check for $2,000. (IA54). Mr. Klutman testified that was not the case and that he would not have approved such a

transaction, (Tr. 564-565). He testified that the $250,000 represented by the deed of trust pertained to Mr. Plunkett's ownership interest, (Tr. 564). As to the suggestion that the deed of trust was to secure the $2,000 personal loan from MACB, Mr. Klutman testified,

> I don't want to use the term "ludicrous," but there is no way that Rusty or even Seth or anyone would even do that. I mean, he needed the money to go to Texas but it was not a note that that was needed to – it was not – sorry I am stumbling a little bit. I am just shocked by the question I guess. The $2,000 would have been used for him to go to Texas. It would not have his capital contribution to the company . . . . (Tr. 614).

The MACB check for the $2,000 loan was dated September 12, 2006, (Exhibit 20 IA665) and was presented for payment by Mr. Plunkett September 13, 2006, (IA666, Ex. 21). Mr. Plunkett was not asked to sign any document relating to this loan. (Tr. 937, Tr. 942-943). Respondent discussed the $2,000 loan with Erik Klutman and Chris Shoemaker in order to make sure it was proper for the company to make the loan and was told to simply write the word "loan" on the memorandum line of the check, (Tr. 935-936).

Lorrie Malloy, who worked for respondent and MACB, denied the allegation that she told Mr. Plunkett he would have to sign a promissory note before she would give him the MACB check, (Tr. 853). She testified that she wrote the check on the instructions of respondent, (Tr. 852) but that she was not the person who gave Mr. Plunkett the check, (Tr. 853). Respondent testified that the only note Mr. Plunkett was asked to sign was the

unrelated note for his capital contribution to MACB of $250,000 and that note had been signed seven days earlier on September 5, 2006 (Tr. 936-937).

Ashley Pauley, a former paralegal for respondent, testified the note for the $250,000 to be used for a capital contribution on behalf of Mr. Plunkett had been prepared either by her or respondent and signed by Mr. Plunkett in her presence on September 5, 2007, seven days prior to the MACB loan being made, (Tr. 521). Mrs. Pauley also testified that she prepared the deed of trust on September 5, 2006, (Tr. 503) and that Mr. Plunkett picked up a copy of the deed of trust on September 5, 2006 (Tr. 514]). She testified that the purpose for giving Mr. Plunkett a copy of the deed of trust at that time was so that he could take it to an attorney, (Tr. 514).

Mrs. Malloy's computer log for the office indicates that Mr. Plunkett's promissory note and unidentified real estate documents were prepared on September 5, 2006. (Tr. 855, Exhibit 00 IA1296). The note and deed of trust are dated September 7, 2006, (Exhibits 18 and 19 IA659-IA664). Respondent testified that the documents were so dated, because it would take a couple of days to secure the funds to put into company, (Tr. 945).

Mrs. Malloy also testified that Mr. Plunkett had signed the $250,000 on September 5, 2006, the day it was prepared, (Tr. 854-855). She testified that respondent brought the signed note to her and she made a copy of it for Mr. Plunkett, (Tr. 856). She remembered the date because Mr. Plunkett also was in the office to sign to a medical release authorization of that date for his personal injury case, (Tr. 855-856). Mrs. Pauley

testified that the reason Mr. Plunkett came into the office that day was to sign the medical release, (Tr. 814).

On September 11, 2006 another copy of the deed of trust was mailed to Mr. Plunkett together with a copy of the note and a cover letter prepared by Mrs. Malloy, (Tr. 877, Exhibit PP IA1297). Respondent testified that Mr. Plunkett had called him and requested another copy of the deed of trust, (Tr. 946).

On September 12, 2006 Mr. Plunkett appeared at respondent's office without an appointment asking to see respondent, (Tr. 849). Mrs. Malloy was not aware that he came in seeking a loan until she was instructed to write the MACB check for $2,000, (Tr. 851-852). She testified that to her knowledge the note and deed of trust for the $250,000 capital contribution were not discussed that day, (Tr. 853).

On September 14, 2006 Mr. Plunkett called Mrs. Malloy and told her he had signed the deed of trust that day at his home in Boone County, Missouri, (Tr. 860). Mrs. Malloy testified she had known Mr. Plunkett for years, knew his voice, knew his signature and his telephone number, and with that information notarized the deed of trust bearing Mr. Plunkett's signature when it was brought to her by respondent later that day, (Tr. 861).

Respondent testified that Mr. Plunkett gave him the signed deed of trust during lunch with others from MACB at Wallaby's in Lenexa, Kansas that day, a day that Mr. Plunkett and Mr. Shoemaker were firing several MACB employees, (Tr. 945-946) and that he returned to his office with the document before Mrs. Malloy had left for the day,

(Tr. 946). Exhibit WW, a credit card receipt, shows that respondent paid for meals at Wallaby's in Lenexa, Kansas on that day, (IA1304).

Mrs. Pauley testified she recorded the deed of trust when she returned from maternity leave in October 2006. (Tr. 503-504). She remembered recording it, because initially the recorder rejected it, and it had to be sent back to be recorded, (Tr. 504). Exhibit 00 reflects that the computer did something with the deed of trust October 5, 2006. (IA1296). Mrs. Malloy testified that the document was modified that day, (Tr. 859). The recorder's stamp indicates it was recorded October 10, 2006, (IA660).

Mr. Plunkett's Experience with Deeds of Trust

Prior to executing the deed of trust in this case, Mr. Plunkett had executed 14 deeds of trust recorded in Marion County alone, (Ex MM, RA24-RA127, Tr. 864), plus two deeds of trust on his Boone County property, (Tr. 951).

As to Mr. Plunkett's ability to appreciate the significance of the deed of trust he conveyed to respondent, Mr. Meeks was asked if Mr. Plunkett was sophisticated enough to understand that you do not pledge a $250,000 note for $2,000 for a trip to Texas; he responded: "Absolutely. He was not, I mean, he is definitely not a simpleton. I mean, he comes off as the country guy who rodeos and likes horses and things of that nature, but he, I mean, in the deposition, itself, the differences between the two shows some form of higher thinking. I mean, he knows what he is doing," (Tr. 623).

Ashley Pauley heard Mr. Plunkett make statements on September 5, 2006 indicating he was aware that he was putting up his house in order to make a capital contribution to MACB, (Tr. 510-511, Tr. 514-515).

Q. Can you tell us about that, what Mr. Plunkett said during that conversation?

A. That he had not put anything into this, and this was his way of - - because he can boastful when he wants to be – his way putting something into this company, his contribution, because he was the only one that had not, and he was the one that was getting paid all of this and lot of the other owners never received anything.

Q. So it was your understanding that he was signing that deed [of trust] and promissory note to make a capital contribution to the company?

A. Yes. (Tr. 511).

RHI

Resort Holdings International, Inc., a/k/a RHI, was one of several entities engaged in a Ponzi scheme involving Michael Kelly and the sale of timeshare/leaseback arrangements. The Securities Division of the Secretary of State's office concluded that Mr. Plunkett became a sales representative in this enterprise in 2003. (IA684) The Division made specific findings that Mr. Plunkett engaged in the sale of unregistered securities to senior citizens, guaranteeing them a nine per cent annual return for timeshare/leaseback arrangements and the right to withdraw their entire principal in three years. (IA686-IA688). Interest payments on the investments ceased, and the victims of the scheme did not receive a return of their principal investment as promised, (IA686-IA688). The Division concluded Mr. Plunkett violated Sec. 409.301, RSMo, for selling unregistered securities, Sec. 409.101(2), RSMo, for omitting to state material facts to the

victims of the security sales and Sec. 409.101(2), RSMo, for making untrue statements of material fact that the investments were guaranteed when, in fact, the investments were not guaranteed, (IA703-IA706). The Division's Cease and Desist Order was the subject of a press release from the Secretary of State dated March 20, 2007 naming Mr. Plunkett as one of the perpetrators stating "Unscrupulous professionals who give bad advice pose a real threat to investors," (IA806).

Mr. Plunkett's customers lost $600,000 in the scheme. (Tr. 349). His commission for those sales was $60,000. (Tr. 349). Mr. Plunkett was fearful that he would lose his license and get in a lot of trouble over the scheme, (Tr. 289). He testified that he told respondent it would be a good idea to sue Michael Kelly on behalf of his customers in order that they might recover their investments, (Tr. 360). Mr. Plunkett gave respondent the names of the customers who wanted to file such a suit, (Tr. 1147-1148). In March, 2007 respondent filed suit against Michael Kelly on behalf of 50 victims of the scheme referred to respondent by Mr. Plunkett, some of whom had been sold leases by Mr. Plunkett, (Tr. 962, Tr. 1143, Tr. 1152). The lawsuit obtained a good result, a judgment which can be collected from a restitution trust fund set up by the federal criminal court in Illinois which includes assets Kelly had held in Panama and Mexico. (Tr. 962, Tr. 990-991). Respondent testified the outcome advanced Mr. Plunkett's interest " . . . in that it made him look like a hero in getting them [his victims] to an attorney who would pursue the case to a conclusion, which is what we did, and we got a judgment. So it keeps him from worrying about, I guess, the enhanced anxiety of, I guess, the possibility of going to jail." (Tr. 990).

Mr. Plunkett's fear of going to jail was a subject of conversation between him, attorney Danieal H. Miller and respondent in July 2007 at the Tinderbox Cigar Shop in Columbia. (Tr. 726, Tr. 1160-1161, Tr. 966-969). The occasion originally was for Respondent and Mr. Miller to celebrate Mr. Miller's birthday with cigars, (Tr. 967). Mr. Plunkett called and invited himself to the gathering, and Mr. Miller was not happy to see him, (Tr. 968). Mr. Plunkett expressed his fear of going to jail over the RHI scam, (Tr. 969]). Mr. Miller testified that when it was suggested that his customers might be entitled to recover from Kansas City Life, Mr. Plunkett said, "Do it. Do it. Do it,: (Tr. 730-731), and that Mr. Plunkett specifically "directed" Respondent to write Web Bixby of Kansas City Life and Old American Insurance Company, (Tr. 731, Tr. 966-969, Tr. 970-973, Tr. 974-977).

Skintas

In October 2006 Andrew Skinta and Dorothy Skinta were in default on a loan secured by a deed of trust on two of three adjoining lots they owned in Kirksville, Missouri, (IA612, Tr. 461). The two lots contained a pole building housing their video rental business, their home and a driveway easement to a vacant third lot (Tr. 459-460). The deed of trust was held by Northeast Missouri State Bank (IA612). By August 2006 the Skintas were in default and were not responding the bank's calls and requests for payment which had begun in April, (IA954-IA955, IA962-IA963, IA968). The bank accelerated payment and initiated foreclosure with the sale scheduled for October 27, 2006, (Tr. 173, Tr. 54, IA612). This was but the third foreclosure the bank had initiated in twenty years, (IA963).

The Skintas had operated a real estate business for 35 years, (Tr. 490), longer that respondent has been licensed as an attorney, (Tr. 1028). Mr. Skinta obtained a broker's license in 1972, (Tr. 19). At one time his business employed six associates, (Tr. 19). They had experience with deeds, real estate contracts, deeds of trust and leases, (Tr. 96-97, Tr. 199). They did not use an attorney is using deeds and deeds of trust in their real estate business, (Tr. 97). At one time they owned six to eight rental properties and used leases they prepared with their tenants, (Tr. 96-97, Tr. 199). Mrs. Skinta testified they now own four or five rental properties. (Tr. 199).

Mr. Skinta's formal education included a Bachelor of Science in Business Administration, a Master's degree in Secondary School Administration; he was a doctoral candidate at the University of Missouri in the areas of higher adult education and instructional technology, and he attended law school for a year and half, (Tr. 16). Mrs. Skinta's formal education included a Bachelor of Science in art education from Northeast Missouri State and a Master's. She had held a real estate sales license which had lapsed, (Tr. 161-162).

On October 22 and 23, 2006 Mrs. Skinta completed and mailed a letter to 20 people she knew had interests in Kirksville real estate, inviting them to bid on the foreclosed property, (Tr. 173, Ex. 12 IA620). Mr. Skinta testified that respondent was one of those to whom the letter was sent, " He had been previously invited in the letter - - the availability of bidding on the property at the courthouse steps," (Tr. 85).

Respondent and Mr. Skinta agreed that Mr. Skinta's first verbal contact with respondent was October 24, 2006, three days prior to the scheduled foreclosure sale, (Tr.

58, Tr. 996). Mr. Skinta was seeking respondent's help in asking the bank to postpone the foreclosure sale, (Tr. 60, Tr. 996-997). Respondent agreed to try to obtain a postponement of the sale, (Tr. 997).

The Skintas had read on the internet of a right of redemption, but apparently were unaware that the right only existed if the mortgagee (bank) purchased the property at foreclosure and only then if the debtors posted a bond, (Tr. 1009). The Skintas had hoped that by filing a form on the day of the sale, they could secure a right to redeem the property within a year after the sale, (Tr. 63-64).

On direct examination Mr. Skinta denied discussing redemption in the October 24, 2006 telephone conversation but acknowledged that respondent October 24, 2006,

Q. He was aware of what it was. He was not aware that you knew?

A. Right. (Tr. 60).

Respondent testified he discussed the right of redemption and that Mr. Skinta rejected the idea, because he did not have the money for a bond, so attention was directed to trying for a postponement, (Tr. 996-997, Tr. 1002-1003, IA1098-IA1099). Mr. Skinta testified no advice was given regarding redemption, (Tr. 64). Respondent agreed to help obtain a postponement, (Tr. 997).

Respondent's understanding of his representation of Mr. Skinta was to get the foreclosure postponed if he could, (Tr. 1001). In 2006, Respondent understood that a writing was not required for a limited representation, (Tr. 1001). Respondent made calls to the executive vice president of the bank and to loan officer Majors and was told the bank would not postpone the sale, (Tr. 999, IA955, IA957). Mr. Majors also testified the

bank had no intention of buying the property at foreclosure, (IA957). Mr. Majors told respondent the bank was not interested in postponing the sale or allowing the Skintas to remain on the property as tenants, that because the Skintas had not communicated with the bank, (Tr. 1008).

Real estate appraiser Harry Rider viewed the property the week of the foreclosure sale per the Skintas' request, (Tr. 461). Mr. Rider testified that the Skintas did not have the money to pay for a formal appraisal, but he wrote them an opinion of the value of all three lots which read, "All land (3 lots, 1-House, 1-Building) Quick sale $100,000 (cash sale) 1-2 marketing time. $200,000 to $250,000," (Tr. 462-463, IA613). Mr. Rider testified that the value of the property would be significantly higher if one were selling all three lots, (Tr. 460). He testified that it would be tough to receive $70,000 for the two lots up for foreclosure, because the two lots alone were only 100 feet deep, and a buyer would have to spend tens of thousands of dollars per lot demolishing the buildings and hauling the debris to an EPA-qualified dump, (Tr. 464).

Mrs. Skinta faxed Mr. Rider's written opinion to respondent in a three page fax machine dated "Oct-24-2006" with one page reading: "Hi Seth! This is what Harry Rider dropped by the house yesterday. Dot" and another page reading: "Thanks Seth—Anything you can do to help us would be great. Dot." (Tr. 204-205, Tr. 997-998).

Mr. Skinta and Mr. Rider had conflicting testimony regarding any interest Mr. Rider might have had in owning the property: Mr. Skinta testified that Mr. Rider offered him $100,000 for the property, (Tr. 114-115). Mr. Rider testified he would not have bought the properties under foreclosure, "No. I would not have. Absolutely not. There

is (sic) too many problems, and there is not a lot of room to do anything with it," (Tr. 468). When asked of the likelihood of any purchaser agreeing to keep the Skintas as tenants, Mr. Rider testified: " I would not have." (Tr. 469).

Ending the Representation

Respondent testified of a telephone conversation with Mr. Skinta on the morning of October 26, 2006: "I indicated to him that the bank was not interested in putting off that foreclosure sale. That is all I could do for him, and if he thought of anything else let me know. Good luck," (Tr. 1010). At that point respondent considered his representation at an end, respondent thought he had made that clear to Mr. Skinta, (Tr. 1011).

Respondent testified Mr. Skinta called again later on October 26, 2006 asking if respondent would buy the two lots being foreclosed for $70,000 and lease it back, (Tr. 1011-1013). Respondent testified Mr. Skinta agreed to lease the two lots for $700 per month based upon a 100 to 1 investment to revenue ratio common to the real estate trade, (Tr. 1032).

Initial Sale/Leaseback Discussions

Respondent testified that in the initial conversation with Mr. Skinta on October 24, 2006, Mr. Skinta said as a last resort, he would rather sell it than go through a foreclosure and lease it back so he could stay there, (Tr. 997). Respondent said he not tell Mr. Skinta he would buy the property:

Q. Did you tell him you were going to buy the property?

A. No. He asked me if I would buy it, and I said, 'Well, we will talk about that if we can't get this postponed.'" (Tr. 1002).

Mr. Skinta testified that respondent initiated the discussion about a sale and leaseback, and that Mr. Skinta told him that would have to be an absolute last resort, (Tr. 61). Mr.Skinta testified that respondent asked for an appraisal, (Tr. 62). Respondent said he did not solicit an appraisal, (Tr. 998).

Title Concerns

Following the second conversation of October 26, 2006, a title company reported to respondent that a tax lien against Mr. Skinta and a judgment lien against Mrs. Skinta made the property unmarketable, (Tr. 1018-1020). Rather than argue with the title company about the effect of the liens against entireties property or to risk either lien attaching upon the death of one of the spouses, upon the advice of Danieal Miller, respondent decided to purchase the property in name of Miller Properties, (Tr. 1021). Respondent testified he explained this arrangement to Mr. Skinta in a third conversation on October 26, 2007. (Tr. 1022). On October 27, 2006 the Skintas signed a deed to Miller Properties and a lease from Miller Properties, (IA614-IA618). Mrs. Skinta testified in deposition that she signed the documents because she was afraid Mr. Skinta would kill himself if he was forced to move. The bank assigned the Skintas' $70,000 note to KV1316 LLC in care of respondent, (IA619). Respondent testified that to complete the transaction in a manner that would clear the title, he guaranteed payment of the note, (Tr. 1036), and the property was then conveyed to Reaggy, LLC, a company

wholly owned by respondent, (Tr. 1036-1037). Respondent had no interest at any time in Miller Properties.

Respondent also paid the $7,700 in delinquent taxes owed on the lots purchased and the adjoining lot retained by the Skintas, (Tr. 1038-1039).

OCDC

Mr. Klutman and Mr. Shoemaker testified they were not contacted by Informant prior to the time Informant filed the initial Information in this case (Tr. 416, 602).

POINTS RELIED ON

POINT I

(In response to Points I and IV of Informant's Brief)

RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT BY TAKING A NOTE AND DEED OF TRUST FROM HIS CLIENT IN RETURN FOR MAKING CAPITAL CONTRIBUTIONS ON THE CLIENT'S BEHALF, BECAUSE THE TERMS OF THE TRANSACTION COMPLIED WITH RULE 4-1.8(a) (2006), IN THAT UNDER THE CIRCUMSTANCES THEY WERE FAIR AND REASONABLE, FULLY DISCLOSED AND CONSENTED TO IN WRITING, AND THE CLIENT HAD A REASONABLE OPPORTUNITY TO SEEK ADVICE OF INDEPENDENT COUNSEL.

Rule 4-1.8(a) (2006

In re Mirabile, 975 SW2d 936 (Mo banc 1994) (Judge Holstein's concurrence)

POINT II

(In response to Points II and IV of Informant's Brief)

RESPONDENT SHOULD NOT BE DISCIPLINED UNDER COUNT II OF THE INFORMATION IN THAT BOTH HIS REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS AND HIS LETTER TO MR. BIXBY WERE DONE AT THE SPECIFIC REQUEST OF MR. PLUNKETT, AND ANY CONFLICT LIMITING HIS REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS WAS WAIVED.

Rule 4-1.8(a) (2006

State ex rel Horn v. Ray, ED94968 (MoApp ED 9-21-2010)

In re Mirabile, 975 SW2d 936 (Mo banc 1994) (Judge Holstein's concurrence)

In re Weier, 994 SW2d 554 (Mo banc 1999)

POINT III

(In response to Point III of Informant's Brief)

RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT REGARDING THE SKINTAS IN THAT THE ATTORNEY CLEINT RELATATIONSHIP PRIOR TO THE TIME MR. SKINTA AGREED TO CONVEY THEIR PROPERTY, BECAUSE WHERE THE PURPOSE OF AN ATTORNEY'S EMPLOYMENT ENDS, THE RELATIONSHIP TERMINATES.

In re Disney, 922 SW2d 12 (Mo banc 1996)

In re Madison, 282 SW3d 350 (Mo banc 2009)

Erickson v. Civic Plaza National Bank of Kansas City, 422 SW2d 373 (MoApp 1967)

Section 433.420, RSMo.

POINT IV

(In response to Point IV of Informant's Brief)

SUSPENSION FOR THE TRANSACTION WITH THE SKINTAS IS OVERLY HARSH, BECAUSE THE TRANSACTION WAS FAIR AND REASONABLE, DISCLOSED IN WRITING TO PARTIES FAMILIAR AND EXPERIENCED WITH REAL ESTATE DOCUMENTS, AND EXIGENT CIRCUMSTANCES CREATED BY THE SKINTAS MADE IT IMPOSSIBLE TO OBTAIN TIMELY REVIEW BY INDEPENDENT COUNSEL.

In re Cupples, 979 SW3d 932 (Mo banc 1998)

Rule 4.18(a) (2006)

POINT V

INFORMANT'S RECOMMENDATIONS AS TO DISCIPLINE SHOULD BE GIVEN NO WEIGHT IN THAT THEY ARE NOT THE PRODUCT OF SOUND REFLECTION, BECAUSE THE RECORD REFLECTS INFORMANT DID NOT COMPLETE AN OBJECTIVE OR THOROUGH INVESTIGATION OF THE ALLEGATIONS HEREIN PRIOR TO FILING THE INFORMATION PURSUANT TO RULE 5.09, HAS BEEN INCONSISTENT IN HER RECOMMENDED SANCTIONS, AND APPARENTLY HAS BASED HER RECOMMENDATIONS ON ONLY SELECTED PORTIONS OF THE RECORD RATHER THAN THE ENTIRE BODY OF EVIDENCE.

Rule 5.09

Comment to Rule 4-3.8

POINT I

(In response to Points I and IV of Informant's Brief)

RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT BY TAKING A NOTE AND DEED OF TRUST FROM HIS CLIENT IN RETURN FOR MAKING CAPITAL CONTRIBUTIONS ON THE CLIENT'S BEHALF, BECAUSE THE TERMS OF THE TRANSACTION COMPLIED WITH RULE 4-1.8(a) (2006), IN THAT UNDER THE CIRCUMSTANCES THEY WERE FAIR AND REASONABLE, FULLY DISCLOSED AND CONSENTED TO IN WRITING, AND THE CLIENT HAD A REASONABLE OPPORTUNITY TO SEEK ADVICE OF INDEPENDENT COUNSEL.

STANDARD OF REVIEW

"Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). This Court treats the panel's findings of fact, conclusions of law, and the recommendations as advisory. *In re Crews*, 159 S.W.3d at 358. Moreover, this Court may reject any or all of the panel's recommendations. *In re Madison*, 282 S.W.3d 350, 352 (Mo. banc 2009). The fundamental purpose of an attorney disciplinary proceeding is to "protect the public and maintain the integrity of the legal profession." *In re Weier*, 994 SW2d 554 (Mo Bank 1999).

ARGUMENT

The events of 2006 are governed by Rule 4-1.8(a) as it existed then:

4-1.8 Conflicts of Interest: Prohibited Transactions

(a) 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 to the client in a manner that can be reasonably understood by the client;

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

(3) the client consents in writing thereto. *Id.*

The accusation that Respondent's capital contribution to MACB on behalf on a client in an unrelated matter in exchange for a note and deed of trust constitutes ethical misconduct is but the kindest accusation contained in Count I of Informant's Petition.

Because Mr. Plunkett was no stranger to promissory notes and instruments conveying mortgages in land, having previously executed 14 deeds of trust recorded in Marion County alone, Respondent believed the words of the note and deed of trust alone could be reasonably understood by Mr. Plunkett and that his signature on those documents constituted consent in writing. In 2006 there existed no additional requirement, as is found in the present rule, that the client give "….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."

Under the rule as it existed in 2006, it was reasonable to presume that one's signature on documents so common in society as notes and deeds of trust, documents almost all homeowners sign without assistance of counsel, established that the signer both understood and accepted the terms therein contained. This is true especially with one, such as Mr. Plunkett, who had spent his life selling, and presumably explaining insurance policies. For more than a century Missouri law has presumed that all insurance customers have read and understood the policies they purchased upon receipt of the policies and that their silence thereafter constitutes acceptance. *Jenkad Enterprises v. Transportation Ins.*, 18 S.W.3d 34 , 38 (Mo.App.E.D. 2000). One might ask, which writing is transmitted in a manner that is easier to understand, a deed of trust or an insurance policy? Regardless of how one might answer such a question, it is not unreasonable to presume that Mr. Plunkett, who previously had executed 14 deeds of trust recorded in Marion County and at least one recorded in Boone County, if not more, had demonstrated he was familiar, at the very least, with the purpose and impact of such instruments. [1] The same conclusion also can be reached as to the note, for in addition to whatever notes or other debt instruments that were secured by Mr. Plunkett's

[1] Mr. Plunkett testified he did not have an attorney when he signed a deed of trust with Palmyra State Bank, when he bought his house. (Tr. 342).

previously executed deeds of trust, he had previously drafted his own note to Bernard Steinkamp and executed another note to a Mr. Wooten, (Tr. 319-320).

It is on this point where Respondent disagrees with the hearing panel. It concluded that Respondent violated the rule by failing to obtain written consent; thus, it did not conclude that Mr. Plunkett's signature on the documents, the nature of which he was familiar, constituted consent. Reasonable men and women can differ in their conclusions. But in terms of the application of the 2006 version of the rule, Respondent is and was unaware of any conclusive authority stating his conclusion is misguided or in direct and unequivocal violation of the rule. If there is such authority, then Respondent's error is one of omission and not of commission.

While the current rule carries with it more specific duties for the lawyer to guarantee informed consent and waiver by his client, those duties were not included in the 2006 version of Rule 4-1.8(a) which governs this case. The same is true of the duty to give a client reasonable opportunity to consult independent counsel. The 2006 version contained no directive to give that advice in writing and no directive that a written waiver include mention of the lawyer's role in the transaction.

As to Mr. Plunkett's opportunity to consult independent counsel, the respondent testified that he advised Mr. Plunkett to consult independent counsel before signing the deed of trust. But this Court does not have to rely on Respondent's credibility to conclude that Mr. Plunkett was given a reasonable opportunity to seek independent advice of independent counsel.

Mr. Plunkett admitted to being rather sophisticated in terms of retaining attorneys to represent him in defense of at least some of his 14 speeding tickets. (Tr. 338). In addition to obtaining counsel in defense of speeding tickets, Mr. Plunkett had obtained counsel to defend him in numerous complaints before the Department of Insurance, (Tr. 338-339). Mr. Plunkett admitted that he had obtained the services of Messrs. Wally Bley, Lou Milan, Jay Anghoff, Roger Brown and Craig Van Matre, not exactly a rogue's gallery of legal talent, as well as those of respondent and Danieal H. Miller and Mr. James Griffin of Blackwell-Sanders, (although the record does not disclose if he ever consulted Mr. Griffin prior to the time he entered into this transaction), (Tr. 338-339). Plus, he had contact with the Kansas attorneys for MACB, (Tr. 339). The point is that even if, after having executed at least 15 deeds of trust prior to this transaction, Mr. Plunkett had any questions about this particular deed of trust, he knew numerous lawyers, and they knew him. He knew where to find lawyers for various purposes and had been successful in retaining their services.

The evidence establishes that Mr. Plunkett had between September 5, 2006 and September 14, 2006 to consult a lawyer prior to signing it. Office records as well as the testimony of respondent's office staff prove that the note and a related real estate document, namely the deed of trust, were drafted and generated September 5, 2006. (They were dated September 7, 2006. Respondent explained this was to give him time to secure the money so as to not to charge interest on the funds prior to the time they were available for infusion into MACB). Respondent testified Mr. Plunkett called him later, asking for another copy of the deed of trust. This testimony is supported by testimony of

staff, backed up by office records, showing a copy of the deed of trust was generated by computer again on September 11, 2006, and that it was mailed to Mr. Plunkett that day. Ms. Malloy testified that Mr. Plunkett called on September 14, 2006 to tell her he had signed the deed of trust at his home that day, and Respondent testified Mr. Plunkett delivered the deed of trust to him at lunch at day in Lenexa, Kansas.

Thus, Mr. Plunkett had nine (9) days to contact a lawyer, during which time he requested and received an additional copy of the deed of trust to review. Considering Mr. Plunkett's experience and familiarity with numerous lawyers on subjects ranging from traffic tickets to insurance fraud, nine days satisfied Respondent's ethical obligation to give Mr. Plunkett a reasonable opportunity to seek advice of counsel.

While the actions involved in this transaction would not comply with Rule 4-1.8(a) as it exists in 2010, they do comport with the rule as it existed in 2006, at least as to the allegations that Respondent was unethical in the execution of this transaction.

Unfortunately, Count I of Informant's Petition is not limited to that one subject or allegation, it also accuses Respondent of failing to provide value for the note and deed of trust in the form of $250,000.00 in capital contributions on behalf of Mr. Plunkett. If two subjects were not enough, extraordinarily, it also accuses Respondent of forcing Mr. Plunkett to sign these instruments in return for a $2,000 loan from MACB. In furtherance of this latter allegation, the Information alleged, or at least implied, that Respondent or MACB forced Mr. Plunkett into transaction by denying him his monthly salary of $8,000 plus benefits. (When faced with documentary evidence to the contrary

and with Mr. Plunkett's admission that he had been mistaken, the Informant moved to amend the Information accordingly, but has yet to do so.)

For both these allegations, the Informant admits in her brief that she has accepted as true all the statements of Mr. Plunkett and has rejected as untrue all the statements of Respondent. But her conclusions thus also reject the testimony of numerous other witnesses which establish that:

1) capital contributions of $250,000 were made by Respondent on Mr. Plunkett's behalf; 2) MACB made the $2,000 loan to Mr. Plunkett independently of that transaction; 3) MACB members' ownership interests varied from time to time as capital contributions were made; 4) adjusting the records of each member's ownership interest to reflect their capital contributions was the responsibility of the management team; 5) Mr. Plunkett was MACB's Chief Executive Officer (and, thus, of the management team); 6) while Mr. Plunkett was allowed an ownership share of MACB at its inception without making a payment in cash or by guaranteeing debt, it always was expected he would do so; 7) unless a member made a cash contribution or guaranteed debt for his interest he could not deduct his losses; and 8) Mr. Plunkett made statements admitting and acknowledging his willingness to pledge his house in return for a cash infusion into MACB. That such testimony, from two members of the Kansas bar, Chris Shoemaker, Danieal Miller, Lorrie Malloy, Ashley Pauley and others, should be rejected wherever it conflicts with Mr. Plunkett's account, implies the existence of grand conspiracy. That was an implication the hearing panel did not make (IA135). (Nor has it been charged or proven.)

In Informant's effort to overcome such evidence she focuses on Respondent's attacks upon the credibility of his former client, as if this is a sign that Respondent is an unethical lawyer. The unfortunate fact is that Respondent was taken in by Mr. Plunkett. He is guilty of an error in judgment of the man's character and has suffered for it. In that Respondent obviously is not alone. But his attack upon the credibility of Mr. Plunkett was not initiated in vengeance or even to recover the long lost capital contribution made in his behalf.[2] Indeed it is with some embarrassment that Respondent must air the fact that he was duped. But Respondent finds his professional license and livelihood challenged. And the airing of his experience with Mr. Plunkett's character merely joins the airing made by the Secretary of State, the Director of Insurance, the Attorney General, the Director of Revenue and countless others. The Informant appears to be yet another victim.

And Informant, leaving all context and reason aside, attempts to discredit Respondent by declaring he has denied the fact that he was Mr. Plunkett's attorney. Obviously, Respondent represented Mr. Plunkett in his personal injury claim against American Family. He and his staff testified to such, and court records establish it. But Respondent further testified that he was not Mr. Plunkett's lawyer in their business dealings with MACB or in the transaction involved in this complaint. Nor was

[2] Mr. Plunkett admits the deed of trust given by Mr. Plunkett remains not only inferior to at least one other deed of trust for $150,000, but to an IRS lien for $200,000 and two or three years of property taxes on property worth $360,000. (Tr. 339-342, Tr. 374).

Respondent the attorney for MACB or responsible for keeping records of each member's respective ownership share. While his denial of an attorney-client relationship with Mr. Plunkett may or may not have seemed broader than that, it must be viewed in the context of all that is alleged in Counts I and II of the Information. This argument is a red herring. If one is to believe Respondent would unequivocally deny ever representing Mr. Plunkett in any matter in the face of reality, then perhaps probate is the proper jurisdiction.

While this Court reviews the evidence de novo, determines independently the credibility, weight and value of the testimony of the witnesses and draws its own conclusions of law," *In re Oberhellmann*, 873 S.W.2d 851, 852 (Mo. banc 1994), Respondent urges this Court also consider the long line of cases related to appellate review of factual determinations made by trial courts in its review of the testimony and evidence submitted to the Hearing Panel and the Hearing Panel's conclusion regarding the credibility of Mr. Plunkett. This recommendation comports with the comments made by Justice John Holstein in his opinion in *In Re Mirabile*, 975 S.W.2d 936, 941 (Mo. banc 1998) in recognizing that a Master's findings are helpful to the Court. *In Re Griffey*, 873 S.W.2d 600, 601 (Mo. banc 1994). This is because typically the one before whom a witness testifies is in a far better position to determine the credibility of the witness and the weight to be given to the testimony than a tribunal reviewing only the cold record. *Davis v. Research Medical Center*, 903 S.W.2d 557, 568 (Mo. App. 1955). This approach is taken as to factual findings by other states in disciplinary actions, *In re Kreamer*, 14 Cal.3d 524, 532, fn. 5, 535 P.2d 728 (1975).

The basest accusation in Count I is that somehow Respondent forced Mr. Plunkett to sign a $250,000.00 note in exchange for a $2,000 loan from MACB. The Informant apparently did not convince one member of the hearing panel that this occurred. And after five days of evidence, Informant appears to be the only one in the hearing who accepts that proposition, save possibly Mr. Plunkett himself. Yet even Mr. Plunkett has acknowledged that he acquired his ownership share, his skin in the game as it were, with a second deed of trust against his house.

Such a theory might have acquired a modicum of support if, as also alleged and implied, Mr. Plunkett was driven into poverty by MACB's refusal to pay him his monthly salary of $8,000.00 plus benefits. (While those with real "skin in the game" were receiving nothing on the investment he convinced them to make.) Business records as well as testimony from ***all*** witnesses proved this was untrue, even to the point that Informant moved to amend the Information so as to strike that accusation.[3]

Again, the testimony of the attorneys and officers of MACB together with business records showing Respondent's contributions on behalf Mr. Plunkett would destroy this theory even if Mr. Plunkett had not been paid his salary. And Mr. Plunkett's deposit of the $2,000.00 loan from MACB occurred two days before he signed the deed of trust for the $250,000 capital contribution. Thereafter, Mr. Plunkett boasted to Danieal Miller, and acknowledged to fellow MACB officials and in deposition testimony that he

[3] To date no such amendment has been made either by interlineation or by amended pleading in writing.

given a second deed of trust on his house to obtain his capital contribution. To date none of those who testified about his statements to that effect have been indicted for perjury. Furthermore, why would Mr. Plunkett make such boasts and acknowledgements if he truly believed he was duped out of a $250,000.00 mortgage in return for $2,000.00?

Yet that accusation remains in the Information. And the Informant has not even moved for leave to amend the Information to conform to the evidence in this regard, as she did with the salary story.

In the face of such an accusation, can Respondent be blamed if his defense at times seemed overly aggressive? His defense is not meant to be disrespectful of the rules of ethics or this Court. Nor is he unwilling to acknowledge fault where it applies. But no attorney, nor anyone else, should be punished for failing to concede to baseless attack upon his character simply because one given the task of upholding ethical standards is repeating the canard.

POINT II

(In response to Points II and IV of Informant's Brief)

RESPONDENT SHOULD NOT BE DISCIPLINED UNDER COUNT II OF THE INFORMATION IN THAT BOTH HIS REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS AND HIS LETTER TO MR. BIXBY WERE DONE AT THE SPECIFIC REQUEST OF MR. PLUNKETT, AND ANY CONFLICT LIMITING HIS REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS WAS WAIVED.

STANDARD OF REVIEW

"Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). This Court treats the panel's findings of fact, conclusions of law, and the recommendations as advisory. *In re Crews*, 159 S.W.3d at 358. Moreover, this Court may reject any or all of the panel's recommendations. *In re Madison*, 282 S.W.3d 350, 352 (Mo. banc 2009). The fundamental purpose of an attorney disciplinary proceeding is to "protect the public and maintain the integrity of the legal profession." *In re Weier*, 994 SW2d 554 (Mo Banc 1999).

ARGUMENT

The issues raised by Count II are governed in part by Rule 4-1.7 as it existed in 2006, the relevant parts of which are:

> 4—1.7 Conflict of Interest: General Rule
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected;
>
> (2) the client consents after consultation. ….*Id.*

At the heart of this issue is whether it was foreseeable that representing the *Johnson v. Kelly* plaintiffs would require Respondent to take a position adverse to Mr. Plunkett's interests, or *vice versa.* Mr. Plunkett's expressed interest in 2006, generated by his fear of indictment and imprisonment for his role in the RHI fraud, was for his customers/victims to obtain restitution so as not to seek justice against him in the criminal courts. At the time, he cared not whether his customers were assuaged from the

restitution fund being established in federal court or from the insurers for whom he sold. (And he returned none of the $60,000 in commissions he obtained in fraud.)

From Respondent's perspective, Mr. Plunkett's less than altruistic motives did not seem in conflict with the realistic interests of his customers/victims. From the perspective of the customers, recovery of their investments seemed to be the primary concern. And by this time Respondent was painfully aware that the likelihood of a recovery from personal assets of Mr. Plunkett was zero or less. Mr. Plunkett was in a unique position to assist his former customers by identifying who they were and where they lived, thus speeding the initiation of establishing their claims, the amounts of their claims and the priority of their claims. If any resentment or anger directed at Mr. Plunkett were to be assuaged in the process, that did not seem to be a goal or interest for Mr. Plunkett that would materially alter a lawyer's responsibilities toward his customers in seeking recovery for them in *Johnson v. Kelly*.

Where Respondent admittedly erred was in not dealing first on with the alternative course of action available to the Johnson plaintiffs that would involve a hypothetical claim against Mr. Plunkett, impractical as it may have been. In retrospect, and with the guidance of case law and amendments to the rule that have since come forth, it is easier to see now where such dual representation could put strains on a lawyer's loyalty to one client or the other, but at the time the possibility of such strains seemed not only impractical, but hypothetical at best.

Since the larger issues of all clients involved concerned recovery from the deep pockets available, it was reasonable, or at least it seemed reasonable to Respondent, that

his dual representation would not adversely affect his duty of loyalty to either client. And "reasonable belief" was what was required by Rule 4-1.7(a) (2006).

Foreclosure, resulting from such dual representation, of the Johnson clients' avenue of suing Mr. Plunkett was a conflict that ultimately was waived by the Johnson clients when Respondent brought it to their attention after he had filed their suit and after this concern was raised. Under Rule 4-1.7(a) (2006), Respondent should have consulted the customers about this conflict before beginning the attorney /client relationship with them before filing suit on their behalf. But the Johnson plaintiffs suffered no harm as a result of this error, and are likely to benefit from the dispatch in which Respondent initiated and prosecuted their claim against Kelly.

As to loyalty to Mr. Plunkett in this setting, what Respondent did not recognize or anticipate was that the mercurial nature of Mr. Plunkett would lead him to reverse his stated interest in seeking a recovery for his customers/victims from the company he sold products for through a broker. But what lawyer realistically can anticipate each time a client will take a 180 degree turn? Perhaps the fear or altruism which initially led Mr. Plunkett to suggest this means of recovery for his customers was tempered when it appeared that Respondent's efforts in *Johnson v. Kelly* would serve his purpose. Or perhaps it was tempered by some later assurance that he would escape criminal prosecution.

The fact remains that Respondent's letter to Mr. Bixby in pursuit of an additional means of recovery for the Johnson plaintiffs was written at the request of Mr. Plunkett and in support of Mr. Plunkett's stated interests at the time. At that time, when Mr.

Plunkett was consumed with fear of criminal prosecution, could Respondent reasonably have anticipated such a forthcoming reversal? Or is the Informant's charge that he should have done so, merely Monday morning quarterbacking? If the answer to the first question is "yes" or if Respondent erred in his application of Rule 4-1.7(a) (2006), is such an error worthy of suspension of his license? *In re Weier, supra* suggests not.

Respondent recognizes that Rule 4-1.7 was amended in 2007 and that there certain concurrent conflicts of interest which cannot be waived by a client, see *State ex rel. Horn v. Ray,* ED94968 (Mo App ED 9-21-2010). Respondent also recognizes that modern ethical rules, in an effort to protect the public and the dignity of the bar, are designed to head off problems such as those that erupted in the instant case even when the likelihood of such problems erupting do not appear at first light. In that vein, should matters similar to those involved in Count II present themselves again, Respondent would take a more cautious approach to questions of dual representation.

But even so, the 2007 amendments and the guidance of *State ex rel. Horn v. Ray, Id.*, do not unequivocally answer all questions regarding the foreclosure of avenues of recovery when dual representation occurs. Judge Norton dissented in *Horn v. Ray, Id*. That case involved a lawyer's dual representation of the victim of criminal domestic assault and the defendant, who desired to be represented by one lawyer when the victim wished to recant her testimony. One might observe from life's experiences that a married client's desire to recant her testimony, or a reversal of that position, are reversals that are reasonable to anticipate when determining the likelihood that certain avenues of recovery might be foreclosed by dual representation. Such reversals are much more likely to

anticipate than Mr. Plunkett's reversal of desire that his customers/victims recover from a company he sold an insurance product for rather than him.

But even in the *Horn v. Ray* setting, Judge Norton dissented from his colleagues, pointing out that the parties had no existing conflict in positions when the lawyer was retained. Applying that analysis, it is significant that Mr. Plunkett and the Johnson plaintiffs had no existing conflict when Mr. Plunkett asked Respondent to contact Mr. Bixby.

In addition, the dissent in *Horn v. Ray* demonstrates that reasonable jurists can differ in their interpretation of the present rule even when judging in hindsight. (Is the lawyer who convinced Judge Norton to be suspended because his interpretation is the minority view?) In judging the present case, Respondent urges this Court to recognize that reasonable lawyers can differ in their application of the rule before the fact. Thus, Respondent's choice of interpretation and application, should not result in suspension.

Obviously, Respondent's position on this matter centers on his testimony and the testimony of Mr. Miller regarding what they were told by Mr. Plunkett when he crashed Mr. Miller's cigar-smoking birthday celebration in 2007. That testimony reveals that Mr. Plunkett was still in fear of criminal prosecution and that he crashed the gathering with the reluctant acceptance of Mr. Miller, who by that time had grown to distrust him. This testimony refutes the notion suggested by Informant that the lawyers' purpose was to invite Mr. Plunkett into their smoking den to open the insurer/employer's deep pocket in order to extract fees. (Again, Web Bixby/Old American, not Kansas City Life, were Plunkett's employers as alleged by Informant).

On this vital issue of credibility, Respondent once again urges this Court, as it views the transcript de novo, to consider the hearing panel's credibility finding as to Mr. Plunkett. In that vein Respondent restates and incorporates by reference his credibility argument contained in Point I of this brief.

Regarding the effect the dual representation had on Respondent's ability to represent Mr. Plunkett, there is no evidence of any resulting harm. There is no evidence that the tension produced by Mr. Plunkett's reversal had any negative effect upon his unrelated claim for personal injuries. If anything, the evidence suggests or proves that Mr. Plunkett's unwillingness to cooperate in obtaining medical evaluations was a larger strain on Respondent's ability to represent him than anything else. And Mr. Plunkett ultimately obtained his recovery.

Finally, as to Respondent's interest in fees in *Johnson v. Kelly* and Informant's suggestions and insinuations that: 1) he placed his interest in those fees above his loyalty to his clients and 2) that Respondent has and will do little to earn those fees, Respondent denies those assertions, to put it mildly, and points out that there is no evidence to support such conclusions. Respondent's position is and has included the following considerations:

1) that it was in the *Johnson v. Kelly* clients interests to establish their claims and the amounts of their claims by reducing them to judgment prior to further adjudication and ultimate distribution of the victims' restitution fund in the federal court;

2) that by reducing these claims to judgment in advance, the clients may obtain a priority over unadjudicated claims thereby speeding their recovery and possibly increasing the size of their recovery in the event the restitution fund is inadequate to fully reimburse all victims;

3) that Mr. Plunkett's unique ability in identifying and locating the some of the Johnson plaintiffs speeded up the preparation and prosecution of the litigation;

4) Respondent was able to secure reimbursement for all of Kelly's victims, not just the ones Respondent represented for amounts deducted from their original investments for early withdrawal of IRAs the victims used to buy into the scheme.

Furthermore, the fairness of Respondent's fee already has been adjudicated indicating that the court, as opposed to the Informant, considers Respondent's services in this regard to be of real value to his clients. Moreover, any allegation that the fees are unfair has not been formally charged in this proceeding. And the existence of the fee arrangement did not cause or inspire any tension or disagreement that erupted between Respondent and Mr. Plunkett. That disagreement was of Mr. Plunkett's sole volition when he reversed his position regarding the insurers.

POINT III

(In response to Point III of Informant's Brief)

RESPONDENT DID NOT ENGAGE IN PROFESSIONAL MISCONDUCT REGARDING THE SKINTAS IN THAT THE ATTORNEY CLEINT RELATATIONSHIP PRIOR TO THE TIME MR. SKINTA AGREED TO CONVEY THEIR PROPERTY, BECAUSE WHERE THE PURPOSE OF AN ATTORNEY'S EMPLOYMENT ENDS, THE RELATIONSHIP TERMINATES.

STANDARD OF REVIEW

"Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court reviews the evidence *de novo*, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). This Court treats the panel's findings of fact, conclusions of law, and the recommendations as advisory. *In re Crews*, 159 S.W.3d at 358. Moreover, this Court may reject any or all of the panel's recommendations. *In re Madison*, 282 S.W.3d 350, 352 (Mo. banc 2009).

ARGUMENT

A lawyer hired for a specific purpose does not become the client's lawyer forever or for all purposes; when the purpose of the attorney's employment ends, the attorney-client relationship terminates, *In re Disney*, 922 SW2d 12 (Mo. banc 1996), citing *Schwarze v. May Department Stores*, 360 S.W.2d 336, 338 (Mo. App. 1962). Although the attorney-client relationship, "`in a limited and dignified sense' is essentially that of

principal and agent," it is limited in scope to the purpose for which the attorney is employed. *Erickson v. Civic Plaza National Bank of Kansas City*, 422 S.W.2d 373, 378 (Mo. App. 1967)

The sequence of events the week of the transaction included:

1) The Skintas letter to respondent and 19 others inviting them to bid on their property at the foreclosure sale;
2) Mr. Skinta contacting respondent regarding Missouri's right of redemption and expressing his desire to remain on the property;
3) Respondent's advice that the right of redemption was limited to those cases where the mortgagee purchases the property at auction and is conditioned upon the posting of a bond;
4) Mr. Skinta telling respondent he did not have the money for a bond, asking for help in obtaining a postponement and telling respondent that a sale and leaseback arrangement would be the last resort;
5) Respondent agreeing to help obtain a postponement;
6) Respondent's calls to bank officials in which he was told the bank would not postpone the sale and had no interest in acquiring the property;
7) Respondent telling Mr. Skinta in the first of three conversations on October 26, 2006 that the bank would not postpone the sale and that there was nothing else he could do for him.

8) Mr. Skinta calling back on October 26, 2006 asking if respondent would buy the two lots being foreclosed and lease them back;

9) Respondent calling Mr. Skinta later in the day informing him of the liens against the property and that respondent proposed to purchase the property initially in the name of Miller Properties,

This sequence of events establishes that the purpose of the attorney-client relationship ended with the first conversation of October 26, 2006. Any interest or reasonable expectation in the right of redemption by that time should have been concluded as well in that: (a) the Skintas had no money for the security required under Sec. 443.420, RSMo, and (b) bank officials had indicated they did not intend to purchase the property at foreclosure. And even if the bank ended up being the highest bidder, bank officials had told respondent they were not interested in keeping the Skintas on the property as tenants, because the Skintas had not communicated with the bank for months.

With the bank refusing to postpone the sale, there was no longer a purpose for respondent to represent the Skintas in that regard. And since the Skintas had no money for a redemption bond, in the unlikely event the bank, the only party from whom the redemption right applied, acquired title at the foreclosure sale, the Skintas were not in a position to exercise redemption. Respondent rightfully considered his representation of Mr. Skinta ended with the first conversation of October 26, 2006.

To meaningfully analyze the events that followed, one must be mindful that time was of the essence as the Skintas' desire to stay of the property, that they were highly educated and sophisticated as to instruments that convey real property, having been in the

real estate business for 35 years. And the time constraints were of the Skintas' own making; they were not the result of any procrastination by respondent. They waited until three days before the sale to contact respondent. Respondent acted immediately, but his efforts to delay the sale failed. There was no time for a letter memorializing the termination of respondent's representation.

Arguably, at least in an earlier, gentler time, there was no attorney-client relationship in 2006. The Skintas' first communication with respondent sought him out as a potential purchaser of the property. The specific task of asking the bank to delay the sale was not a task requiring the unique skills of an attorney. Indeed, the Skintas testified they contacted respondent because he had served on a bank board, was familiar with bank personnel and was experienced in real estate transactions. Any of the 19 non-lawyers who received invitations to bid may have fit at least two of those qualifications.

Even consideration of the right of redemption seemed more like an afterthought, a fleeting idea from desperation in the eleventh hour, than a legitimate legal theory to pursue. And it was, or should have been, quickly discarded as a realistic option. For even if the bank ended up owning the property after the bidding, in spite of its intent not to do so, the Skintas' lack of funds prevented them from providing the security of a year's interest, costs of foreclosure including legal fees and the more than $7,000 in back taxes owed, all of which were required by Sec. 443.420, RSMo. Whether the bank would end up owning the property in spite of its intent would have been, and is now, mere speculation. But under these circumstances, any role respondent had as an attorney in relation to questions pertaining the right of redemption also ended with the first

conversation of October 26. That is when respondent told Mr. Skinta there was no more he could do for him.

Indeed, no file was opened for the Skintas, no fee for legal services billed and no discussion with Mrs. Skinta about representation. Perhaps more importantly, there was no engagement letter, no rejection letter and no termination letter, but the absence of such documents was due not to respondent's neglect, but to the exigencies of the situation that the Skintas had created. Their first move in their effort to remain on the property under foreclosure was to seek respondent as a bidder, not as a lawyer.

POINT IV

(In response to Point IV of Informant's Brief)

SUSPENSION FOR THE TRANSACTION WITH THE SKINTAS IS OVERLY HARSH, BECAUSE THE TRANSACTION WAS FAIR AND REASONABLE, DISCLOSED IN WRITING TO PARTIES FAMILIAR AND EXPERIENCED WITH REAL ESTATE DOCUMENTS, AND EXIGENT CIRCUMSTANCES CREATED BY THE SKINTAS MADE IT IMPOSSIBLE TO OBTAIN TIMELY REVIEW BY INDEPENDENT COUNSEL.

STANDARD OF REVIEW

In a disciplinary proceeding this Court treats the hearing panel's findings of fact, conclusions of law, and the recommendations as advisory. *In re Crews*, 159 S.W.3d at 358. Moreover, this Court may reject any or all of the panel's recommendations. *In re Madison*, 282 S.W.3d 350, 352 (Mo. banc 2009).

ARGUMENT

The purpose of discipline is not to punish the attorney but to protect the public and maintain the integrity of the legal profession, *In re Carey*, 89 SW3d 477 (Mo. banc 2002). The disciplinary hearing panel's recommendation as to the appropriate measure of discipline is merely advisory, *In re Donaldo*, 98 SW3d 871 (Mo. banc. 2003). In determining the proper sanction, this Court must consider the presence and absence of aggravating circumstances and mitigating circumstances, *In re Cupples*, 979 SW3d 932, 938 (Mo. banc 1998).

Respondent acknowledges that Rule 4-1.8(a), both in 2006 and now, imposes strict restrictions on when and how an attorney may purchase property from a client. But there has been authority supporting the notion that where the client intends for the attorney to make the purchase, the paramount concerns were good faith, honesty and fairness rather than the niceties of an ethical rule. *Demmel v. Hammet*, 360 Mo. 737, 742 , 230 S.W. 2d 686 1950).

This is not to say that in no event may an attorney buy his client's property (7 C.J.S., Sec. 126(b), p. 961) but "The question of good faith on the part of an attorney in acquiring an interest adverse to that of his client, the fairness of the transaction, or the adequacy of consideration will not as a general rule be inquired into where the client seeks to secure the benefit of a purchase made by his attorney for his own interest or benefit *and without the knowledge or consent of the client. * * * If, however, the client intended that the attorney should make the purchase for himself and acquiesced in his action, the transaction will be upheld if open, honest, and fair*." 5 Am. Jur., Sec. 62, p. 295; 7 C.J.S., Sec. 126, p. 960. *Demmel v. Hammet, supra.*.

In this brave new world of ethical considerations, there is no doubt that a client must be advised in writing to have the transaction reviewed by independent counsel regardless of the circumstances, Rule 4-1.8 (a). And even if respondent's interpretation of the 2006 rule was incorrect, this transaction and respondent's actions should be viewed in light of the circumstances as they presented themselves in 2006 as to the matters of fairness, voluntariness and mitigation.

As to whether the transaction was voluntary, respondent testified that, when advised of the alternatives, the Skintas wanted to sell and leaseback, so they could stay on the property, (Tr. 1038-1039).

It is most significant that the man the Skintas chose to appraise their property, Mr. Rider, concluded that respondent had been more than fair in the transaction. " I heard about this after the fact that Seth bought it, and he ended up – and then I heard he did not get the back lot. I thought he was doing them one heck of a favor," (Tr. 470). Mr. Rider testified he would not have purchased the lots under foreclosure, because there were too many problems associated with them, (Tr. 468). Moreover, as to Mr. Skinta's mental health, Mr. Rider observed that it did not prevent him from operating a real estate business for 35 years or stop him from operating his video rental business, (Tr. 490-91).

It also is significant that on March 7, 2007, more than four months after the exigency had passed giving the Skintas time to analyze and reflect upon the transaction, they told respondent in writing, "Am so glad you were able to assume the loan….."(IA943). During that time they were paying the rent they agreed to pay.

There is no dispute as to the exigency of the situation the Skintas faced in the week leading up to the scheduled foreclosure sale. They basically had ignored the bank's correspondence to the point where bank officials refused to agree to a postponement. They owed $7,700 in back real estate taxes. They did not have the money for the taxes, much less the costs of foreclosure or one year of interest on their note; thus, attempting to exercise a right of redemption was out of the question. Furthermore, there was no guarantee that the right would be available to them, because the bank had no desire to

hold title to the property. Moreover, Mr. Majors testified the bank had no desire to lease the premises to the Skintas even if it ended up with the property due to its past experience with them. But each of the exigent circumstances were caused by the Skintas. None of them were caused by respondent.

Informant argument speculates on what would have occurred had the transaction not occurred. But Informant's speculation assumes, without discussion of the bond requirement of Sec. 443.420, RSMo, that the bank would have acquired title on the property been sold at auction. Thus, it ignores the fact that even if the bank had acquired title, it would have been under no obligation to honor any effort at redemption absent the posting of the bond required by Sec 443.420, RSMo. A much more likely result of proceeding through the foreclosure sale would have been that the Skintas would have been removed from the foreclosed lots soon after the foreclosure sale. And it is possible, if not likely, that Respondent's actions saved the Skintas from a suit for any deficiencies resulting from the foreclosure sale, especially in light of their overdue tax obligations. In light of these facts, it is difficult to perceive, without rank speculation, how the Skintas were damaged by entering into the transaction with respondent.

Unfortunately, Informant engaged in such speculation. It is all too easy for the Informant to view with a jaundiced eye the unfortunate results of a four year old transaction and declare it to be unfair or the product of overreaching. In doing so, Informant has rejected the conclusion reached by a dis-interested witness, Mr. Rider, that respondent did, or at least attempted to do, the Skintas a favor when no one else would. It is difficult to see how this transaction caused damage to the Skintas.

Informant also seems to accept as true most, if not all, of the statements of the Skintas in this matter including the allegations of damage. The advisory council did not.

While this Court reviews the evidence de novo, determines independently the credibility, weight and value of the testimony of the witnesses and draws its own conclusions of law," *In re Oberhellmann*, 873 S.W.2d 851, 852 (Mo. banc 1994), Respondent again urges this Court also consider the long line of cases related to appellate review of factual determinations made by trial courts in its review of the testimony and evidence submitted to the Hearing Panel and the Hearing Panel's conclusion regarding the credibility of the Skintas. And to that respondent restates and incorporates by reference his argument in Point I on this subject.

To a lesser, but still significant extent, Respondent's conduct subsequent to the transaction also is mitigating. In spite of the Skintas' failure to pay all rent owed since January of 2008 or to clean up or maintain the property or to terminate the lease, respondent has expressed willingness to sell the property back to them for what he has in it, (Tr. 1075, Tr. 1077).

Suspension is inappropriate in this matter, even as punishment, in that respondent already has been punished to the point where he would not consider entering such a transaction again. He testified:

> "This situation has consumed my practice. It has consumed my Secretaries, my staff, and it has caused a lot of grief, a lot of heartache, a lot of regret, and it is just not worth it. I always tried to help people that were having problems finding attorneys, difficult people, and that is a reason why they

have such a problems (sic), but after this, I am not going to do it anymore. I just – I can't. I don't think I can financially take it, and I know psychologically, I can't do it." (Tr. 1039-1040).

Suspension would further punish respondent. Rather than protect the public from future misconduct, in effect it would punish one who chose to attempt to do a good deed. This is not to say that attention to disciplinary rules is not required or the reasons that they are to be followed to the letter, but further recognition of the importance of that attention can be accomplished with a public reprimand, which in itself a substantial sanction, *In re Voorhees*, 739 SW2d 178, 187 (Mo. banc 1987).

POINT V

INFORMANT'S RECOMMENDATIONS AS TO DISCIPLINE SHOULD BE GIVEN NO WEIGHT IN THAT THEY ARE NOT THE PRODUCT OF SOUND REFLECTION, BECAUSE THE RECORD REFLECTS INFORMANT DID NOT COMPLETE AN OBJECTIVE OR THOROUGH INVESTIGATION OF THE ALLEGATIONS HEREIN PRIOR TO FILING THE INFORMATION PURSUANT TO RULE 5.09, HAS BEEN INCONSISTENT IN HER RECOMMENDED SANCTIONS, AND APPARENTLY HAS BASED HER RECOMMENDATIONS ON ONLY SELECTED PORTIONS OF THE RECORD RATHER THAN THE ENTIRE BODY OF EVIDENCE.

Investigations under Rule 5.09 are for the purpose of determining probable cause, presumably before the filing of an Information, *Id.* One who serves as a public prosecutor seeking sanctions or punishment on behalf of society has the responsibility of a minister of justice and not simply that of an advocate. Comment to Rule 4-3.8.

Depending on the day, Informant has determined that the appropriate sanction against Respondent should be a public reprimand, (Tr. 1210), a stayed, one year suspension, (RA131), an indefinite term of suspension without a stay, (Tr. 1221), and her brief now calls for a two year suspension without leave to seek reinstatement. The Informant chose to get into these matters in her summation before the hearing panel by arguing: "You are not supposed to talk about settlement negotiations in the case, but I will tell you this:…" (Tr. 1213).

OCDC filed the first Information in this without first interviewing witnesses who support Respondent's position. In his efforts to cooperate with OCDC Informant identified, among others, Mr. Klutman and Mr. Shoemaker as objective witnesses to inter-workings of MACB and Mr. Plunkett's dealings with that company. Neither was interviewed prior to the time Informant filed the initial Information, (Tr. 416, Tr. 602). That can indicate that Informant did what we ask juries not to do, reached a conclusion before hearing all the evidence. To be fair, one also might argue that Informant concluded there was probable cause to prosecute Mr. Plunkett's complaint based on his assertions alone, and that the Informant merely was exercising her discretion in doing so, but subsequent events have demonstrated that this decision reflects a continuing pattern of actions that lack objectivity.

Informant's argument and subsequent correspondence with the hearing panel (RA129, RA130) reflect that she sought an admission by Respondent of the allegations contained in Count I. Included in those allegations is the claim that Mr. Plunkett had been deprived of his $8,000 per month salary, a claim that even Informant now admits is in error. Also included in those allegations is a claim that Respondent somehow forced Mr. Plunkett to sign a $250,000 note and deed of trust in exchange for $2,000. All witnesses connected to MACB have refuted that allegation. In an effort to cooperate with Informant's investigation, Respondent gave her the names of Mr. Klutman, an attorney, and Mr. Shoemaker, the chief financial officer of MACB, to verify his defense.

Informant not only chose not to interview those witnesses before filing the Information, but now chastises Respondent for not admitting the allegations in Count I

prior to exercising his right to be heard by a disinterested tribunal. (Tr. 1213). Respondent urges this Court not to deem his refusal to admit to those particular allegations as a sign of disrespect for the need to police the ethical behavior of attorneys or as a refusal to admit when one is wrong.

Absent from the record is any indication that Informant shared her investigation of the Skinta complaint with Respondent or sought a response from Respondent prior to the filing of the amended Information containing Count III. Interviews with any of Mr. Rider, Mr. King or Mr. Majors surely would have contributed to a determination of probable cause. Such failures again reflect an absence of objectivity.

Informant's actions indicate perhaps that she was caught up in a fervor of competition in this matter. To be fair, she would not be the first attorney to succumb to such. But her persistence in prosecuting the claim that a $250,000 note was signed in exchange for a $2,000 loan, and her failure to formally amend the Information removing the assertion that Mr. Plunkett was deprived of his salary after Informant admitted that was not accurate, reflect a lack of objectivity which removes her a fair judge of the merits of the case, much less what, if any, sanctions are appropriate. Her actions prove she has departed from the role of minister of justice to that of an advocate. The comments to Rule 4-3.8 ask that criminal prosecutors refrain from such departure. Respondent hopes it is not asking too much to expect the same from OCDC, at least before putting any stock in the punishments it recommends.

CONCLUSION

For the foregoing reasons the Information in this case should be dismissed or in the alternative, in the event this Court finds that Respondent has engaged in ethical misconduct, the proper discipline to impose is a public admonishment.

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned Brent Mayberry certifies the following:

1. That the attached Respondent's Brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 14,738 words, excluding the cover, this certificate of Compliance and Service, and the signature block as determined by MicroSoft Word 97; and

2. That the CD filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of this Respondent's Brief, and a CD containing a copy of this brief, were forwarded via U.S. Mail, postage prepaid, to Informants Sharon K. Weedin, Sam S. Phillips and Melody Nashan, 3335 American Avenue, Jefferson City, MO 65109, this 9th day of December, 2010.

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