IN THE SUPREME COURT

STATE OF MISSOURI

IN RE:	)	
	)	
DAVID S. PURCELL,	)	Supreme Court Case # SC94050
	)	
Respondent	)	

RESPONDENT'S BRIEF

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INTRODUCTION

This case involves three separate disciplinary Complaints filed with the Office of Chief Disciplinary Counsel (Informant) against attorney David S. Purcell, MBE 24739 (Respondent). The matters were consolidated and presented in an Information in three Counts. Respondent filed an Answer and Affirmative Defense contesting each Count. The parties reached a Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendations for Discipline (the "Stipulation") dated January 14, 2014. [A-63-95]. A Disciplinary Hearing Panel (DHP) met on January 14, 2014, receiving the Stipulation and other evidence, including testimony of Respondent and arguments of counsel. Thereafter on January 21, 2014 the DHP made its Decision, adopting the facts, conclusions and recommendations of the Stipulation. Informant accepted the DHP Decision and Respondent did not respond.

On March 25, 2014 the Supreme Court ordered Informant to file a complete record of proceedings and the parties to file briefs pursuant to Rule 84.24(i).

With passage of time and unfolding of events since the Complaints were filed, circumstances informing the Stipulation have changed in substantial ways such that the efficacy of the Stipulation itself is in question.

Finally, the circumstances giving rise to each of the three Counts, and to the Stipulation, occurred against the backdrop of Respondent's personal, civic, and professional life.

RESPONDENT'S BACKGROUND, PROFESSIONAL AND DISCIPLINARY HISTORY

David S. Purcell is a retired 68 year old attorney [A-117] licensed in Missouri in September, 1973 as MBE 24739. He was in full time private practice of law in Missouri from 1973 until he began the process of retirement in 2012. He has publicly announced his retirement and holds himself out as retired from practicing law. Although he is employed part time by the law firm, Your Estate Matters L.L.C., dba Amen, Gantner & Capriano, he has no ownership or management therein, and acts solely in roles other than as a lawyer. The firm no longer bears his name. [A-116-118]. In his forty year career he has received one letter of admonition under Rule 4-7.1 relative to a communication concerning a lawyer's services. His licenses to practice law in Missouri and Illinois, are in good standing.

A summary of many of Respondent's personal and professional activities is set out in pages 27 through 30 of the Stipulation herein: [A156 et seq.].

PERSONAL

Respondent has been married to Beth Purcell since 1973 and they have raised three daughters.[A-89].

PROFESSIONAL

Respondent has achieved and maintained a superb professional reputation among his peers and public in that he is rated AV Preeminent by Martindale-Hubbell, [Lexis-Nexis,

Lawyers.com], and 10.0 by AVVO [Superb], their highest levels for both legal ability and ethical standards. Respondent is a Fellow of the American Academy of Estate Planning Attorneys. [A-89].

Respondent has served The Missouri Bar as a member of its Probate and Trust, Elder Law and Alternative Dispute Resolution Committees. He was Vice Chairman of The Missouri Bar Lawyer's Assistance Committee [MOLAP], only resigning recently in order to avoid embarrassing the Committee and frustrating its work with impaired lawyers, in anticipation of his own possible public discipline . [A-89].

Respondent has written and updated a chapter of the Missouri Bar Continuing Legal Education Deskbook on Elder Law and contributed extensively for many years to the Senior Citizens Handbook, Laws and Programs Affecting Senior Citizens in Missouri, jointly published by Legal Services of Eastern Missouri and the Missouri Bar. [A-90].

Respondent has for many years lectured extensively to legal, financial, and elder care professionals, to the public, and written numerous articles published in the St Louis Bar Journal, Journal of the Society of Certified Senior advisers, St Louis Times, and Senior Market Adviser about estate planning and administration, elder law, end of life issues, and care of seniors. He has given several presentations about financial exploitation of the elderly in such forums as the St Louis Circuit Court and Clergy Forum, Social Services Association of Missouri, Sixth Annual Show Me Summit of the Missouri Alliance of Area Agencies on Aging, and to social workers and adult abuse hotline workers in the St.

Louis area. Moreover, for a period of six years he hosted an hour long weekly radio program on matters of concern to senior citizens, their families and advisors.[A-90].

As a member of the Bar Association of Metropolitan St Louis, Respondent served as co-chairman of the Elder Law Committee and as a volunteer investigator and mediator for the Fee Dispute Resolution Committee. [A-90]. He also served as Director and Officer of the St Louis County Law Library from 1985 to 2012. [A-91].

Respondent has been an active member of the National Academy of Elder Law Attorneys and its Missouri Chapter since 1997, a member of the St. Louis Estate Planning Council since approximately 1989, and Board Member and Chairman of the Consumer Education Committee of the Missouri End of Life Coalition. [A-91].

CIVIC AND CHARITABLE

Respondent has been a member of the Kirkwood Area Chamber of Commerce since 1984, was a board member from 1993 to 1998 and its President in 1997. He has also been a member of the Kirkwood Rotary Club since 1987 and served on its board.[A-91].

Respondent has been a volunteer mediator and arbitrator for the Better Business Bureau of St Louis and was a member of its Alternative Dispute Resolution Committee. The law firm he founded has a AAA accreditation by the BBB. [A-92].

Active in numerous charitable organizations, he was a Founder of the Heritage League of the American Cancer Society Heartland Division and Chair of its Speakers Bureau. He

has been a member of the Endowment Committee, the Board of Managers and is a Lamplighter at the Kirkwood-Webster YMCA. [A-92].

Respondent served as Chairman of the Planned Giving Committee and was a member of the Advancement Committee of the Salvation Army Midland Division. [A-91]. He also served on the Board of Directors of the Mary Culver Home [formerly the Blind Girls Home] in Kirkwood, Missouri. [A-92].

RELIGIOUS AND SPIRITUAL

Respondent has been active in Kirkwood United Methodist Church since 1982, serving as board member, counsel, committee member, Sunday School teacher, work camp leader, adult Bible study teacher, and Stephen Minister. [A-92].

Respondent has been a member of the Board and President of the St. Louis Alano Society. [A-91] He conceived, organized and led an ecumenical ministry to rehabilitate dilapidated housing in southeast Kirkwood [Meacham Park] Missouri.[A-92].

Respondent is a White House Retreatant and has served as a Prayer Companion in the Ignatian Spiritual Exercises program of the St Louis Jesuit community. [A-92].

MILITARY

Respondent served our country on active duty during the Vietnam War as a commissioned officer in the United States Naval Reserve, retiring after twenty eight years with the rank of Commander. [A-92].

Respondent has provided full and cooperative disclosure to the OCDC (ABA Standard 9.32 (e)). [A-92].

BACKGROUND OF STIPULATION BETWEEN INFORMANT AND RESPONDENT TO IMPOSITION OF TWO YEAR LICENSE SUSPENSION

Because this matter comes to the Court as a Stipulation, it is appropriate that the antecedents to the agreement between Informant and Respondent, including their assumptions, negotiating ostures and positions be available for review.

THE MEYER V. PURCELL CIVIL SUIT, VERDICT AND JUDGMENT

On March 4, 2009, Gerald E. Meyer, in his role as personal representative and trustee for decedents Anna Holtz and Steve Boliance, sued Respondent and his law firm, Purcell & Amen L.L.C. in the Circuit Court of the City of St Louis alleging that as attorney for Susan Zehnle, Respondent committed legal malpractice in negligently causing Zehnle to transfer assets of her elderly aunt, Holtz and uncle, Boliance to herself without regard to their estate plans and in failing to advise or assist Niece in providing an accounting and returning such assets to Estates. The Petition alleged that Respondent had unethically conspired with Zehnle to deprive her relatives of their assets and had represented multiple conflicting interests. [A-81,82]

Seeking punitive damages, Plaintiff submitted instructions patterned on MAI 21.02 and 11.06 for a finding that Respondent "showed complete indifference to or conscious disregard for the rights or property of others....when he [1] caused the transfer of all of the assets of {Holtz} and {Boliance} to {Niece } in her own name without regard to

their estate plans, or [2] failed to advise {Niece} to cooperate with the personal representative of the Estates …. and failed to advise or assist {Niece} to return the assets {to Estates}. [A-188].

The case was tried in August 2011 and a verdict was returned and judgment entered against Respondent for $256,896.52 in compensatory damages and $600,000 in punitive damages. [A-83]. Post-trial motions being unsuccessful, Respondent appealed to the Missouri Court of Appeals, Eastern District. [A-185].

CONCURRENT DISCIPLINARY PROCEEDINGS

The Affidavit of Richard C. Wuestling in Support of Joint Application for Continuance of the disciplinary proceedings [A209-213] sets out many of the intervening events subsequent to entry of the judgment and prior to disposition by the Court of Appeals. Additionally the letter of Thomas J. Hayek, Respondent's attorney in the civil matter, to Alan D. Pratzel, Chief Disciplinary Counsel [A-594-603] briefs the latter about the case and explains why the Complaints filed by the Plaintiff's attorneys, and the judgment, which was then under appeal, should not be relied on as a basis for disciplinary action against Respondent.

In October 2011 Informant filed a Complaint against Respondent, as Case No. 11-1625-X [Count III] arising out of the Meyer case, based upon allegations of attorneys representing Meyer, the nominal plaintiff in the civil action. On November 29, 2011 the DHP set Counts I and II for hearing on April 10 and 11, 2012. In early February of 2012

Informant sought and obtained leave to file a Third Amended Information consolidating Counts I, II and III. Respondent sought a continuance of the hearing on Count III until a decision was rendered on the appeal of the civil judgment and also sought a severance of that matter from Counts I and II. These requests were granted. [A-210, 211].

During the pendency of the civil appeal, Respondent's attorneys Wuestling and Hayek discussed with Informant settling all three Counts of the Information. Informant would not consider settling the Counts piecemeal. [A-211].

While the Circuit Court Judgment remained the law of the case in *Meyer vs Purcell*, it had a potential res judicata effect upon the disciplinary proceedings, or might be used in evidence before the DHP. Conversely, disposition of the OCDC Complaint either by trial or stipulation could influence the reasoning and outcome of the appeal. The parties were unable to discern with any degree of certainty how the proceedings in either forum might affect the other. Moreover the possibility appeared to exist that the decisions of the DHP and of the Court of Appeals might conflict with each other. In the event that the Court of Appeals sustained the trial court verdict and judgment for punitive damages, there was every possibility that Informant would seek Respondent's disbarment.

As can be seen and surmised from the Hayek letter to Pratzel [T- 614-623] and the Wuestling affidavit [A-209], Respondent showed without success that the disciplinary proceedings should be delayed unconditionally until the Court of Appeals ruled. Informant would not agree to delay unless Respondent agreed to stipulate as to the level

of punishment to be imposed, on the strength of the trial court judgment which was not final.

These are the background circumstances prompting Respondent to agree in or around March 29, 2012 to a stipulation for a recommendation to this Court which would in effect result in a suspension of his law license for a two year period. At that time no agreement was reached as to any of the statement of facts or conclusions of law to be made a part of the stipulation. The only agreement was that the final agreement would cover Counts I, II, and III and would not be finalized until after the appeal of the Meyer civil suit was finally resolved.

Informant drafted a proposed stipulation and transmitted it to Respondent's attorneys on April, 12, 2012. No further communication of substance occurred between the Informant and Respondent until after the Court of Appeals ruling. Nearly two years after entry of the trial court's judgment, and fifteen months after the "agreement to agree" was reached, the Court of Appeals issued its opinion on July 16, 2013 [A-183]. [Informant's Brief at page 20 erroneously dates the Opinion on July 16, 2012.]

THE DECISION ON APPEAL

The punitive damages judgment was reversed on appeal because Plaintiffs had not presented evidence to support a finding that Respondent knew or should have known his actions and omissions created a high degree of probability of injury to Estates' rights or interests when he caused Niece to retitle their assets. The Court of Appeals also

determined that the record did not "clearly and convincingly prove Purcell's reckless indifference or conscious disregard of Estates' rights by failing to advise Niece to cooperate with the personal representatives of Estates and return such assets when he knew Niece was represented by counsel. Accordingly the trial court erred in submitting the case to the jury on the issue of punitive damages." [A-190].

The opinion sustained the award of compensatory damages based upon an assessment of the evidence taken in a light most favorable to Plaintiff, giving Plaintiff all reasonable beneficial inferences (citing *Emery v. Wal-Mart Stores, Inc*., 976 S.W. 2d 439, 433 (Mo banc 1998). [A-190]. On the issue of compensatory damages the Court of Appeals stated that in reaching its decision it followed the authority of *Erdman v. Condaire Inc.* 97 SW 3d 85, 88 (Mo App. E.D. 2002) and presumed that the Plaintiff's evidence was true and disregarded any of the Defendant's evidence that did not support the Plaintiff's case. [A-191].

COUNT III (MEYER/RODDY)

The Opinion of the Missouri Court of Appeals, Eastern District in the case of *Gerald E. Meyer, etc. against David S. Purcell etal.* ED97630, contained in Informant's Appendix at [A-183-198] and quoted in part herein, sets out many facts relevant to COUNT III of the Information. This opinion was offered in evidence as Exhibit 11 by Informant at the DHP and received without objection. [A-101]. Other references are from the Stipulation [A-63-95] before this Honorable Court.

"In November, 2000 Boliance and Holtz created estate plans that included wills, trusts, and powers of attorney. In these estate plans, Boliance and Holtz designated how they intended property to be distributed upon their deaths, choosing each other as their first personal representative, trustee, and attorney-in-fact, and selecting successor representatives, trustees, and attorneys in fact." [A-184]. Mr. Boliance was the brother-in-law of Ms Holtz. [A-77].

"Niece (Susan Zehnle) initially approached Purcell [in 2007] to discuss how she could assist Boliance and Holtz in managing their finances due to their deteriorating health. Boliance and Holtz, both in their nineties, were in advanced stages of physical and mental decline. During their initial meeting, Purcell suggested Niece and he visit Boliance and Holtz to find out more information about their conditions and discuss obtaining the signatures on powers of attorney and medical directives that would designate Niece as their attorney-in-fact. Soon thereafter Purcell met with Boliance and Holtz and obtained their signatures on powers of attorney documents." [A-187]. These new powers designated their great niece, Susan Zehnle, ("Niece") as their primary attorney-in-fact." [A-184].

"At the time that they each executed the powers of attorney prepared by Purcell, Boliance had suffered an injury to his hip and a stroke, leaving him severely debilitated and Holtz was residing in an Alzheimer's unit." [A-187].

"Purcell and Niece were unaware of Boliance's and Holtz's estate plans when they met with them and obtained their signatures on the powers of attorney documents.

> Purcell did not consult with either Boliance or Holtz prior to drafting the powers of attorney or inquire whether they already had executed estate plans or powers of attorney prior to obtaining their signatures. Purcell did not review with them any of the specific powers granted to niece, nor did he provide them with copies of these documents." [A-187,188].
>
> "Following execution of these powers of attorney, Niece consolidated Boliance and Holtz's respective assets into two separate bank accounts and designated herself as a joint accountholder on each account. Niece also retitled the house owned by Boliance and Holtz, naming herself as joint tenant, pursuant to advice and counsel of Attorneys. [A-184]."

Informant and Respondent have stipulated that this advice and counsel may have been provided either by Respondent or by others in the firm. [A-79].

Holtz died on December 4, 2007 and Niece then advised Boliance that she had retitled the Holtz and Boliance real estate to include herself on the title and Boliance responded, "Good, no court." Boliance died three days later on December 7, 2007. [A-188].

> "After retitling the property, Niece discovered Boliance and Holtz's prior estate plans while searching the house for burial clothing. She turned these documents over to Purcell on December 8, 2007. Purcell then contacted Estates' personal representatives and trustees in a letter dated December 10, 2007, informing that Niece had retitled Boliance's and Holtz's assets to include herself in joint

capacity to avoid probate. [A-184]. On December 14, 2007, Zehnle paid Respondent and Purcell & Amen LLC legal fees in the amount of $5,000 from a bank account that had previously been retitled to her name on the account along with Ms. Holtz. [A-80]. Thereafter, Estates' representatives and trustees [through their attorney Harvey Avellone] contacted Purcell in a letter dated December 21, 2007, and demanded an accounting and return of all of Boliance's and Holtz's assets held by Niece." [A-184].

On December 26, 2007, Respondent responded to Mr. Avellone stating that "once we have received notification of the formal documentation appointing your client as personal representative, we will be happy to turn over accounting and additional information so that your client may undertake the necessary steps to administer the estate." [A-80, 81].

"Upon receipt of Estates' representatives' initial demand for accounting, attorney Michael George ("George"), on January 5, 2008, undertook representation of Niece in making her accounting and returning Estates' assets. Niece, Purcell, George as well as Estates' probate attorneys all testified that George represented Niece during the period in which she prepared an accounting and ultimately returned Estates' assets. Testimony and letters submitted as exhibits showed George, who shared office space with Attorneys, was in direct contact with Estates' attorneys once he undertook representation of Niece and that Purcell did not participate or involve himself in Niece's representation before the probate court. The record further shows that Purcell understood George was overseeing the matter and he advised Estates' attorneys of George's role when he received

subsequent demands for an accounting. Furthermore, Purcell, George, and Niece testified Niece always intended to provide an accounting and return Estates' assets and Estates' attorney conceded the accounting provided to him itemized "legitimate" expenses and that such assets were returned to Estates." [A-189].

> "Although the record below clearly shows Purcell failed to advise or assist Niece in providing her accounting to Estates or returning Estates' assets, in light of Purcell's knowledge of George's representation of Niece on the matter, and evidence showing Niece in fact provided a legitimate accounting and returned Estates' assets, the record below does not clearly or convincingly show Purcell knew, or should have known that a high degree of probability of injury to Estates arose from his failure to advise Niece to provide an accounting and return Estates' assets."[A-189-190].

> "In March, 2008. Estates filed a petition against Niece in probate court for discovery of assets. In May, 2008, following the initiation of litigation by Estates solely against Niece for accounting and discovery of assets, Niece provided an accounting and returned the assets totaling $860,689.96 to Estates. In the effort to recover those assets, Estates paid $256,896 in litigation fees to their attorneys pursuant to a contingency fee agreement." [A-185].

> "Thereafter, estates sued Attorneys [Purcell and the law firm of Purcell and Amen, LLC] for legal malpractice, alleging Purcell was negligent for causing the transfer of Boliance's and Holtz's assets to Niece without regard to their estate

plans and for failing to advise or assist Niece in providing an accounting or returning such assets to Estates. Following trial, the jury returned a verdict in favor of Estates finding Attorneys jointly and severally liable and awarding Estates, $256,896, in compensatory and $600,000, in punitive damages. Attorneys subsequently filed a motion for judgment notwithstanding the verdict and a motion for new trial. The trial court denied these motions. Attorneys appeal(ed)."[A-185].

In August, 2013, in the aftermath of the decision of the Missouri Court of Appeals, the judgment for compensatory damages was paid and satisfied. [A-200].

COUNT I (GIESS/BERNDES)

Count I relates to the administration of a trust, guardianship, and conservatorship for the benefit of Marcella Berndes, an incapacitated person. Complainant Linda Giess and her husband John Giess, who was related to Berndes by blood, were the court appointed co-guardians and co-conservators and were co-trustees. Mrs. Giess retained Respondent's law firm on November 5, 2003 to represent her with respect to her fiduciary responsibilities.[A-64].

Ms. Berndes died in November, 2006, and Mr. Giess, the co-fiduciary died the following January. Also in January 2007, the attorney initially assigned to handle the fiduciary representation left the law firm and Respondent became the responsible attorney. [A-65].

Mary Wanner, a trust and estate administration paralegal in Respondent's law firm was assigned to assist with the Giess estate administration. She had frequent contact with

Mrs.Giess and handled settlements and other matters without active supervision or direction by Respondent. Ms. Wanner prepared and filed Annual Settlements with the Jefferson County Circuit Court. These settlements at times initially contained errors or were filed after the initial due date, however in this case corrections were made and Respondent requested, and was granted, an extension by the Court. [A-65].

Mrs. Giess had little or no personal contact with Respondent during the ongoing administration. When Mr. Giess died she asked Ms. Wanner to get her late husband's affairs in order before work continued on the Berndes matters and Ms. Wanner did so without active supervision by Respondent. [A-65]. Although Mrs. Giess complained to Ms. Wanner several times, Respondent did not become aware of her complaints to Wanner until Giess for the very first time complained directly to him. He then investigated and responded. [A-66].

Apart from delay in making a final distribution to the residuary beneficiaries of the testamentary trust, no harm ensued. [A-66].

COUNT II (FORBECK)

Count II of the Information arises out of a controversy involving Alphonse Forbeck, which was the subject of litigation in the Probate Division of the Circuit Court of Lincoln County, Missouri and thereafter in the Missouri Court of Appeals, Eastern District. The issues pleaded in the probate litigation were never tried nor otherwise judicially resolved. In consequence, although there is a lengthy record of "facts" available for this honorable

Court's review, significant questions remain because of what that record does not disclose.

Alphonse Forbeck [Alphonse] was a Lincoln County, childless, bachelor farmer born September 22, 1918. He was visually impaired and a cancer survivor. As care receiver, he made an oral care agreement with Joann Mulkey [Mulkey] as care provider prior to 2005 pursuant to which he had moved into her home where she cared for him.

Respondent's relationship with Alphonse began in 2005 when they met for estate planning purposes. They executed a written legal services agreement at that time. [A-67.] Respondent drafted a revocable living trust, pour-over will, durable power of attorney for property, and healthcare power of attorney for Alphonse. Respondent also drafted a written Agreement for Personal Care to cover the subject matter of the previous oral caretaker arrangement with Mulkey. Mulkey had her own attorney with respect to the Agreement for Personal Care. These documents were executed by Alphonse on April 25, 2005. [A-68].

The estate plan documents appointed Mulkey attorney in fact under both financial and health care powers of attorney. Alphonse and Mulkey were named co-trustees of the trust, and Purcell & Amen L.L.C. was named as special co-trustee "to protect the financial resources controlled and governed by [The Forbeck Living] Trust and the interest of the beneficiaries."[A-68]. Respondent continued to perform legal services for Alphonse after April 21, 2005, prepared and executed several restatements for the Forbeck Living Trust. [A-68,69].

On December 3, 2008 Alphonse moved from Mulkey's home to the Elsberry Healthcare Center ("the facility").[A-164].

On February 26, 2009, James L. Forbeck [James] and Joseph A. Schneider [Joseph] filed a Petition for Appointment of Guardian and Conservator in the Probate Division, Lincoln County Circuit Court against Alphonse alleging he owned personal property exceeding in value $1,000,000 and real property exceeding in value $1,000,000, that he was nearly blind, suffered from cancer, and that by reason of old age was unable to manage his affairs. They also alleged that the Department of Health and Senior Services (DHSS) was investigating a complaint of "suspected abuse and financial wrong-doings by Mulkey, who had been Forbeck's health care assistant". [A-164]. This case was docketed as Cause No. 09L6-PR00030.

Alphonse was served with the court notice of hearing at 12:50 PM that same day [February 26th] and an "emergency hearing" was held in the Probate Division at 4:30 PM., again on that same day. [A-165]. Temporary letters of emergency guardianship and conservatorship were issued to the Petitioners and attorney Chris Mennemeyer was appointed Guardian Ad Litem for Alphonse "until another Guardian could be appointed or private counsel entered on behalf of Alphonse." [A-69].

The description of this "hearing" in the Opinion of the Missouri Court of Appeals, by its omissions, shows that the record did not contain any medical or financial evidence, nor evidence of an actual emergency. Moreover no mention is made of any facts supporting a conclusion that Alphonse was mentally incapacitated or under undue influence by

Mulkey or anyone else and therefore unable to take care of his affairs. Furthermore the record in the Probate Court contains no evidence as to the substance, if any, of allegations allegedly being investigated by DHSS. Significantly, the record did not address how, having been living outside of Mulkey's home for three months following December 3, Alphonse was suddenly in need of emergency protection such as to require an ex-parte hearing on the same day the Petition was filed. In fact, at no time was there ever a hearing on the merits of any of the allegations contained in the Petition. [A-164-167]. Mennemeyer testified [without providing any detail whatsoever] that Mulkey had transferred substantial assets belonging to Alphonse into her own name and that she felt the family should obtain an accounting of his assets. "(Mennemeyer) further opined:

> [T]here would be no harm if the Court entered the order temporarily because he's in a good place. There's not a financial issue where he is going to be kicked out. He doesn't have anything that needs to be managed between now and when you can have a hearing that would be detrimental if the Court issues the order.
>
> If the Court doesn't issue this order, I think he is at grave risk for the person that the allegations against will continue to take immediate action and further deplete his assets and things of that nature. Kind of perpetuate the cycle, if you will, that's going on. So I would recommend that the Court entertain what has been asked for by the petitioners to protect the respondent.

"Mennemeyer indicated that she did not see a medical emergency for the order."[A-166].

"At the close of the hearing, the probate court entered a temporary order appointing Mennemeyer as (Alphonse) Forbeck's temporary emergency guardian, appointing Petitioners temporary emergency co-guardians and temporary emergency co-conservators, issuing Temporary Letters of Emergency Guardianship and Conservatorship to Petitioners, and setting the matter for hearing on March 25, 2009. The probate court concluded that:

> This court, based upon the petition for appointment, based upon the affidavit by both petitioners (James) Forbeck and Schneider, as well as Linda M. Haake, and not in small part upon the testimony of Ms. Mennemeyer, finds that it is necessary to appoint a co -a temporary emergency co-guardian and co-conservator at this time for (Alphonse) Forbeck's benefit.
>
> The Court has clear concerns as to whether or not this gentleman is incapacitated, which by law is required for a finding here. And I'm telling you that right now. There are other avenues available for what is being sought here, tort actions and other actions. However, based upon the petition presented and the evidence presented here today I am making this finding.[A-167].

Respondent first heard about the ex parte hearing and court order on February 27, 2009 (a Friday) when he visited the nursing home facility to see Alphonse. Gerontologist Diane Keefe accompanied him in order to conduct a mental competence exam. They were informed by the facility administrator that they could not meet with Alphonse without the consent of either James or the temporary emergency guardian, Ms. Mennemeyer. They

nevertheless met with Alphonse in the facility cafeteria until threatened with arrest. [A-70].

On Tuesday March 3, 2009 Respondent entered his appearance as attorney for Alphonse in the probate case and filed pleadings and motions on his behalf. He filed a motion to vacate the emergency guardianship and conservatorship order, alleging that the court's temporary order did not afford (Alphonse) Forbeck reasonable notice or any other elements of procedural due process. This motion alleged that the temporary order did not comply procedurally with Chapter 475 RSMO, and that the order was entered into without competent or clear and convincing evidence in support of the Petition's allegations. Among other things, the motion alleged that Petitioners and Elsberry Health Care Center had ignored or circumvented Forbeck's health care directive and health care powers of attorney, and had denied him the benefit of contact with his own chosen care provider, Mulkey. [A-167-168].

Respondent's motion to vacate further alleged that "(Alphonse) Forbeck has made previous adequate provisions for management of his financial affairs through creation of an intervivos trust and durable powers of attorney and is receiving adequate assistance with these affairs through Joann Mulkey and David S. Purcell, attorney at law and the Purcell & Amen law firm." The motion further stated that, because (Alphonse) Forbeck did not own any personal or real property, a conservatorship was inappropriate. The motion additionally stated: "Alphonse Forbeck is not mentally incapacitated and if he were, by virtue of his durable power of attorney, and trust, neither a guardianship nor

conservatorship would be necessary and even if a guardianship or conservator were appropriate, he has exercised his rights under Section 475.050 to choose his own fiduciary." [A-168].

Prohibited from meeting with his client, Respondent did not have specific consent from Alphonse to file such pleadings. [A-70].

On March 4, 2009 a Third Amendment to Alphonse's living trust was drafted by Respondent and signed by Mulkey as attorney in fact for Alphonse without his request or authorization and without consulting him. [A-70].

On March 5, Mulkey through her own attorneys filed a "Motion to Dismiss Petitions for Guardianship and Conservatorship or, in the Alternative, to appoint Attorney in Fact." In her motion to dismiss, Mulkey stated she was Forbeck's duly appointed attorney-in-fact for healthcare and financial matters. Mulkey asserted that no guardian or conservator was needed because Forbeck was able to receive, evaluate, and communicate decisions, and if he needed assistance, he had a duly appointed attorney-in-fact for health care and financial matters. Mulkey also said that the Petition should be dismissed for failure to allege any specific physical or mental condition as a basis for the finding of incapacity or disability. Mulkey contended the court's temporary order should be vacated due to Petitioners' failure to inform the court that a durable power of attorney existed, and averred that the order undermined the authority of Mulkey as attorney-in-fact without notice and due process. [A-168-169].

Alternatively, Mulkey asserted that, should the probate court determine after a full hearing that Forbeck was in need of a guardian or conservator, the court was required, except for good cause shown, to appoint Mulkey because she was the attorney-in-fact for Forbeck. The probate court ordered that the rules of civil procedure would apply to the cause and its proceedings. [A-169].

Subsequently, Respondent and Mulkey filed various motions opposing the Petition. As well, counsel representing Purcell & Amen in the law firm's capacity as fiduciary to Forbeck (the Special Co-Trustee of the Forbeck Living Trust) entered its appearance and filed a "Motion Incorporating and Joining In Certain motions Filed by Respondent." [A-169].

On or about March 6, at Alphonse's request, Mennemeyer made written demand upon Respondent for Alphonse's complete client file, including all of the estate planning documents which Respondent had drafted for Alphonse. Respondent did not comply with this demand, instead advising that he would continue to serve as attorney for Alphonse as he had received no instructions to the contrary.[A-70].

While Respondent and Mulkey were still unable to meet with Alphonse, Respondent, accepted from his co-trustee and attorney-in-fact Mulkey funds in the amount of $12,500, without the consent or knowledge of Alphonse. Respondent used part of the money to pay a CPA for expenses of auditing the Mulkey records, to pay Ms. Keefe for the competency examination, and for attorney fees to outside counsel, and paid the balance to Respondent's own law firm for attorney fees. [A-73-74].

Mennemeyer filed a "Motion to Strike All Filings of [Respondent]" in the Probate Division,. [A-71]. Respondent filed notice to take the deposition of Alphonse which was opposed by a motion to quash and for protective order filed by Mennemeyer.[A-169].

On March 23, 2009, Mennemeyer drafted and Alphonse [her ward] signed a modification to his trust, a new durable power of attorney, and new health care power of attorney to remove Mulkey from all fiduciary capacities to which she had previously been appointed. [A-71].

On March 24, Respondent contacted the office of Missouri Legal Ethics Counsel to seek advice and direction as to whether he could, should, or should not proceed as attorney for Alphonse in the probate matter. On March 25, Respondent called Sara Rittman, then Missouri's Legal Ethics Counsel, who advised Respondent that based upon the facts presented, Respondent could continue to represent Alphonse until there was a final Order of a court of competent jurisdiction either appointing a guardian and conservator or otherwise finally disposing of the case, but there was no guarantee that Respondent would be paid. [A-71]. A transcript of these calls, prepared by and obtained from the Ethics Counsel is part of Respondent's Supplement to the Record. [T-611-613].

On April 3, 2009, a hearing was held in the probate matter before Judge Ben Burkemper. Alphonse testified that he had not hired Respondent to represent him in the case, and that he did not want Respondent to serve as his attorney. Respondent and Mulkey also testified at the hearing. Mulkey testified that on the morning of February 27, 2009 she was told she would be unable to have contact with Alphonse nor to bring him to a

scheduled meeting with Respondent, because of a probate court order the nursing home had received. She called Respondent to let him know of this information. [A-172].

Respondent testified on April 3rd that between the initial 2005 client contact and the filing of the guardianship proceeding in February 2009, he had met with Alphonse approximately six times and spoken to him by phone approximately six times. Respondent testified that at the hurried conclusion of the meeting with Alphonse at the nursing home on February 27, 2009 he had the impression Forbeck wanted him to represent him as his attorney in the general context of resisting efforts to take away his rights and control of his property. [A-172].

At the conclusion of the April 3rd hearing, Mennemeyer and the Petitioners argued that Purcell & Amen, as special co-trustee, was not a proper party to the guardianship and conservatorship proceeding. Respondent asked that the court "consider whether there should be a guardianship and conservatorship at all." Following this hearing, on April 7, Mennemeyer's motion to strike the court filings by Respondent in the case was denied, [A-71, 170, 173] and the Court continued the temporary emergency letters pending a full hearing. [A-173].

On April 20, 2009, having succeeded in getting papers prepared by Mennemeyer and signed by Alphonse to "get rid of Mulkey", Petitioners dismissed the Petition in Cause 009L6-PR00030 and filed a Consent Judgment for legal fees in the amount of $15,000 on behalf of Mennemeyer against Alphonse. Alphonse waived an accounting, inventory, turnover settlement, and appraisal. Court costs were to be assessed to Petitioner (James

Forbeck). The dismissal and Consent Judgment were signed by Alphonse Forbeck as well as by Mennemeyer and the Petitioners, and entered by the Probate Court. [A-72, A-173].

After the dismissal, Respondent continued to advocate for Alphonse and file motions in the case. He sought to have his time and expenses, which were still accruing, taxed against the Petitioners in the probate matter and to have the Probate Court set aside the April 20 dismissal.[A-72, 174].

On or about May 21, 2009 Alphonse and James sent a letter to Respondent requesting that he deliver Alphonse's complete file to Alphonse. On or about June 2, 2009 Respondent responded to this request, expressing concern that the request was not coming from Alphonse, and offering to bring the entire file to a meeting with Alphonse.[A-72].

On June 16, 2009, all of Mulkey's and Respondent's and Purcell & Amen's pending motions in the probate matter, including to clarify the status of trustee and special co-trustees responsibilities, to set aside the dismissal, and to tax attorney fees and costs were denied and disposed of by final order and judgment.[A-72,A-174].

On June 25 Mulkey filed notice of appeal and on June 29, 2009 Respondent filed notice of appeal in the probate matter on behalf of Alphonse, himself, and Purcell & Amen L.L.C. as Special Co-Trustee. [A-174,175]. Alphonse had no knowledge of and did not request or authorize the appeal. On or about July 6, Alphonse communicated with

Respondent to the effect that he had no desire to meet with Respondent to retrieve his file and demanded that Respondent drop the appeal filed on his behalf. [A-73].

Malaine Hagemeier (Hagemeier) was hired to represent Alphonse in the appeal. On January 12, 2010 Hagemeier wrote to Respondent requesting additional time to file her brief. Respondent replied on January 14 that:

"I would ask that your clients withdraw their complaint to the OCDC or at the very least consent to stay that matter pending the final outcome on appeal. I think you can appreciate that I am not so amenable to extending professional courtesy on the appeal while the complaint remains in the present status."[A-73].

Hagemeier advised the Court of Appeals in her request for additional time that she did so with Respondent's assent and the Court of Appeals granted her request. [T-607-610].

On May 18, 2010, the Missouri Court of Appeals, Eastern District, dismissed the appeal filed by Respondent for lack of standing. [A-73]. The Opinion of the Court of Appeals in ED93195 is set out at length in the Appendix at A-163-182.

The Court of Appeals decision cited and relied on two affidavits created and filed after the appeal had been initiated. The first was by Alphonse himself saying he did not want the appeal to proceed and wanted it dismissed. The second was dated February 5, 2010 by a physician who stated he had been treating Alphonse since December 2008, that Alphonse had demonstrated no mental incapacity during that period of time and was competent to handle his own affairs.

Because the Court of Appeals dismissed the appeal for lack of standing, its Opinion does not address any of the substantive challenges to the probate action and the manner and terms of its dismissal which were raised by the Appellants.

EFFORTS TO REOPEN STIPULATION NEGOTIATIONS WITH INFORMANT

The Opinion of the Missouri Court of Appeals in *Meyer v Purcell* [A-183] significantly undermined the basis for Informant's contentions with respect to Count III of the Information. The Court of Appeals held that Plaintiff's evidence had not shown Respondent acted with the requisite evil intent sufficient to support an award of punitive damages [A-185]. The Court found the record did not establish that Purcell knew or should have known his actions and omissions created a high degree of probability of injury, nor prove reckless indifference or conscious disregard for the Estates' rights. [A-190]. As indicated elsewhere in this Brief, the standard of review pursuant to which the Court sustained the compensatory damage award was much more liberal, giving deference to the lower court judgment on the thinnest of supporting evidence and disregarding any of the Defendant's contradictory evidence.

Respondent relied upon the Opinion and its reasoning to contend that the facts no longer warranted the two-year license suspension previously agreed to with Informant, proposed to Informant that such a harsh penalty was not justified in light of the facts and argued that the agreement to stipulate should be modified. Informant declined to renegotiate nor recommend a lesser penalty. However Informant dropped his allegations contained in the Information that Respondent's conduct violated Rule 4-8.4[c] which charged that

Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. [A-105,106].

At the DHP hearing, Respondent again contended that the Meyer Opinion warranted reconsideration of the stipulated penalty recommendation. [A-102 through A-110]. Respondent's attorney pointed out, without objection, that the agreement of Informant and Respondent made in 2012, to stipulate to a recommendation to the Supreme Court that Respondent's license to practice law be suspended for a period of two years, was made under severe duress and in a context which changed significantly with the rendition of the Meyer appellate decision. The prior "agreement to agree" contemplated that the parties would later reach a consensus on facts to present, and legal conclusions to draw, along with the recommendations which might or might not be appropriate in the view of the Supreme Court. However there was not and could not have been a meeting of the minds as to what those stipulated facts and conclusions would be.

When negotiation of the Stipulation resumed in the later part of 2013, Respondent honored his commitment, but asked that the DHP make its determination mindful of the context in which it was made, and of the effect of the Meyer appellate decision upon that context. [A-109].

POINT RELIED ON

I.

IN COUNT I, RESPONDENT'S PERFORMANCE IN ASSISTING A FIDUCIARY CLIENT IN THE ADMINISTRATION OF THE ESTATE AND TRUST FOR THE BENEFIT OF AN INCAPACITATED PERSON DID NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT IN THAT:

[A] RESPONDENT ACTED PROMPTLY IN RESPONDING TO MRS. GIESS'S COMPLAINTS JUST AS SOON AS HE BECAME AWARE OF THEM;

[B] RESPONDENT, THROUGH HIS PARALEGAL MARY WANNER, KEPT MRS. GIESS INFORMED AND AWARE OF ALL MATTERS IN THE CASE AND;

[C] RESPONDENT EXERCISED REASONABLE EFFORTS TO ASSURE THAT MRS. WANNER'S PERFORMANCE WAS COMPATIBLE WITH HIS OWN PROFESSIONAL OBLIGATIONS.

Rule 4-1.3, Rules of Professional Conduct (2007) (amended effective July 1, 2007)

Rule 4-1.4, Rules of Professional Conduct (2007) (amended effective July 1, 2007)

Rule 4-5.3(b), Rules of Professional Conduct (2007) (amended effective July 1, 2007)

POINT RELIED ON

II.

RESPONDENT DID NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT IN REPRESENTING OR TRYING TO REPRESENT THE INTERESTS OF ALPHONSE FORBECK IN THAT:

[A] IN CARRYING ON HIS EFFORTS HE ACTED IN GOOD FAITH RELIANCE ON PRIOR EXPRESSIONS OF HIS CLIENT THROUGH HIS ATTORNEY-CLIENT CONVERSATIONS, THROUGH ALPHONSE FORBECK'S EXPRESSIONS OF INTENTIONS IN HIS ESTATE PLANNING DOCUMENTS, THROUGH DIRECTIONS FROM HIS CHOSEN FIDUCIARY, AND THROUGH A REASONABLE BELIEF THAT CONTRARY COMMUNICATIONS FROM THE CLIENT WERE MADE UNDER DURESS OR WHEN THE CLIENT WAS LEGALLY INCAPACITATED AND UNDER UNDUE INFLUENCE AND;

[B] HE RELIED ON ASSURANCES OF THE MISSOURI ETHICS COUNSEL, THE PROBATE COURT HAVING JURISDICTION OVER THE CASE, STATUTES, AND RULES INDICATING THAT SUCH REPRESENTATION WAS BOTH PERMISSIBLE AND PROPER AND;

[C] HIS REPRESENTATION WAS HANDICAPPED BY THE IMPOSSIBILITY OF MAINTAINING NORMAL CLIENT COMMUNICATIONS AND;

[D] ALL HIS ACTIONS WERE FULLY AND PROMPTLY REPORTED TO THE PROBATE COURT AND WERE FOR THE SOLE PURPOSE OF BENEFITING AND PROTECTING HIS ELDERLY CLIENT ALPHONSE FORBECK AND NO ONE ELSE AND WITH THE REASONABLE BELIEF THAT THE INSTITUTION, PROSECUTION, AND DISMISSAL OF THE PROBATE ACTION WAS A FRAUD ON BOTH ALPHONSE FORBECK AND ON THE COURT.

Rule 4-1.14

475. 075.2,7,8,11 RSMo

475.085.1 RSMo

475.050.1(2) RSMo

POINT RELIED ON

III.

INFORMANT'S CONTENTION THAT RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT IN ASSISTING ZEHNLE TO TAKE CARE OF HER AGED RELATIVES AND OF THEIR FINANCIAL AFFAIRS IS NOT SUPPORTED BY THE RECORD IN THAT, TAKING INTO ACCOUNT THE CIRCUMSTANCES KNOWN OR REASONABLY ASCERTAINABLE TO HIM, HIS ASSISTANCE WAS:

[A] RENDERED IN A COMPETENT FASHION;

[B] PERFORMED IN GOOD FAITH AND WITHOUT EVIL OR SELFISH MOTIVE OR EFFECT;

[C] RESULTED IN SUBSTANTIAL BENEFIT TO ANNA HOLTZ AND STEVE BOLIANCE IN PROVIDING THEM WITH CARE AND ASSISTANCE IN THE LAST FEW MONTHS OF LIFE;

[D] RESULTED IN NO HARM TO ANNA HOLTZ OR STEVE BOLIANCE NOR TO ANYONE ELSE TO WHOM A DUTY WAS OWED;

[E] WAS RENDERED WITH THEIR IMPLIED APPROVAL AND WITHIN THE REASONABLE SCOPE OF HIS ENGAGEMENT TO PROVIDE THEM WITH A POWER OF ATTORNEY;

[F] RENDERED TO ZEHNLE ONLY FOR SO LONG AS THERE WAS NO CONFLICT OF INTEREST AND WAS PROMPTLY TERMINATED UPON THE FIRST APPEARANCE OF SUCH A CONFLICT, AND WITH ASSURANCES THAT THE ESTATES OF THE DECEDENTS WERE REPRESENTED BY OTHER ATTORNEYS;

[G] RESPONDENT DID NOT ATTEMPT TO OBTAIN, NOR DID HE RECEIVE, PERSONAL GAIN FROM THE REPRESENTATION APART FROM ATTORNEY FEES FOR ASSISTING HOLTZ AND BOLIANCE;

[H] RESPONDENT HAD NO POWER OR RESPONSIBILITY TO PROVIDE ACCOUNTING NOR TURN ASSETS OVER TO THE ESTATES NOR TO CONTROL ZEHNLE IN DOING SO.

Rule 4-1.4, Rules of Professional Conduct (2007) (amended effective July 1, 2007)

Rule 4-1.14, Rules of Professional Conduct (2007)

404.714.9 RSMo

404.717.1(4) RSMo

POINT RELIED ON

IV.

CONSIDERING THE TOTALITY OF CIRCUMSTANCES, THE COURT SHOULD REJECT THE STIPULATION AS TO CONCLUSIONS OF LAW AND SANCTIONS AND COUNTS I, II, AND III OF THE INFORMATION AGAINST RESPONDENT SHOULD BE DISMISSED.

Preamble: Rules of Professional Responsibility [14], [15], [19], [20].

ABA Standards for Imposing Lawyer Sanctions

ARGUMENT

I.

IN COUNT I, RESPONDENT'S PERFORMANCE IN ASSISTING A FIDUCIARY CLIENT IN THE ADMINISTRATION OF THE ESTATE AND TRUST FOR THE BENEFIT OF AN INCAPACITATED PERSON DID NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT IN THAT:

[A] RESPONDENT ACTED PROMPTLY IN RESPONDING TO MRS. GIESS'S COMPLAINTS JUST AS SOON AS HE BECAME AWARE OF THEM;

[B] RESPONDENT, THROUGH HIS PARALEGAL MARY WANNER, KEPT MRS. GIESS INFORMED AND AWARE OF ALL MATTERS IN THE CASE AND;

[C] RESPONDENT EXERCISED REASONABLE EFFORTS TO ASSURE THAT MRS. WANNER'S PERFORMANCE WAS COMPATIBLE WITH HIS OWN PROFESSIONAL OBLIGATIONS.

The essence of the Joint Proposed Conclusions of Law regarding Count I of the Information is that Respondent did not reestablish and maintain personal contact with the surviving fiduciary/client, Mrs. Giess, after the departure of the prior assigned attorney and was not adequately proactive in monitoring and supervising Ms. Wanner so as to be more timely informed of complaints.

Unlike cases and controversies more commonly heard by our courts, guardianships and conservatorships involve ongoing administrative supervision of caretakers of protectees during their continuing lifetimes and wrapping up their affairs after their deaths, with the objective of assuring that their financial resources are appropriately invested, managed, disbursed, and that their personal needs are met. The duty to administer the estate is primarily with the appointed guardian/conservator. The duty of the probate attorney is to advise and assist and to appear before the court where appropriate.

In the efficient management of guardianship and conservatorship matters, probate courts routinely employ non-lawyer settlement and audit clerks and other support personnel and probate attorneys routinely employ paralegals to assist them. In each case the attorney or judge has responsibility for establishing procedures, training, and supervision of their respective assistants. The responsible attorney is required to sign and be responsible for all filings with the court. However, where paraprofessional staffing is provided for, routine filing matters are properly delegated.

Management and delegation practices enable a professional to leverage his or her time and expertise in order to provide greater overall benefit to more people in similar situations where standard operating procedures can be established and followed by himself and support personnel in the office. Cost savings is one benefit, but by no means the only one. In addition, the lawyer is able to communicate better with clients, expedite the process, and obtain more predictable results. Such efficiency is an important component of a lawyer's obligation to provide professional legal services. Rule 4-5.3

does not require that the performance of the lawyer or assistants be perfect in every respect.

The Berndes estate was valued, at one point, at around $30,000. In order to avoid inordinate attorney fees [which in any event would have to be approved by the probate court] from dissipating the corpus, Respondent was required by necessity to impose and adhere to stringent cost control measures in his firm. Doing so required delegation of the preparation and filing of paperwork to a paralegal under his supervision. Of course all court filings were reviewed and signed by the responsible attorney and were his professional responsibility.

As stipulated, Respondent requested and received extensions in times for filing conservatorship Annual Settlements and made some "errors" in submittals, but nevertheless suggests that such practices, while not admirable, were neither out of the ordinary in such cases, nor substantial, nor prejudicial to the protectee, the fiduciaries, or the residual beneficiaries. The record does not show what the substance was to the "errors" in submittals. This Court may be aware that procedures and expectations in such matters sometimes vary from court to court, and case to case. Oftentimes in such matters, settlement clerks and auditors simply ask for additional documentation as to conservatorship transactions. Moreover these delays and "errors" may or may not have been avoidable had Respondent himself performed the clerical and other duties himself, or supervised Ms. Wanner more closely, or been aware at an earlier date of Mrs. Giess's complaints. Alternatively Mrs. Giess, who as guardian and conservator also signed and

presumably read and approved all of the annual reports, might have actually made, or caught any of the supposed mistakes or other irregularities in the filings. Having failed to do so it seems disingenuous of her to complain that Respondent was derelict in supervising Wanner and communicating with her [Giess]. Had Mrs. Giess earlier complained directly to Respondent, an earlier investigation and response could have been made.

An annual report in an ongoing probate case should be timely filed in order to keep the court and interested parties informed of the status of the estate and protectee. Tardiness, incompleteness, or inaccuracy can, but in this case did not, prejudice anyone simply because all it involved was delay in completing administrative paperwork. No penalties, no loss, and no additional expense. Like a late tax return where there is no penalty or interest.

The reality is that in the administration of guardianship and probate estates, as in human affairs in general, delays, mistakes and miscommunications occur which, while regrettable, call for tireless efforts at improvement, but not severe punishment. If it did, nobody would escape severe reprimand or worse on a fairly frequent basis. It seems unimaginable that a good lawyer or law firm would not on occasion experience a need for a continuance, a paperwork snag, or a problem with a client having unmet expectations.

Having served as a commissioned officer in the U.S. Navy Reserves for twenty-six years, receiving promotions and increasing responsibility, and retiring as a Commander, building and running a law firm, and acting as a board member and officer of a number of

other organizations, Respondent has had a lifetime of opportunity to learn and exercise skills of leadership, management, training, and supervision. His track record raises an inference of conscientious, committed dedication to his own performance and that of his subordinates.

Here the Informant has targeted a single case in Respondent's legal career of forty plus years to build a basis for harsh penalty. The Respondent's failure in this matter was an isolated instance of not being immediately aware of a communication problem between a staff member and a client in the midst of several personnel changes including the death of the protectee, Ms. Berndes, the departure of the firm's attorney previously assigned to the case, and the death of the co-fiduciary Mr. Giess.

The incident does not involve a proven substantial error or omission by the staff member, apart from her failure to better communicate both with the client and with Respondent. Nor did it involve an unprofessional or lackadaisical attitude on the part of Respondent, nor any active impropriety on his part. More likely it involved an irritable, frustrated individual who was simply upset at the slow pace of her case and lashed out accordingly. Finally it did not lead to any loss or damage to the fiduciary, the estate, or otherwise.

Following the Complaint of Mrs. Giess, Respondent, in his continuing efforts to achieve and maintain best practices changed office procedures at the firm to improve training and supervision of paralegals in conformity with ABA Standards 9.32 (b) and (d). Moreover he has expressed remorse at having failed to learn of the client dissatisfaction at an earlier date so he could more effectively manage and supervise the firm's relationship with Mr.

and Mrs. Giess. [A-93]. Clearly the appropriate lessons have been learned and measures taken to improve communications and supervision.

Pursuit of perfection in the practice of law is a noble ambition but should be tempered with common sense realistic expectations. Hopefully, this Honorable Court will wisely reflect that using this case as a basis for disciplining Respondent will have a negative overall impact on the goals of protecting the public and advancing the administration of justice.

The cases of *In re Hagerty*, 661 SW 2d 8 [Mo banc 1983] and *In re Donaho*, 98 SW 3d 871 [Mo banc 2003] cited in Informant's Brief are instructive in the instant matter only in that they involve communications between a lawyer and client. In all other respects they are completely inapposite, both on the nature and extent of the lawyer's shortcomings.

Hagerty stole money from one of his clients and when confronted failed to return or account for it. In another case, a criminal proceeding, when notified by the court of a presentence hearing at which the attendance of both he and the client was required, he did not bother to attend the hearing himself nor notify the client, who was jailed for several months prior to sentencing in consequence of having failed to appear. In another criminal case Hagerty failed to file a timely notice of appeal, concealing his tardiness from the client and misrepresenting to the client's replacement attorney that he had done so in a timely fashion.

Donaho, having received a fee deposit from a client, failed to do any of the work for which he had been paid, repeatedly ignored any of the numerous communications he received from his client, closed and moved his office without notifying his client, and breached a promise to refund the fee deposit. When the disciplinary committee offered him an opportunity to mitigate the matter by making restitution to the client he fraudulently presented them with copies of money orders payable to the client, which he in fact never remitted but instead cashed it for himself. Finally, at his disciplinary hearing Donaho refused to acknowledge that the misrepresentation of repayment was dishonest. Notwithstanding what the opinion describes as Donaho's "continued apparent inability to understand the difference between fact and fiction, right and wrong, confirms that Respondent does not yet 'fully understand the profound duty imposed by his profession'" at page 871, the Court only imposed a suspension with leave to apply for reinstatement after twelve months.

Respondent did not breach his supervisory obligation under Rule 4-5.3(b), nor of Rules 4-1.3 and 4-1.4(a) and Count I should be dismissed

ARGUMENT

II.

RESPONDENT DID NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT IN REPRESENTING OR TRYING TO REPRESENT THE INTERESTS OF ALPHONSE FORBECK IN THAT:

[A] IN CARRYING ON HIS EFFORTS HE ACTED IN GOOD FAITH RELIANCE ON PRIOR EXPRESSIONS OF HIS CLIENT THROUGH HIS ATTORNEY-CLIENT CONVERSATIONS, THROUGH ALPHONSE FORBECK'S EXPRESSIONS OF INTENTIONS IN HIS ESTATE PLANNING DOCUMENTS, THROUGH DIRECTIONS FROM HIS CHOSEN FIDUCIARY, AND THROUGH A REASONABLE BELIEF THAT CONTRARY COMMUNICATIONS FROM THE CLIENT WERE MADE UNDER DURESS OR WHEN THE CLIENT WAS LEGALLY INCAPACITATED AND UNDER UNDUE INFLUENCE AND;

[B] HE RELIED ON ASSURANCES OF THE MISSOURI ETHICS COUNSEL, THE PROBATE COURT HAVING JURISDICTION OVER THE CASE, STATUTES, AND RULES INDICATING THAT SUCH REPRESENTATION WAS BOTH PERMISSIBLE AND PROPER AND;

[C] HIS REPRESENTATION WAS HANDICAPPED BY THE IMPOSSIBILITY OF MAINTAINING NORMAL CLIENT COMMUNICATIONS AND;

[D] ALL HIS ACTIONS WERE FULLY AND PROMPTLY REPORTED TO THE PROBATE COURT AND WERE FOR THE SOLE PURPOSE OF BENEFITING AND PROTECTING HIS ELDERLY CLIENT ALPHONSE FORBECK AND NO ONE ELSE AND WITH THE REASONABLE BELIEF THAT THE INSTITUTION, PROSECUTION, AND DISMISSAL OF THE PROBATE ACTION WAS A FRAUD ON BOTH ALPHONSE FORBECK AND ON THE COURT.

The context of the attorney-client relationship and events surrounding Count II of the Information, as outlined in Respondent's Statement of Facts, shows that Respondent's law practice was limited to estate planning and administration (including probate), and elder law. Respondent's planning clients typically wish to order their affairs such that in old age they can be sure of receiving the help that they need and at death that their estates will be managed by persons of their choosing and be distributed to the beneficiaries of their choosing.

As an experienced estate planning attorney, Respondent learns about the particular situations and concerns of each of his clients: their health, finances, family, other relationships, and their estate planning objectives. Tools typically used by Respondent and others who assist clients in such planning include durable powers of attorney for finances and property, trusts, wills, and health care documents such as living wills, advance medical directives, and health care powers of attorney. Many of these documentary tools have roots in our legal traditions since time immemorial. All have

received varying degrees of support, criticism, and discussion in statutes, judicial decisions, and other commentary. The tools continue to evolve with the complexities of the times, unique wishes and situations of clients, and the lessons learned and skills acquired by legal practitioners.

Some estate planning tools are relatively new and have not yet received universal application nor extensive judicial scrutiny. Such newer tools include the use of special co-trustees or trust protectors. More recent tools also include statutory authority for a person of sound mind to designate the person or persons he or she wishes to be his or her guardian and/or conservator should a court of competent jurisdiction determine that one is required.

As attorney for Respondent Alphonse Forbeck, he met and spoke by phone with him a number of times, learned about him, and prepared just such documents for his approval and signature. They included designation of Respondent's law firm as special co-trustee and nomination of Ms.Mulkey as guardian and conservator, as well as co-trustee, and attorney-in-fact. In fact, Respondent continued to meet with and talk on the phone with Alphonse during the years from 2005 to 2009, and prepared updates for his estate plan as the client circumstances and wishes changed.

Estate planning clients also typically wish to avoid unnecessary expenses, such as transfer and income taxes, probate fees, and costs of litigation, of "will contests", and interference with their plans by financial exploiters and interlopers, well-meaning or otherwise. As indicated by Respondent's biographical material made a part of the

Stipulation herein, Respondent has done much to learn and teach others how to deal with such concerns. In particular his presentations on financial exploitation of the elderly have made him an expert on the subject, heightened his sensitivity, and equipped him to defend his clients from such predations.

It was against this background that Respondent was alerted that Alphonse was suddenly forbidden from coming to Respondent's office for a scheduled meeting or from communicating with Ms. Mulkey because of what was vaguely described as a probate court order mysteriously obtained by James and Joseph. He logically surmised that the mental capacity of Alphonse, who was in the nursing home and known to be elderly and in frail health, was in question.

Out of loyalty and a sense of obligation as his Special Co-Trustee and attorney, and suspicion that there was mischief afoot, Respondent proceeded as quickly as possible to the nursing home to investigate the situation and discuss it with Alphonse. He took Ms. Keefe with him in order to determine Alphonse's mental competence at the time. They met with Alphonse and conducted the competency examination and exchanged information on what little was then known about the court proceedings until Respondent was evicted from the facility by the threat of arrest. Unable to formulate a clear course of action nor complete the discussion in a normal fashion, Respondent was nevertheless under the impression that Alphonse wanted him to continue representing him.

In the context of Respondent's prior communications with Alphonse and his experience as an elder law and estate planning attorney, the situation which Respondent discovered

upon visiting first the nursing home and then the Probate Court heightened his protective instincts and raised his suspicion that Alphonse Forbeck was indeed being exploited, but not by Ms. Mulkey! The persons in control of visits and finances were not the persons whom Alphonse had consistently designated in his estate plan. They had waited several months until after Alphonse was no longer in Ms. Mulkey's home to accuse her of "undue influence" and financial misappropriation while insuring that she would have no opportunity to defend herself. They had filed legal papers, obtained a hearing, and gotten a court order on shockingly short notice to Alphonse (and none at all to Respondent or Mulkey). They had presented not one scintilla of reliable, competent evidence normally demanded by probate courts even for emergency matters and required by law under the provisions of Sections 475.060 , 475.061 and 475.075 of the Missouri Probate Code.

In consequence of the isolation imposed upon Alphonse from communicating with anyone not approved by James or Ms. Mennemeyer, his civil rights could not be restored without judicial action to reverse or modify the so-called temporary emergency order. This isolation was initially effective by refusal of the nursing home to let Alphonse meet with Mulkey and come to Respondent's office and the threat to cause the arrest of Respondent if he did not cease meeting with Alphonse and leave the nursing home on February 27, 2009.

The isolation was perpetuated by the subsequent refusal, by the temporary emergency GAL and nephews James and Joseph, to allow Respondent access to Alphonse. Clearly no consideration had been given, or was ever given, to ensure that Alphonse was, during

the pendency of the case, afforded the least restrictive environment for his protection as required by Section 475.010(10) RSMo.

On its face, the estate plan which Respondent had assisted Alphonse in preparing and maintaining was completely frustrated by the temporary emergency order. As his attorney, Respondent had an ethical obligation to advocate for his client and for the preservation of the estate plan which Alphonse had made. To have abandoned the client in such circumstances would surely have been not only unprofessional and a violation of Rule 4-1,4 and especially contrary to the guidelines of comments 5, 9, and 10, but dishonorable as well. Respondent had an ongoing ethical obligation, pending resolution by the Probate Court of the threshold question as to whether Alphonse could make informed decisions, to safeguard his confidential papers, even from the temporary emergency GAL. While Respondent's mental competency remained at issue, Rule 4-1.2(a) was, in Respondent's reasoned opinion, superceded by Rule 4-1.14.

In the ensuing weeks, Respondent zealously represented what he clearly thought were his clients wishes and interests, and the intention of his estate plan to conduct his own affairs with the assistance of his chosen helpers [ie. Mulkey, Respondent and others] free from interference by the court and a hostile takeover by his nephews James and Joseph. Respondent was able to review the court record of the February 26 filing and service of the petition, of the hearing held, without the presence of Alphonse Forbeck, on less than four hours notice, of the paucity of evidence in support of the Petition, and the Probate

Court's articulated reservations about the possible impropriety of the Petitioner's methods and relief sought. [A-167].

Respondent filed a number of motions demanding that Alphonse be given fundamental Constitutional procedural due process rights including a right to notice and a hearing, a right not to testify, a right to an attorney of his own choosing, a right to jury and a right to confront his accusers. In particular Respondent repeatedly sought leave of the Court to meet with Alphonse.

In addition Respondent's motions on behalf of Alphonse [as well as those filed by Mulkey] asserted that by reason of Alphonse's existing estate plan, he had designated a fiduciary to take care of his personal, medical, and financial needs in the event of incapacity, and had nominated Mulkey to serve as guardian and conservator in the event the court determined he required one. 475.050.1(2) RSMo. The motions also sought a full determination of issues raised by the Petition as to whether Alphonse was incapacitated by undue influence or otherwise.

Regrettably, after February 27th, neither the Probate Court, Mennemeyer, James, nor Joseph would let Respondent communicate in any way with Alphonse. All communications purportedly from Alphonse to Respondent were made through Mennemeyer. Respondent did not even see Alphonse until the April 3rd court date. The court filings and activity of Mulkey's attorneys indicates that he was similarly deprived of access to his caretaker, co- trustee, and attorney-in-fact. Respondent justifiably feared that this five week period of isolation afforded an opportunity to brainwash Alphonse.

Respondent incurred substantial time and expense in his efforts to prevent the exploitation of his client. He hired and paid gerontologist Diane Keefe to come to Lincoln County on short notice to conduct the competency exam. There being allegations in the Petition that his client's money had been misappropriated by Mulkey, he incurred accounting expenses. He retained outside counsel, John Challis and of the Polsinelli Law Firm to assist and represent his law firm in its role as Special Co-trustee.

Mulkey, as Alphonse's attorney in fact and co-trustee, had broad authority over assets of Alphonse, the trust in her control, and was responsible to use them sensibly for his benefit. As such, she had possession of $12,500 cash belonging to her principal. Neither Mulkey nor Respondent could have gotten the prior consent of Alphonse for the use of the money, nor did they have any assurance that they would in the future be able to discuss it with him. Accordingly, she turned this money over to Respondent to use in the defense of the client. Respondent had every right under 404.710 and 404.719 RSMo to assume that money Alphonse had put into Mulkey's hands, and that she in turn paid him, could and ought to be used for the purposes agreed. Since Mulkey acted strictly as fiduciary/agent for Alphonse in this transaction, the provisions of Rule 4-1.8(f) were not violated.

Similarly Respondent and Mulkey, as his Special Co-Trustee and attorney-in-fact, respectively, in a further vigorous effort to protect the rights and interests of Alphonse during that time when they were unable to confer with him, took steps to amend his estate plan by preparing a Third Amendment to his Forbeck Living Trust. This was done in

good faith in the belief that it would reinforce existing clauses in the trust set up by Alphonse with the intent to defeat interference in the plan by interlopers such as nephews Joseph and James. The logic of the amendment follows from the circumstances as then known by Respondent: [1] that it was impossible to confer directly with Alphonse to discuss the involuntary incompetency proceedings against him; [2] that those proceedings appeared to be hostile to him in that they exploited his blindness, old age, and confinement in the nursing home; [3] and that he had expressed an intent in his estate plan that his affairs would be managed and after his death, his property be distributed, according to his own expressed wishes rather than through intestate succession, the wishes and assumptions of others, and the need for probate.

The terms of the Third Amendment which Respondent drafted were never made public nor were they implemented. Indeed there was never an opportunity even after the fact for Respondent and Alphonse to discuss them. Therefore no court has ever examined its terms or considered how it might have affected the outcome of the wrangling over Alphonse's affairs. On the other hand, the modifications to the which Mennemeyer drafted similarly remained secret but were apparently implemented. It is clear that the Mennemeyer amendment to the estate plan moved the management of Alphonse's estate, no doubt to herself and the nephews. One can only speculate as to how they changed the distribution of the substantial assets after his death.

Guided by Rule 5.30[c], on March 24, 2009 Respondent initiated contact with the office of the Missouri Bar Ethics Counsel to discuss his professional quandary. He talked to

Sara Rittman the following day, receiving assurance that his continued efforts to represent Alphonse, under the circumstances, did not pose an ethical violation. She warned Respondent that he might not get paid for such efforts and indeed, except for the money he received from Mulkey, less amounts paid as expenses. A transcript of this conversation, prepared by the Office of the Missouri Bar Ethics Counsel is attached. [T-611-613].

Respondent did not invoice Alphonse and he received no further compensation for his trouble. Upon the dismissal of the probate case he asked that his fees and expenses be taxed as costs against the Petitioners under the provisions of 475.085.1 RSMO which provides that:

> "The costs of proceedings as to incapacity or disability of any person shall be paid from his estate if he is found incapacitated or disabled or, if his estate is insufficient, costs shall be paid by the county; but if the person is found not to be incapacitated or disabled, the costs shall be paid by the person filing the petition, unless he is a public employee acting in his official; capacity, in which case the costs shall be paid by the county",

However this request was never entertained by the probate court nor the appellate court. [A-174, 182]. Informant's charge to the effect that Respondent violated Rule 4-1.5 by charging excessive fees is contradicted by the reality that he sought unsuccessfully to submit his time and expense for judicial review, was rebuffed, and in consequence was paid virtually nothing.

The Stipulation concludes without explanation, that Alphonse Forbeck's appointment of Purcell & Amen as Special Co-Trustee of his trust created a conflict of interest under Rule 4-1.7 in that there was a significant risk that representation of the trust by Respondent and the law firm would be materially limited by Respondent's representation of Alphonse Forbeck. The Stipulation also states that [although he of course signed the trust] Alphonse never consented to this conflict in writing.[A-68]. The Stipulation does not further specify what conflict is perceived, nor whether it actually created a prejudice to a client representation or only created that possibility. Respondent reasonably concluded that a separate written explanation of the Special Co-Trustee role, beyond the terms of the trust provision itself and the extensive meetings they had had, particularly to a client who was visually impaired, would have served no useful purpose under Rule 4-1.4.

Regardless of the hypothetical possibilities that might have arisen from Respondent's dual fiduciary roles, when Alphonse was the subject of these incompetency proceedings, Respondent rose to the occasion. Whether as his attorney or as Special Co-Trustee, he sacrificed his own self-interests to zealously defend Alphonse in order that his rights might be vindicated and his plans carried out as he intended. The notion that Respondent's loyalties were somehow diluted or divided is not supported in the record and purely a construct by Informant. In fact the record shows that Respondent's efforts to "do the right thing" were driven by single-minded loyalty.

The hearing in the Probate Court on April 3, 2009 was for the purpose of disposing of pending preliminary matters raised by the parties, particularly as to whether Respondent's filings would be stricken and he discharged from further representing Alphonse. After hearing testimony from Alphonse, Respondent, and others, the court declined to strike Respondent's filings nor to remove him from the case. Under the circumstances it was reasonable for Respondent to conclude, as he had in the past, that terminating his efforts to help Alphonse would violate Rule 4-1.16 because withdrawal could not be accomplished without material adverse effect on the interests of the client.

Although not specifically named a "Link Hearing" by the court, to meet the requirements of *In re Link*, 713 SW2d 487 (Mo banc 1986), this was surely it. Thus irrespective of the eventual outcome of the case, the propriety of Respondent's continued advocacy was judicially acknowledged. Since uncertainty remained at that time as to whether Alphonse was or had been under undue influence either by Mulkey or by Mennemeyer, the Probate Court, attached little or no significance to his expressions that he did not want Respondent to represent him.

The terms and means by which Mennemeyer, Petitioners James and Joseph, and [purportedly] Alphonse dismissed the probate proceedings, and the manner in which the trial court approved it, were remarkable. It revealed that Mennemeyer, while representing to the Probate Court that Alphonse was incapacitated, had actually been meeting with him during the pendency of the temporary emergency probate on a completely separate mission to redo his estate plan. Such a project was certainly beyond, and in conflict with,

her special court appointed role. Equally remarkable was Mennemeyer and the Petitioners' consent judgment against Alphonse, waiving any accounting for the period during which they had complete control of his finances, and for an award of substantial attorney fees from Alphonse to Mennemeyer.

The things that were not accomplished or even attempted in the probate proceedings show that they were a complete sham, initiated by the Petitioners and aided by Mennemeyer for the sole purpose of "getting rid of Mulkey" as stated by James [A-71] and grabbing control of Alphonse's multi-million dollar estate. There is no indication whatever that the probate proceedings in any way had the intention or effect of benefitting Alphonse. Nor does the record reflect what became of Alphonse's estate or trust.

Petitioners and Mennemeyer did nothing whatsoever to investigate, prove, or reverse the alleged financial misconduct of which Ms. Mulkey was accused in the Petition, nor to bring Alphonse's finances under judicial scrutiny. Nothing was done to establish forensically whether Alphonse was or was not mentally competent and free of undue influence such that he could manage his own affairs. [Of course much later, the Petitioners filed a physician's affidavit with the Court of Appeals opining that Alphonse had never been incapable of managing his own affairs. Nothing was done to explain why such evidence as to his competence was unavailable on February 26, 2009.]

Nothing was done to establish that Alphonse, while under guardianship and conservatorship protection and isolated from those whom James, Joseph, and

Mennemeyer did not want him to communicate with, was not therefor under such undue influence by those purporting to protect him that he was nevertheless capable of freely changing his estate plan. To have allowed Alphonse to communicate freely would have undermined their control.

Nothing was done to show that in executing the dismissal of the probate proceeding, with its waiver of accounting and $15,000.00 consent judgment against him, Alphonse had an opportunity to consult an unbiased attorney, nor anyone other than Mennemeyer and Petitioners James and Joseph in whose favor the dismissal was negotiated. This conduct, which on its face violated Rule 4-1.8(a), is particularly shocking in view of the current accusations initiated by Mennemeyer and James and prosecuted by Informant against Respondent as to alleged bias and conflicts of interest.

Nothing was done to show why [since Alphonse was apparently competent, at least according to the physician's affidavit, and was no longer living in Mulkey's home] it was not possible in February 2009 for concerned family members to simply go to the nursing home, visit, and converse normally with Alphonse about his health and wellbeing, his finances, and his relationships with Mulkey and Respondent. Had Alphonse been willing to voluntarily discuss those things with James and Joseph they could have then suggested that he meet with another attorney. Alternatively if Alphonse had wanted to change his arrangements and was capable of taking initiative himself, he was certainly free to contact some other attorney to "get rid of Mulkey and Respondent" on his own. Of course

instead his nephews chose to file suit instead in order to gain control of their uncle and his money and farm.

Nothing was done to explain why Alphonse, if he freely and independently wanted to dismiss Respondent as his attorney, could not or would not simply meet with Respondent or otherwise communicate in a manner which would give a clear indication that he was acting on his own.

The reasonableness, and therefore the ethics, of Respondent's actions in representing, or purporting to represent, the interests of Alphonse Forbeck ought to be examined here, if at all, only in the context of what Respondent knew or should have known at the time of his actions, and in light of his reasonable beliefs as to what he was unable to determine. Moreover this examination ought to be done with an appreciation that undue influence, by its nature, causes the victim to deny that it has occurred and that its effects are unwanted. That examination will show that Respondent fairly believed that the probate proceeding was a fraud.

This Honorable Court ought not to engage in speculation as to what Respondent might have known had he been afforded a better or different opportunity to confer with his client. Nor should it base its determination upon assertions by Alphonse made when he was effectively and presumptively incapacitated by the pendency of the temporary emergency order, nor by the claims of Mennemeyer, James and Joseph which were on their face suspect as being hostile to the rights and interests of Alphonse. Finally this Court ought not to adjudicate Respondent's fate based upon the determination by the

Court of Appeals, that Respondent's efforts to assist Alphonse were mooted by the physician's affidavit that he was and had been competent all along , nor by the affidavit of Alphonse that he did not want the appeal to proceed on the merits.

Whether or not the filing, prosecution, and dismissal of the probate petition were actually a fraud upon Alphonse and upon the Probate Court, as Respondent suspected and asserted, is now beside the point. Alphonse has died and the underlying lawsuit and appeal are history. However contrasted with those of Mennemeyer, James and Joseph, all of Respondent's actions were fully disclosed to the courts, done in the full light of day, and done without profit to himself. Under the circumstances, the disciplinary Complaint by Mennemeyer etal. looks like an effort to use the Rules of Professional Conduct as a weapon against Respondent, invoked as a procedural weapon, to slander Respondent as they had previously slandered Mulkey, subverting the purpose of those Rules. Rule 4 Preamble [20].

As the record shows, Respondent filed the Notice of Appeal on behalf of Alphonse Forbeck, as well as himself and Purcell & Amen L.L.C. [A-73]. Just as he had at the lower court level, he laid out facts, issues, and legal theories consistently advocating the positions, including that he was a proper advocate for Alphonse, in accordance with the rules in such cases provided. Indeed the question of Respondent's role was the threshold issue. The Court of Appeals ultimately decided the matter based upon lack of standing. *In re Forbeck*, 310 SW3d 740 [ED Mo 2010]. However Respondent made no misstatement of fact in filing and arguing the appeal, and the Court of Appeals was in no way factually

misled. Assertion of a legal position or theory in a case which is overruled by the court is not a violation of Rule 4-8.4 [c]. If Respondent was unsuccessful in his advocacy for Alphonse, he was not unethical in doing so.

Informant has complained to the effect that in his reply to attorney Hagemeier's request that he consent to additional time for her to file an Answer Brief in the appeal, Respondent attempted to somehow create unfair competition in the adversary system by destroying or concealing evidence, improperly influencing witnesses, obstructive tactics in discovery process and the like, in violation of Rule 4-3.4. Unless the words "and the like " contained in that rule are to be read to include anything which an adversary finds contentious, what Respondent admits to have done was simply not a violation of that or any ethical rule.

In the first place, the disciplinary proceedings were not a competition between Respondent on the one hand and Hagemeier and her clients on the other. Secondly, Respondent's correspondence was at most an indication that in general he did not wish to extend extraordinary courtesies to Hagemeier. The letter from Respondent was not a denial of her request, nor did she understand it as such. In actuality, Hagemeier represented to the Court of Appeals that Respondent had assented to the continuance and the Court of Appeals granted her extra time. [T-607-610].

For much the same considerations in the delay of the DHP hearing in the Meyer matter [Count III], pending resolution of the appeal in that civil matter, Respondent had good reasons for asserting that any disciplinary action concerning the Forbeck representation

should await action by the courts which had subject matter jurisdiction over the very issues contained in the Complaint. Had the Court of Appeals ruled differently or had the disciplinary matter proceeded concurrently to the appeal, there was every possibility of prejudice, inconsistent results and wasted resources.

ARGUMENT

III.

INFORMANT'S CONTENTION THAT RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT IN ASSISTING ZEHNLE TO TAKE CARE OF HER AGED RELATIVES AND OF THEIR FINANCIAL AFFAIRS IS NOT SUPPORTED BY THE RECORD IN THAT, TAKING INTO ACCOUNT THE CIRCUMSTANCES KNOWN OR REASONABLY ASCERTAINABLE TO HIM HIS ASSISTANCE WAS:

[A] RENDERED IN A COMPETENT FASHION;

[B] PERFORMED IN GOOD FAITH AND WITHOUT EVIL OR SELFISH MOTIVE OR EFFECT;

[C] RESULTED IN SUBSTANTIAL BENEFIT TO ANNA HOLTZ AND STEVE BOLIANCE IN PROVIDING THEM WITH CARE AND ASSISTANCE IN THE LAST FEW MONTHS OF LIFE;

[D] RESULTED IN NO HARM TO ANNA HOLTZ OR STEVE BOLIANCE NOR TO ANYONE ELSE TO WHOM A DUTY WAS OWED;

[E] WAS RENDERED WITH THEIR IMPLIED APPROVAL AND WITHIN THE REASONABLE SCOPE OF HIS ENGAGEMENT TO PROVIDE THEM WITH POWERS OF ATTORNEY;

[F] RENDERED TO ZEHNLE ONLY FOR SO LONG AS THERE WAS NO CONFLICT OF INTEREST AND WAS PROMPTLY TERMINATED UPON THE FIRST APPEARANCE OF A CONFLICT OF INTEREST, AND WITH ASSURANCES THAT THE ESTATES OF THE DECEDENTS WERE REPRESENTED BY OTHER ATTORNEYS;

[G] RESPONDENT DID NOT ATTEMPT TO OBTAIN, NOR DID HE RECEIVE PERSONAL GAIN FROM THE REPRESENTATION APART FROM ATTORNEY FEES FOR ASSISTING HOLTZ AND BOLIANCE;

[H] RESPONDENT HAD NO POWER OR RESPONSIBILITY TO PROVIDE ACCOUNTING NOR TURN ASSETS OVER TO THE ESTATES NOR TO CONTROL ZEHNLE IN DOING SO.

When called upon by Susan Zehnle to advise her in assisting her great aunt Anna Holtz and her great uncle Steve Boliance, Respondent had the benefit of his decades of professional experience in dealing with seniors, their health, personal, and family affairs. He also had the benefit of the opportunity to meet and to the extent possible, personally evaluate the situations, needs, and wishes of Ms. Holtz and Mr. Boliance, and their relationships with Mrs. Zehnle. Moreover he could gauge the capabilities of both of the individuals to make decisions of varying simplicity or complexity. Finally he had guidance of Rule 4-1.14 and of long peer association through the many professional organizations of which he has been an active member, to make professional judgments as

to how to best carry out his responsibilities for clients who were to some degree disabled and vulnerable.

Given the circumstances as Respondent knew them, it was altogether reasonable that Respondent did not exhaustively explain each and every detail of the durable power of attorney documents to Holtz and Boliance. Nor, having ascertained that they wished for Mrs. Zehnle to take care of their personal and medical affairs as well as finances, that they completely trusted her and had no one else available to do it, was there any point in detailed warnings about the consequences, should Zehnle abuse her powers. Respondent sensibly determined that such zealous exposition in a nursing home situation would not be a benefit. Indeed, Informant has not suggested how it would have helped Holtz and Boliance.

As to Informant's suggestion that Respondent should have consulted with medical personnel as to the medical conditions of Holtz and Boliance, clearly at that point in time such communications would have likely violated their rights of privacy under HIPAA. 45 CFR Sections 164.500-164.502. Moreover, as an experienced estate planning and elder law attorney, Respondent was able to use his considerable experience in evaluating the soundness of their mental capability to make the decisions called for. In any event, the competency of Holtz and Boliance to understand the documents they signed was a functional and not a medical question. Informant's allegation that Respondent himself was professionally incompetent in his client interviews, violating Rule 4-1.1 ignores the actual context and purpose of the meeting: that Holtz and Boliance were able to secure

the personal care and financial assistance from Zehnle which they clearly needed and desired, when no one else, including Meyers, offered such assistance.

Respondent did not inquire of Holtz or Boliance as to whether they had existing trusts in place for the simple reason that he was at the nursing home only to inquire if they wished to have Susan Zehnle be attorney-in-fact to take care of their health and medical needs, and manage their finances. He did not go to see them about broader estate planning needs or wishes. Their conditions likely indicated that although it was vital that they obtain the sort of assistance afforded by powers of attorney, they were in no condition to discuss post mortem disposition of their estates, nor any other intricacies involved in trusts. Indeed had they been interested in or capable of talking to Respondent about such matters, it seems reasonable that they would have taken initiative to do so. Moreover had there been viable estate planning in place, including trusts and wills as well as a power of attorney for finances, and advanced medical directives, it would have been reasonable to assume that the proponents of such a plan [ie Meyers] would have stepped forward when help was desperately needed. Had the Meyers made themselves, their powers and responsibilities known in a timely fashion, neither Zehnle nor Respondent would have needed to take care of these fragile seniors. Instead Respondent was forced to represent his clients in a "fog of war" with limited information available.

Significantly, neither Boliance nor Holtz ever told Informant that they had previously executed trust documents, nor that they had selected Mr. and Mrs. Meyer, the named successor trustees, to administer their affairs. Perhaps just as significantly, from the time

the powers of attorney were executed until after the deaths of Holtz and Boliance, Mr. and Mrs. Meyer made no communication with Respondent indicating that they had a right or responsibility to care for them, or were even aware themselves of the existence of the trusts.

Informant suggests that having prepared and presented powers of attorney to Mrs. Holtz and Mr. Boliance for their signatures, Respondent was subsequently conflicted from advising Mrs. Zehnle as to how to use those tools to help her principals. Quite the contrary, their affirmation to Respondent that they agreed to sign the papers carried a reasonable implication that Respondent would at the very least explain the papers and resulting legal powers and responsibilities to Zehnle, in order that she could carry out the shared intentions. This interpretation would seem to be in line with the intention of Rule 4-1.14 (b) that a lawyer ought to take "reasonably necessary protective action, including consulting with individuals or entities that have the ability to protect the client." From the time that Boliance and Holtz agreed to the powers of attorney, Respondent and Zehnle had a shared mission to meet their needs. If it was reasonable and appropriate for Respondent to advise Zehnle in carrying out her duties as attorney in fact, then there was no actual conflict as that advice did not have the intention or effect of injuring the principals, or was otherwise waived.

The Opinion of the Missouri Court of Appeals [A-184, 188] and the Joint Stipulation [A-79] both indicate that it is unclear whether Respondent himself advised Zehnle to retitle the assets as she did or whether the advice was given either by another attorney or staff

member in the firm. Respondent denies having given such advice himself. Admittedly the retitling to joint tenancy was imprudent. However, shortly after the death of Holtz, Zehnle told Boliance of this retitling, he approved by saying: "Good, no court". [A-188]. Thus if a conflict existed, it was waived. Moreover the record is clear that Zehnle always understood that she was not entitled to keep the assets and that she never had an intention to do so.

Zehnle fulfilled her duties as attorney-in-fact for Boliance and Holtz by attending to their care and managing their finances. So far as was known to Respondent, she provided them with great benefit and with no design to enrich herself at their expense. Respondent similarly expressed an intention that the duties of the attorney-in-fact would be carried out so as to care for the principals and identify, safeguard, and account for their assets.

Unquestionably the potential existed for conflicts of interest to arise. Hypothetically there could have been disagreement between Holtz and Boliance or serious divergence of their interests. Either Holtz or Boliance or both could have changed their minds about the powers conferred upon Zehnle. Zehnle could have resigned or neglected her position or become unable to serve, leaving her elderly charges in a mess. Zehnle could have stolen their assets or otherwise abused her powers. Such possibilities would exist in any such fiduciary or agency-principal relationship.

In actuality none of the foregoing events occurred. However, inevitably, the power of attorney relationship dissolved with the deaths of the respective principals by operation of 404.717(4) RSMO. At that point it became Zehnle's duty under the provisions of

404.714.9 RSMO to account for her actions and for the property entrusted to her. Indeed it did not matter at that point how the assets were legally titled: whether still in the names of the decedents or in joint names, under custodial accounts, in trust or otherwise. If they were in Zehnle's possession or control, if she had documentation on them or otherwise had knowledge of them, she was duty bound to cooperate and make them known to the estate representatives.

Had Zehnle become personal representative for the decedent she would have been duty bound to account to the creditors and heirs of these respective estates. In that case Respondent could probably have continued to assist and advise her. But that was not to be.

Immediately upon being told by Zehnle that Holtz and Boliance had executed trusts prior to their deaths, Respondent himself sent the documents to the Meyers. He also informed them that he had been assisting Susan to take charge of assets and that they would be turned over as soon as estate planning documents were validated and letters of administration issued by the Probate Court. The reply from Meyers by their attorney to the effect that they intended to serve as fiduciaries and demanding that Zehnle immediately turn over all of her records and the property to them made it clear that an unwaiveable conflict of interest had arisen between Zehnle and the representatives of the estates, and that Respondent could no longer provide legal advice to Zehnle respecting the matter. It was at this point in time, and no earlier, that the provisions or Rule 4-1.7 (a) would prevent his continued representation of either Zehnle or of the estates.

The following facts were then evident: [a] that Zehnle would not be trustee or personal representative; [b] that she had a duty to account for her activity as attorney-in-fact and to turn over assets; and [c] that the probable legal successors to the Holtz and Boliance estates and trusts were represented by other attorneys. Respondent, while he still owed a duty of loyalty to Boliance and Holtz, himself possessed neither assets nor records belonging to the estates and trusts. It is significant to note that when Meyers later sued Zehnle for an accounting and return of the assets, Respondent and his law firm were not joined as co-defendants. The simple reason for not joining them was that the Plaintiffs knew Respondent was not in possession of the assets which they wanted and was not in a position to render the accounting. The duty to account and relinquish the property and records was exclusively in Zehnle herself. Therefore Respondent properly advised Zehnle that he could no longer represent her, and that she needed another attorney to advise her with respect to her duties. At Respondent's suggestion she retained the services of a new lawyer, Mike George.

Within days of Meyer's demand for an accounting, the transition from Respondent's representation of Zehnle as attorney-in-fact to attorney Mike George's representation of her for the purpose of making her accounting occurred. From that point Respondent was ethically prohibited from acting in any sort of representative capacity. The manner and time frame within which Zehnle and Mr. George resolved the issues with the estates was not his responsibility. Nor was the one-third contingent fee arrangement which Meyer apparently made with attorney David Butsch for recovery of the assets (which so far as

Respondent understood, Zehnle was always willing to relinquish) reasonably foreseeable. Finally, the lawsuit against Zehnle was not something Respondent could have anticipated, mitigated, or controlled. Respondent nevertheless bore a heavy cost in being assigned all of the blame and in incurring the cost of the civil litigation. Significantly, neither the Holtz and Boliance estates and trusts, nor their beneficiaries, incurred any damage because of Zehnle's or Respondent's alleged breaches because, as evidenced by the Satisfaction of Judgment [A-200], Respondent indemnified them.

ARGUMENT

IV.

CONSIDERING THE TOTALITY OF CIRCUMSTANCES, THE COURT SHOULD REJECT THE STIPULATION AS TO CONCLUSIONS OF LAW AND SANCTIONS AND COUNTS I, II AND III OF THE INFORMATION AGAINST RESPONDENT SHOULD BE DISMISSED.

STANDARDS AND PRACTICE IN EVALUATING LAWYER PERFORMANCE AND ASSESSING DISCIPLINE

The Preamble of the Rules of Professional Conduct sets out guidelines for their use, both by practitioners for self-assessment and for guidance in their personal and professional activities and for disciplinary authorities in evaluating those activities. To paraphrase, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation and of the law itself. Some are imperative, some discretionary, some descriptive. They are partly obligatory and disciplinary and partly constitutive and descriptive. [14]. The Rules presuppose a larger legal context in shaping the lawyer's role. That context includes court rules and statutes relating to licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general.[15]. The Rules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. [16].

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

Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. [20].

The ABA Standards for Imposing Lawyer Sanctions [A-577] discusses the imperative that in order for lawyer discipline to be truly effective, sanctions must be based on clearly developed standards and should be uniformly imposed. The Standards prescribe a protocol wherein the disciplinary authority first makes a determination of the facts giving rise to the complaint against the attorney. That determination is to be based upon the answers to the following questions:

[1] What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)

[2] What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

[3] What was the extent of the actual, or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and

[4] Are there any aggravating or mitigating circumstances? [A-581, 582].

Informant's insistence that the parties agree to a stipulated level of sanctions at a time that the facts and circumstances of the Meyer matter had not yet been resolved, was clearly contrary to the intent of the Rules and Standards which mandate that the level of sanctions be based upon facts clearly established. The problem was compounded later when, upon the reversal of Meyer by the Court of Appeals, Informant refused to acknowledge that the two year suspension was inappropriate. Further, Informant's insistence that Respondent was nevertheless obligated to join in the manufacture of a version of "facts" and conclusions of law to somehow justify the pre-ordained suspension, insulted the entire process.

Informant argues for sanctions against Respondent based upon scurrilous ex-parte factual narratives concocted by Complainants who had positions hostile to Respondent's clients, leading to erroneous assumptions as to the professional reasonableness of Respondent's decisions and conduct and concluding with false accusations of serious Rule violations. The Court ought to consider the sources and motivations driving those Complaints, and their virulence in assessing their worthiness.

Rather than address each of Informant's POINT IV conclusions in turn, Respondent's arguments in POINTS I, II, and III describe his client representations in each of the three Counts in a broader context which not only includes Missouri substantive law, Rule 4-1.14 and the American Bar Association Standards for Imposing Lawyer Sanctions, but also his background and experience.

In that context, one looks in vain for either a pattern of activity, or inactivity, or specific instances of Rule violation, which lead to the conclusion that Respondent should receive professional sanctions.

The three Counts all arise out of unique circumstances, showing no pattern of nonfeasance, malfeasance or misfeasance. None of the Complaints were actually made by a client. No client was injured in any way. All of the cases indicate that Respondent had the best of motives in representing the clients and acted reasonably, based upon the facts known and available to him. Each situation involved efforts to represent frail, dependent clients [Marcella Berndes, Anna Holtz, Steve Boliance and Alphonse Forbeck] through their caretakers. In each case, attorney-client communications and relationships depended upon Respondent's best efforts to maintain normal client relationships while turning to the assistance of others where necessary and appropriate.

REMORSE AND REGRET

Respondent has expressed deep remorse and regrets with respect to the matters at hand. With respect to the guardianship, conservatorship and trust for the benefit of Marcella Berndes, he regrets not having maintained more effective direct and indirect

communication with Mrs. Giess so as to be better able to deal with her discontent. In retrospect, had he personally met with she and Mrs. Wanner together, or called her promptly upon the departure from the firm of the lawyer previously assigned to handle the matter, andagain after her husband died, and periodically thereafter so as to monitor progress of the matter and explain processes to her, she might have had clearer and more realistic expectations, and perhaps delays and paperwork snags might have been better avoided. Such additional meetings and monitoring would have come with additional costs and probably not created particular economic benefit for the ward, but might have avoided her Complaint. New such procedures were implemented in the wake of her communication to Respondent in a continuing effort to avoid such difficulty in the future. [A-93].

With respect to Alphonse Forbeck, Respondent profoundly regrets that he was caught up in what began and ended as a losing battle to vindicate this elderly client's legal rights to manage his own affairs. Neither Respondent nor Alphonse could effectively control the situation because of his old age, blindness, ill health, and general fragility, and his inability to communicate freely and to make decisions free of restrictions and compulsions by his nephews and court appointed temporary emergency GAL. Respondent's regret is not that he did the wrong thing but that all of his efforts to do the right thing for his client were in vain. Respondent hoped all along that at some point the legal system would intervene to prevent what he was and remains convinced was a systematic abuse of his client. In this respect he was encouraged by what he thought was clear evidence that the probate case against Alphonse was filed and prosecuted slanderously and fraudulently; that the substantive law and Rules of Conduct mandated that he persistently advocate for his client of many years; by the refusal of the

Probate Court to remove him from the case or strike his pleadings; and by assurances from the Missouri Ethics Counsel that his course of action was acceptable, if unprofitable.

The notion that discretion is the better part of valor was not lost on Respondent. In this case neither discretion, nor valor, nor "the system" worked as Respondent had hoped and as a result, in Respondent's opinion, both Respondent and Alphonse have suffered greatly. But this has by no means been the only occasion that Respondent, during a forty year career as an attorney, has fiercely advocated for a client in what turned out to be a losing battle. Tough situations occasionally require personal and professional courage and in that, Respondent has no regrets.

With respect to use of special co-trustee clauses, Respondent adopted new protocols for assuring and documenting informed client consent, particularly where Respondent or his firm was named, in addition to the disclosures such as were previously made to Alphonse Forbeck and others in the text of the trust itself and in numerous meetings and phone discussions as to the terms and implications contained therein.[A-93].

With respect to the Holtz, Boliance and Zehnle representation. Respondent regrets the occurrence of many of the events which occurred. That when he first met with Anna Holtz and on the two occasions he met with Steve Boliance, that they were both in such a state that he was unable to engage in more in-depth conversations with them in order to deal more broadly and holistically with their situations, discover their objectives for post mortem disposition of their estates and learn that they had previously done some estate planning paperwork. That Susan Zehnle somehow concluded that she should title their assets jointly with herself and that she did so. That Zehnle did not herself learn in a more timely fashion about the unfunded trusts which Anna and Steve had previously executed,

so that she could have retitled their assets into such trusts, or left well enough alone. That Zehnle, being apparently unaware of the trusts during the lifetimes of Holtz and Boliance, and despite any resistance she may have encountered from financial institutions in dealing with assets as attorney in fact, did not either leave title to their assets as she found it, or put it under a clearly fiduciary name. That Respondent himself did not prevent Zehnle from retitling the assets as she did.

Respondent regrets that when Zehnle received the consent of Boliance for the retitling, she did not obtain written confirmation. Respondent regrets that Boliance and Holtz neglected to title their assets into the trusts when they were presumably able to do so, in order to avoid the uncertainty which later occurred during their period of incapacity, and further to avoid the need for probate at death. He regrets that Meyer, the appointed trustee, did not mobilize to help Boliance and Holtz with personal, medical and financial affairs in their time of need, showing up only after their deaths.

Respondent regrets that when Boliance and Holtz died, Zehnle did not make her accounting and turn over assets to the personal representatives of the estates more promptly to their satisfaction. He wishes that Mike George, her attorney at the time had more effectively advised her and worked with the estate attorneys to quickly and amicably resolve the accounting and turnover. Respondent regrets that Meyer and his attorneys somehow negotiated a one third contingent fee contract for the collection of estate assets in a situation which did not seem particularly unusual. [Charging fees radically different from those provided for collection and management of assets under the Missouri Probate Code. 473.153 and 473.155 RSMo seems to have created a conflict of interest between the attorneys and the beneficiaries of the estates. Statutory fees would have been in the neighborhood of $21,550 on assets of $800,000, less than one

tenth of what was paid by the estates and ultimately indemnified by Respondent in satisfaction of the civil matter.[A-93].]

As the Missouri Court of Appeals determined, using the standard of review which considered all of the evidence in the case, except for the possibility that he could have prevented Zehnle's retitling of the assets to joint names, this entire string of events was outside of Respondent's control. And Respondent remains convinced that as a factual matter it was not he that gave Zehnle the advice to retitle assets as she did. [A-79]. Moreover as a legal matter the retitling was harmless and not the cause of any actual damages to Meyer, the estates and trusts of Holtz and Boliance, their beneficiaries, or anyone else because it did not impede the ability nor heighten the responsibility of Zehnle to make her accounting and turnover to the estate representatives.

LESSONS LEARNED

Respondent has retired from active law practice much humbled and chagrined by events described in this matter. Unfortunately the prospect of public discipline will cause some further tarnish to what has been a good professional and personal reputation. Lessons which he has learned, and which may be learned by others from his experiences in these matters may include the following:

From Giess, that an unhappy client can cause significant wreckage to a career, even where the work has been done by subordinates in a workmanlike manner. This is nothing new to the corpus juris of the legal business. Every lawyer understands that big trouble can arise from small things and that bedside manners and good luck are often the keys to good client relations.

From the precedent of Respondent's discipline in the Forbeck matter, future practitioners may well choose to abandon elderly or otherwise fragile clients when

confronted by aggressive attempts to deprive them of their legal autonomy to manage their own affairs. Where a client has neither the capacity to maintain a normal, business-like attorney client relationship nor the means at his or her disposal to pay the lawyer large fees, an attorney will be a fool to follow in Respondent's footsteps in nevertheless trying to uphold justice.

From the precedent of Respondent's discipline in Forbeck, future lawyers may not comfortably rely on opinions obtained from the Missouri Legal Ethics Counsel, in rulings of probate courts in Link hearings, or in the plain language statutory mandates for guardianship and conservatorship petitions in representing clients claimed to be unable to manage their own affairs.

From the precedent of Respondent's discipline in the Holtz, Boliance and Zehnle representation, others may conclude that in assisting an attorney in fact to manage the personal and financial affairs of her principal, the latent conflict of interest which will surely become patent at the death of the principal, if not sooner, is simply not worth the risk, nor can it be effectively waived. The upshot of this conclusion will be that practitioners will choose not to give legal advice to attorneys in fact or other fiduciaries for persons with reduced capacity and declining health.

From the precedence of Respondent's discipline in response to the Meyer [Roddy] Complaint, others may conclude that an attorney working with an attorney in fact for a third person is strictly liable to fourth parties for everything done or not done by the attorney in fact, even after the attorney's relationship with the attorney in fact has terminated.

One would certainly hope that Respondent's discipline in response to the Meyer complaint would not lead to the conclusion that it is sometimes better not to disclose a

will or trust, where its operation may be contrary to the wishes and interests of others, and that Respondent's having sent the Holtz and Boliance trust documents to Meyer set in motion the events leading to the claim against him.

CONCLUSION

Although now retired from practicing law, Respondent would nevertheless like to maintain his license. He is concerned that suspension of his license would create a false, and harmful inference among his numerous clients and their families, that his past representations and counsel were somehow defective. Moreover a license suspension would generate inappropriate inferences within the general public as to the reliability of the legal profession in dealing with difficult issues, particularly pertaining to the legal needs of the elderly and persons under disability. A suspension of Respondent's law license in these circumstances, rather than improve the practice of law, will likely generate risk aversion in other conscientious members of the Bar who might otherwise seek to assist individuals with diminished capacity, through those willing and able to protect them. Suspension of Respondent's law license will encourage invocation of the disciplinary process as a procedural weapon in civil matters by non-clients or their lawyers, who are motivated solely by advantage for themselves.

Finally, Respondent would like the privilege of honorably retiring from active law practice with the ability to continue service in other ways, such as in charitable and civic organizations.

Respondent is not and does not pretend to be, like Stan Musial, the Perfect Warrior. His legal career, like other aspects of his life, in hindsight contained a fair number of miscalculations, misjudgments, and missteps. He is much humbled and saddened by

the situation in which he now finds himself. But the record, fairly presented, shows that in the matters before this Court his judgments and actions were reasonable and within the bounds of discretion.

His career has been a credit to the profession and he has already paid dearly for his alleged transgressions. He has satisfied the judgment to Meyer, given up his practice at a relatively early age, relinquished the law firm which he founded and which no longer even bears his name, spent countless uncompensated hours and expense in his efforts to help Alphonse Forbeck, and for the past several years suffered the pain and expense of defending both civil and disciplinary charges.

He is willing to accept this Court's fair determination and communication of his errors and anxious that the matter be finally concluded. He submits that his continued licensure will do no harm and prays this Honorable Court will forgive transgressions identified in this matter and dismiss the Complaints against him.

Respectfully submitted,

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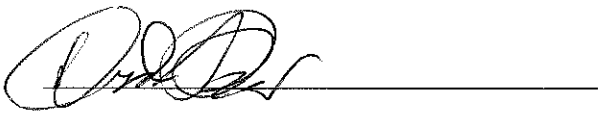
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2014, the Respondent's Brief was sent through the Missouri Supreme Court e-filing system to Maia Brodie, Special Representative , Division 4 , 222 South Central, Suite 708 St Louis MO 63105, attorney for Informant Chief Disciplinary Counsel.



David S. Purcell

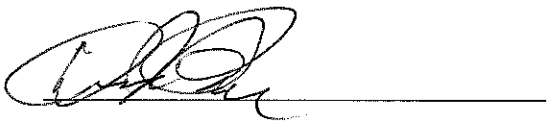
CERTIFICATION: RULE 84.06[c]

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

[1] includes the information required by Rule 55.03 and

[2] complies with the limitations contained in Rule 84.06[b] and

[3] contains 19,331 words according to Microsoft Word, the program used to prepare this brief.



David S. Purcell