

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**IN RE:**

**DAVID S. PURCELL,**

**Respondent.**

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**Supreme Court #SC94050**

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**INFORMANT'S BRIEF**

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ALAN D. PRATZEL      #29141  
Chief Disciplinary Counsel

MAIA BRODIE      #38442  
Special Representative, Division 4  
222 S. Central, Suite 708  
St. Louis, MO 63105  
Telephone: (314) 726-6242  
[mbrodie@keefebrodie.com](mailto:mbrodie@keefebrodie.com)

ATTORNEY FOR INFORMANT  
CHIEF DISCIPLINARY COUNSEL

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	1
TABLE OF AUTHORITIES .....	3
STATEMENT OF JURISDICTION .....	5
STATEMENT OF FACTS .....	6
<i>PROCEDURAL HISTORY &amp; KEY DATES</i> .....	6
BACKGROUND .....	8
DISCIPLINARY HISTORY .....	8
<i>COUNT I (GIESS)</i> .....	8
<i>COUNT II (FORBECK)</i> .....	10
<i>COUNT III (RODDY)</i> .....	15
THE DISCIPLINARY HEARING PANEL’S DECISION .....	21
POINTS RELIED ON	
I .....	25
II .....	26
III .....	28
IV .....	30
ARGUMENT	
I .....	31
II .....	34
III .....	41

IV.....	48
CONCLUSION .....	54
CERTIFICATE OF SERVICE.....	55
CERTIFICATION: RULE 84.06(C) .....	55

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Craig v. Jo B. Gardner, Inc.</i> , 586 S.W.2d 316, 320 (Mo. banc 1979).....	36
<i>In re Caranchini</i> , 956 S.W.2d 910 (Mo. banc 1997) .....	51
<i>In re Carey</i> , S.W.3d 477 (Mo. banc 2002).....	30, 51
<i>In re Coleman</i> , 295 S.W.3d 857 (Mo. banc 2009).....	30, 49, 50
<i>In re Donaho</i> , 98 S.W.3d 871, 873 (Mo. banc 2003) .....	32
<i>In re Griffey</i> , 873 S.W.2d 600 (Mo. banc 1994) .....	48
<i>In re Haggerty</i> , 661 S.W.2d 8, 10 (Mo. bank 1983) .....	32
<i>In re Kazanas</i> , 96 S.W.3d 803, 807-08 (Mo. banc 2003) .....	47, 51
<i>In re Littleton</i> , 719 S.W.2d 772, 777 (Mo. banc 1986).....	47
<i>In re Mirabile</i> , 975 S.W.2d 936, 939 (Mo. banc 1998) .....	35
<i>In re Weier</i> , 994 S.W.2d 554 (Mo. banc 1999).....	30, 49
<i>McLaughlin v. McLaughlin</i> , 427 S.W.2d 767, 768-69 (Mo. Ct. App. 1968).....	36

### **OTHER AUTHORITIES**

<i>ABA Standards for Imposing Lawyer Sanctions (1991 ed.)</i> .....	30, 47, 48, 49, 50, 52, 58
---	----------------------------

### **RULES**

RULE 4-1.1, Rules of Professional Conduct (2007) (amended effective July 1, 2007) .....	28, 29, 41, 42
RULE 4-1.2, Rules of Professional Conduct (2009).....	26, 27, 34
RULE 4-1.3, Rules of Professional Conduct (2007) (amended effective	

July 1, 2007).....	25, 28, 29, 31, 32, 41, 43, 50
RULE 4-1.4, Rules of Professional Conduct (2007) (amended effective	
July 1, 2007).....	25, 31, 32, 33
RULE 4-1.5 Rules of Professional Conduct (2009).....	26, 34, 36
RULE 4-1.7, Rules of Professional Conduct (2005).....	26, 27, 34, 36, 37, 38, 50
RULE 4-1.7, Rules of Professional Conduct (2007) (amended effective	
July 1, 2007).....	28, 29, 41, 43, 44, 45, 50
RULE 4-1.8, Rules of Professional Conduct (2009).....	26, 27, 34, 38
RULE 4-1.16 Rules of Professional Conduct (2009).....	27, 35, 39
RULE 4-3.4 Rules of Professional Conduct (2007) (amended effective	
July 1, 2007).....	27, 28, 35, 39, 41, 45, 50
RULE 4-5.3, Rule of Professional Conduct (2007) (amended effective	
July 1, 2007).....	25, 31, 33
RULE 4-8.4, Rules of Professional Conduct (2009).....	27, 29, 35, 40, 42, 46, 50

### **STATEMENT OF JURISDICTION**

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

## **STATEMENT OF FACTS**

### **PROCEDURAL HISTORY & KEY DATES**

November 27, 2001	Admonition – Communication Concerning Lawyer’s Services
May 17, 2012	Information
June 13, 2012	Respondent’s Answer and Affirmative Defenses to the Information
June 28, 2012	Appointment of Disciplinary Hearing Panel
September 24, 2012	Respondent’s Motion for Stay of Proceedings
October 1, 2012	Order: Respondent’s Motion for Stay of Proceedings Sustained (proceeds stayed pending final Order and Judgment in <i>Gerald D. Meyer, et al. v. David Purcell</i> , E.D. 97630)
August 29, 2013	Letter from Gary R. Sarachan recusing himself from Disciplinary Hearing Panel
September 13, 2013	Letter appointing Jeffrey P. Gault to replace Gary R. Sarachan on Disciplinary Hearing Panel
November 12, 2013	Notice of Hearing (Hearing Date: January 14, 2014)
January 9, 2014	Entry of Appearance for Ed Rolwes on behalf of Respondent
January 13, 2104	Respondent’s Motion to Substitute Attorneys
January 14, 2014	Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline

January 21, 2014	DHP decision adopting Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline
February 7, 2014	Acceptance of DHP decision by Informant
April 24, 2014	Record submitted and briefing schedule pursuant to Rule 84.24 (l) activated



## BACKGROUND

Respondent, David S. Purcell, is the former principal of Your Estate Matters LLC (formerly known as Purcell & Amen LLC) and has been licensed to practice law in the State of Missouri since 1973. **App. 4; 21-22.** Respondent graduated from Washington University School of Law in 1973. Upon graduation, Respondent founded Purcell & Associates as a general practitioner focusing on business litigation and estate planning, which over the years, grew and involved to become Your Estate Matters LLC. In addition to his law credentials, Respondent is a Registered Financial Consultant and holds a General Securities License and Life and Health Insurance License.

Respondent has retired from practicing law, but remains as a consultant and mentor to Your Estate Matters LLC.

## DISCIPLINARY HISTORY

On November 27, 2001, Informant issued Respondent a Letter of Admonition for violation of Rule 4-7.1 (Communication Concerning a Lawyer's Services). **App. 64.**

## COUNT I (GIESS)

Complainant, Linda Giess ("Mrs. Giess") and her husband, John Giess ("Mr. Giess"), were court appointed co-guardians of Marcella Berndes ("Ms. Berndes"), joint conservators of Ms. Berndes property, and successor co-trustees under a testamentary trust for which Ms. Berndes was the beneficiary. **App. 64.**

Ms. Berndes died intestate in November 2006 with four living blood relatives, one of whom was Mr. Giess. **App. 64.** Ms. Berndes' entire estate, including the testamentary trust for which she was a beneficiary, had a value of approximately \$30,000.00 (and was

entirely liquid). **App. 64.** There were no disputes among Ms. Berndes' four living blood relatives. **App. 64.**

On or about November 3, 2003, Mrs. Giess retained Purcell & Amen LLC to handle the legal issues associated with the guardianship of Ms. Berndes and their conservatorship and trusteeship over her estate and trust. **App. 64-65.** Then in January 2007, Mrs. Giess' case was assigned to Respondent following the departure from Purcell & Amen LLC of the attorney who was originally assigned to handle her case. **App. 65.**

During Respondent's representation of Mrs. Giess, Mrs. Giess had frequent contact with Respondent's paralegal, Mary Wanner ("Ms. Wanner"). **App. 65.** Mrs. Giess had little to no personal contact with Respondent. **App. 65.** Mrs. Giess' case was handled primarily by Ms. Wanner with no active supervision or direction from Respondent. **App. 65.**

On January 25, 2007, Mr. Giess died intestate. **App. 65.** Following Mr. Giess' death, Mrs. Giess asked Ms. Wanner to get her late-husband's affairs in order before work continued on her conservatorship over Ms. Berndes' estate and trust. **App. 65.** This work was also completed by Ms. Wanner without the active supervision of Respondent. **App. 65.**

On several occasions following her husband's death, Mrs. Giess called and complained to Ms. Wanner about the handling of her cases (*i.e.* Ms. Berndes' estate and trust and her late husband). **App. 66.** These complaints were addressed directly by Ms. Wanner without the knowledge of Respondent or his input. **App. 66.** While Respondent

ultimately investigated and responded to Mrs. Giess' complaints after she made the same in writing, he failed to become aware of or address any of her prior complaints. **App. 66.**

Apart from a delay in making final distributions to the residuary beneficiaries of Ms. Berndes' trust, no other harm was sustained in either of Mrs. Giess' cases. **App. 66.**

## **COUNT II (FORBECK)**

Sometime prior to 2005, Complainant, Alphonse Forbeck ("Mr. Forbeck"), entered into an oral caretaker agreement with Joann Mulkey ("Ms. Mulkey"). **App. 67.** Following this agreement, Mr. Forbeck moved into Ms. Mulkey's home in Lincoln County, Missouri. **App. 67.**

In 2005, Ms. Mulkey arranged for Mr. Forbeck to meet with Respondent for purposes of estate planning. **App. 67.** A written legal services agreement was entered into between Mr. Forbeck and Respondent. **App. 67.** As part of Mr. Forbeck's estate planning, Respondent reduced Mr. Forbeck and Ms. Mulkey's oral caretaker agreement into a written agreement for personal care ("Agreement"). **App. 68.** Respondent also drafted a revocable living trust, a pour-over will, a durable power of attorney, and a health care power of attorney ("Forbeck 2005 Estate Planning Documents") for Mr. Forbeck. **App. 68.**

On April 21, 2005, Mr. Forbeck met with Respondent and executed the Agreement and all of the Forbeck 2005 Estate Planning Documents, including Mr. Forbeck's Living Trust ("Forbeck Living Trust") which appointed Ms. Mulkey and Mr. Forbeck as co-trustees. **App. 68.** The Forbeck 2005 Estate Planning Documents also granted Ms. Mulkey power of attorney under both Mr. Forbeck's durable power of attorney and Mr. Forbeck's

health care power of attorney and included a special provision appointing Purcell & Amen LLC as special co-trustee to the Forbeck Living Trust “to protect the financial resources control and governed by the [Forbeck Living Trust] and the interest of the beneficiaries.”

**App. 68.** Respondent continued to perform legal services for Mr. Forbeck related to his estate plan after the Forbeck 2005 Estate Planning Documents were executed, including but not limited to meeting with Mr. Forbeck to execute several restatements to Forbeck Living Trust. **App. 68-69.**

Then, in 2009, Mr. Forbeck’s nephews, James Forbeck (“J. Forbeck”) and Joseph Schneider (“Mr. Schneider”) (collectively “Petitioners”), filed a petition in Lincoln County, Missouri requesting emergency guardianship and conservatorship over Mr. Forbeck (Cause No. 09L6-PR00030). **App. 69.** Said action was induced by Petitioners’ claim that Ms. Mulkey was exerting undue influence over Mr. Forbeck as his care provider and stealing from Mr. Forbeck’s assets. **App. 69.**

On February 26, 2009, an emergency hearing was held on Petitioner’s petition. **App. 69.** Temporary letters of emergency guardianship and conservatorship were issued, and attorney Chris Mennemeyer (“Attorney Mennemeyer”) was appointed as *Guardian ad Litem* for Mr. Forbeck until another guardian could be appointed or private counsel entered on Mr. Forbeck’s behalf. **App. 69.**

Respondent first learned of the emergency hearing and temporary orders upon his February 27, 2009 visit with Gerontologist Diane Keefe (“Ms. Keefe”), who was present so that she could administer a competency exam, to the facility where Mr. Forbeck was residing. **App. 69.** Upon trying to meet with Mr. Forbeck, Respondent was advised by the

facility administrator, Linda Haake (“Ms. Haake”) that he could not meet with Mr. Forbeck without the consent of either J. Forbeck or Attorney Mennemeyer. **App. 69.** Over Ms. Haake’s objection, and without the consent of J. Forbeck or Attorney Mennemeyer, Respondent and Ms. Keefe proceeded to meet with Mr. Forbeck. **App. 70.** The meeting ended and Respondent and Ms. Keefe left the facility upon being advised that they would be arrested if they did not leave voluntarily. **App. 70.**

On March 3, 2009, Respondent, without Mr. Forbeck’s consent, entered his appearance in Cause No. 09L6-PR00030 as attorney for Mr. Forbeck. **App. 70.** Following his entry, Respondent proceeded to file numerous pleadings and motions on Mr. Forbeck’s behalf. **App. 70.**

On March 4, 2009, the third amendment to the Forbeck Living Trust was drafted by Respondent and executed by Ms. Mulkey as attorney-in-fact for Mr. Forbeck. **App. 70.** Mr. Forbeck had not requested nor authorized Respondent to draft the amendment, nor was he consulted regarding any of its provisions. **App. 70.**

On or about March 6, 2009, at Mr. Forbeck’s request that Attorney Mennemeyer draft whatever documents necessary “to get rid of” Ms. Mulkey and Respondent, Attorney Mennemeyer made written demand upon Respondent for Mr. Forbeck’s complete client file, including all of the estate planning documents Respondent had drafted on Mr. Forbeck’s behalf. **App. 70.** Respondent failed to comply with Attorney Mennemeyer’s request. **App. 70.** Instead, Respondent advised that he would continue to serve as Mr. Forbeck’s attorney as he believed he had not received any instructions to the contrary. **App. 70.**

On March 12, 2009, Attorney Mennemeyer filed a Motion to Strike All Filings of [Respondent], arguing that Respondent had no authority to represent Mr. Forbeck. **App. 71.**

On March 23, 2009, Mr. Forbeck, through Attorney Mennemeyer, modified the Forbeck Living Trust, his durable power of attorney, and his healthcare power of attorney to remove Ms. Mulkey from every capacity in which she had previously been appointed. **App. 71.**

On or about March 25, 2009, Respondent contacted the office of Missouri's Legal Ethics Counsel to seek advice and direction on whether he could, should, or should not proceed as Mr. Forbeck's attorney. **App. 71.** Respondent was advised that based on the facts presented, he could continue to represent Mr. Forbeck until there was a final order of a court of competent jurisdiction either appointing a guardian or conservator, or otherwise finally disposing of the case. **App. 71.**

On April 3, 2009, a hearing was held in Cause No. 09L6-PR00030 before Judge Ben Burkemper. **App. 71.** Mr. Forbeck testified, in the presence of Respondent, that he did not hire Respondent to represent him (in Cause No. 09L6-PR00030) and that he did not want Respondent to serve as his attorney. **App. 71.**

On April 7, 2009, Attorney Mennemeyer's Motion to Strike All Filings of [Respondent] was denied. **App. 71.** Shortly thereafter, on April 20, 2009, Petitioners and Mr. Forbeck dismissed their petition (filed in Cause No. 09L6-PR00030) and entered into a Consent Judgment which approved legal fees in the amount of \$15,000.00 for Attorney Mennemeyer and had a Waiver of Accounting signed and entered by the Court. **App. 72.**

Despite Mr. Forbeck's testimony in Cause No. 09L6-PR00030 that he did not hire Respondent to represent him and the April 20<sup>th</sup> dismissal of Petitioner's petition, Respondent continued to advocate for and accrue charges for time and services for Mr. Forbeck (with respect to Cause No. 09L6-PR00030), including filing motions to tax attorney's fees against Petitioners and a request to set aside the April 20<sup>th</sup> dismissal. **App. 72.**

On or about May 21, 2009, Mr. Forbeck and J. Forbeck sent a joint letter to Respondent requesting that he deliver Mr. Forbeck's complete client file to Mr. Forbeck. **App. 72.** On or about June 2, 2009, Respondent responded to the joint letter by expressing concern that the request was not actually coming from Mr. Forbeck, and offered to bring the file to a meeting with Mr. Forbeck. **App. 72.**

On June 16, 2009, Respondent's pending motions in Cause No. 09L6-PR00030 were denied and disposed of by final order and judgment. **App. 72.**

On June 29, 2009, Respondent, without Mr. Forbeck's knowledge or consent, filed a Notice of Appeal on behalf of Mr. Forbeck, himself, and Purcell & Amen LLC. **App. 73.** As a result of Respondent's filing, Mr. Forbeck retained attorney Melanie Hagemeyer ("Attorney Hagemeyer") to represent him (in the appeal). **App. 73.** On or about July 6, 2009, Mr. Forbeck advised Respondent that he had no desire to meet with him to retrieve his file and demanded that Respondent drop the appeal that had been filed on his behalf. **App. 73.**

On January 12, 2010, Attorney Hagemeyer sent a letter to Respondent requesting additional time in which file Mr. Forbeck's response brief to Respondent's brief already

on file. **App. 73.** On January 12, 2014, Respondent replied to Attorney Hagemeyer saying: “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 I am not so amenable to extending professional courtesy on the appeal while the complaint remains in its present status.” **App. 73.**

On May 18, 2012, the Missouri Court of Appeals, Eastern District, dismissed the appeal filed by Respondent for lack of standing. **App. 73.**

During the course of Respondent’s representation of Mr. Forbeck in Cause No. 09L6-PR00030, Respondent accepted, without Mr. Forbeck’s knowledge or consent, \$12,500.00 of Mr. Forbeck’s money from Ms. Mulkey as the trustee of the Forbeck Living Trust; those funds were applied to Purcell & Amen LLC for fees (with the balance being applied towards accounting, outside counsel, and expenses charged to Respondent by Ms. Keefe for his competency evaluation). **App. 74.**

### **COUNT III (RODDY)**

Complainant, attorney Daniel M. Roddy (“Attorney Roddy”) was hired by Jacqueline and Gerald Meyer, the named personal representatives and trustees for the estates and trusts of Anna Holtz (“Ms. Holtz”) and Steven Boliance (“Mr. Boliance”), to administer their probate estates and trusts following their deaths on December 4, 2007, and December 7, 2007, respectively. **App. 77.** Mr. Boliance was Ms. Holtz’s brother-in-law. **App. 77.**

Prior to their deaths, on October 22, 2007, Susan Zehnle (“Ms. Zehnle”), the great-niece of both Ms. Holtz and Mr. Boliance, met with Respondent to discuss how she could



assist Ms. Holtz and Mr. Boliance in managing their finances due to their deteriorating health. **App. 77.** Ms. Holtz and Mr. Boliance, both in their nineties, were in advanced stages of physical and mental decline. **App. 77.** During their meeting, Respondent suggested Ms. Zehnle and he visit Ms. Holtz and Mr. Boliance to ascertain more about their conditions and obtain their signatures of powers of attorney and medical directives (that Respondent would prepare) naming Ms. Zehnle as their attorney-in-fact. **App. 77.** No inquiry was made of Ms. Zehnle, by Respondent, as to whether Ms. Holtz and Mr. Boliance already had estate planning documents in place. **App. 78.**

On October 24, 2007, Ms. Zehnle and Respondent met with Ms. Holtz, who at that time was suffering from dementia and Alzheimer's. **App. 78.** Respondent had Ms. Holtz execute a power of attorney that he had previously prepared without making any independent inquiries with medical personnel in order to ascertain Ms. Holtz's mental capacity at the time. **App. 78.** Ms. Holtz's signature was notarized by Respondent. **App. 78.** On October 24, 2007, Ms. Zehnle and Respondent also met with Mr. Boliance with the intention of having him execute a power of attorney that he had previously prepared but Mr. Boliance refused. **App. 78.**

On November 2, 2007, Mr. Boliance had suffered a stroke and was rushed by ambulance to St. Louis University Hospital where Ms. Zehnle and Respondent met with Mr. Boliance and had him the same power attorney they had previously attempted to have executed on October 24<sup>th</sup>. **App. 78.** Respondent again did not make any independent inquiries with medical personnel in order to ascertain Mr. Boliance's capacity at the time.

**App. 78.** Mr. Boliance signed with an “X,” which was then notarized by Respondent.

**App. 78.**

Respondent did not consult with either Ms. Holtz or Mr. Boliance prior to the drafting of or the execution of their powers of attorney to inquire whether they already had estate planning documents in place. **App. 78.** Respondent also did not review with either Ms. Holtz or Mr. Boliance the specific powers being granted to Ms. Zehnle by their powers of attorney nor did he provide them with copies of their powers of attorney upon their execution. **App. 79.**

On or about November 12, 2007, Ms. Zehnle withdrew funds from bank accounts belonging to Ms. Holtz and Mr. Boliance and deposited them into accounts titled in her, Ms. Holtz’s, and Mr. Boliance’s joint names. **App. 79.** Ms. Zehnle also cashed out all of Ms. Holtz and Mr. Boliance’s U.S. Savings Bonds and purchased new ones on which she was the payee on death beneficiary. **App. 79.** These transfers all took place pursuant to the direction of either Respondent or one or more other Purcell & Amen LLC personnel. **App. 79.**

On December 4, 2007, Ms. Zehnle executed a general warranty deed transferring Ms. Holtz and Mr. Boliance’s jointly owned real property to Ms. Holtz, Mr. Boliance, and Ms. Zehnle as joint tenants with rights of survivorship. **App. 79.** Said deed was prepared and executed upon the direction of either Respondent or one or more other Purcell & Amen LLC personnel. **App. 79.**

On December 4, 2007, Ms. Holtz passed away. **App. 79.** Mr. Boliance passed three days later on December 7<sup>th</sup>. **App. 79.** Upon Ms. Holtz and Mr. Boliance's death, Ms. Zehnle held sole legal title to, and possession of substantially all of their assets. **App. 80.**

On or about December 8, 2007, Ms. Zehnle discovered both Ms. Holtz and Mr. Boliance's preexisting estate plans and turned them over to Respondent. **App. 80.** Then on December 10, 2007, Respondent contacted Jaqueline and Gerald Meyer, the named personal representatives and trustees for the estates and trusts of Ms. Holtz and Mr. Boliance under their preexisting estate plans. **App. 80.** Respondent informed them that Ms. Zehnle had retitled Ms. Holtz and Mr. Boliance's assets to include herself in a joint capacity in order to avoid probate. **App. 80.**

On December 14, 2007, Ms. Zehnle paid Respondent and Purcell & Amen LLC legal fees in the amount of \$5,000.00 from one of Ms. Holtz's bank accounts that had previously been retitled to add her name. **App. 80.**

On December 21, 2007, attorney Harvey Avellone ("Attorney Avellone"), on behalf of Gerald Meyer, wrote a letter to Respondent demanding an accounting and return of all of Ms. Holtz and Mr. Boliance's assets currently being held by Ms. Zehnle. **App. 80.** On December 26, 2007, Respondent responded stating that, "Once we have received notification of the formal documentation appointing your client as personal representative, we will be happy to turn over an accounting and additional information so that your client may undertake the necessary steps to administer the estate." **App. 80-81.** Over the course of the next two months, neither Respondent nor Ms. Zehnle provided any sort of accounting

(despite repeated additional requests to do so by the attorneys for Gerald Meyer and the estates and trusts of Mr. Boliance). **App. 81.**

On January 15, 2008, Purcell & Amen LLC recorded the general warranty deed, previously executed on December 4, 2007 with the Recorder of Deeds of the City of St. Louis. **App. 79, 81.**

In March, 2008, Respondent prepared personal estate planning documents for Ms. Zehnle and her husband, including wills for both and a living trust. **App. 81.** Ms. Zehnle and her husband were also provided with information regarding mutual funds that were available for purchase from Purcell & Amen Financial LLC, and it was suggested that they set up and fund their living trust with the same (although neither of them opened any accounts with nor ever invested any money with Purcell & Amen Financial LLC). **App. 81.**

On March 11, 2008, a Petition for Discovery of Assets and Breach of Fiduciary Duty against Ms. Zehnle was filed in the Probate Division of the City of St. Louis on behalf of Gerald Meyer and the estates and trusts of Mr. Boliance by attorney David Butsch (“Attorney Butsch”) to recover property Attorney Butsch claimed had been wrongfully transferred by Ms. Zehnle to herself under the direction and assistance of Respondent and Purcell & Amen LLC (Estate No. 0822-PR00029). **App. 81-82.** In May, 2008, Ms. Zehnle provided an accounting and returned assets totaling \$860,689.96 pursuant to Consent Order entered by Judge David Dowd. **App. 82.**

On March 4, 2009, Attorney Butsch, on behalf of the estates and trusts of Ms. Holtz and Mr. Boliance, filed suit against Respondent and Purcell & Amen LLC for civil

conspiracy and legal malpractice in the City of St. Louis alleging that Respondent was negligent in causing the transfer of Ms. Holtz and Mr. Boliance's assets to Ms. Zehnle without regard to their estate plans already in place, and for failing to advise or assist Ms. Zehnle in proving an accounting of or return of said assets (Cause No. 0922-CC01005).

**App. 82.** In request for production of documents served on Respondent and Purcell & Amen, LLC (in Cause No. 0922-CC01005), Plaintiffs requested the production all documents relating to their representation of Ms. Zehnle. **App. 82.** In response thereto, Respondent and Purcell & Amen LLC failed to produce the will they had prepared for Ms. Zehnle, as well as the brochures given to her and her husband advertising Purcell & Amen Financial LLC mutual funds. **App. 82.**

At trial in Cause No. 0922-CC01005, Ms. Zehnle and Attorney Avellone testified that Respondent failed to cooperate or assist in their efforts to recover Ms. Holtz or Mr. Boliance's assets. **App. 82.** Ms. Zehnle further testified that the after the lawsuit was filed against her in Estate No. 0822-PR00029, Respondent refused her request for her client file (and was never informed of Attorney Avellone's demands for the return of assets). **App. 82-83.**

On August 5, 2011, verdicts were returned in Cause No. 0922-CC01005 in favor of the estates and trusts of Ms. Holtz and Mr. Boliance against Respondent and Purcell & Amen LLC in the amounts of \$256,896.52 in compensatory damages and \$600,000.00 in punitive damages. **App. 83.**

On July 16, 2012, the Missouri Court of Appeals, Eastern District, issued its opinion affirming the compensatory damages but setting aside the award of punitive damages,

holding that the trial court had erred in submitting the issue of punitive damages to the jury.<sup>1</sup> **App. 77.**

### **THE DISCIPLINARY HEARING PANEL’S DECISION**

On January 21, 2014, the Disciplinary Hearing Panel accepted the Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommendation for Discipline submitted to it by the parties, which found that:

- In *Count I*, Respondent violated Rule 4-1.3 (diligence) by not making himself aware as to the status of Mrs. Giess’ case and then failing to personally act after Mrs. Giess had complained of Ms. Wanner’s ineffectiveness. **App. 66;**
- In *Count I*, Respondent violated Rule 4-1.4 (a) (communication) by neglecting to contact Mrs. Giess after her case had been transferred to him following the departure of the original attorney assigned to her case. **App. 66;**
- In *Count I*, Respondent violated Rule 4-5.3 (b) (responsibilities regarding non-lawyer assistants) by failing to supervise the work of Ms. Wanner in handling Mrs. Giess’ cases. **App. 76;**
- In *Count II*, Respondent violated Rule 4-1.2 (a) (scope of representation) by continuing to represent Mr. Forbeck in Cause No. 09L6-PR00030 after Mr. Forbeck testified that he no longer wanted to be represented by Respondent. **App. 75;**

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<sup>1</sup> *Meyer, et al. v. Purcell*, 405 S.W.3d 572 (Mo. Ct. App. E.D. 2013).

- In *Count II*, Respondent violated Rule 4-1.5 (a) (fees) by accruing fees and expenses for time and services in Cause No. 09L6-PR00030 (and the subsequent appeal) after his effective discharge. **App. 75;**
- In *Count II*, Respondent violated Rule 4-1.7 (a) (conflict of interest: current clients) by materially limiting his representation of Mr. Forbeck in that he arranged for his law firm, Purcell & Amen LLC to be appointed as a special co-trustee of the Forbeck Living Trust. **App. 74;**
- In *Count II*, Respondent violated Rule 4-1.7 (b) (conflict of interest: current clients) by failing to obtain Mr. Forbeck's informed, written consent to his law firm's appointment as special co-trustee of the Forbeck Living Trust. **App. 74;**
- In *Count II*, Respondent violated Rule 4-1.8 (f) (conflict of interest: prohibited transactions) by accepting \$12,500.00 from Ms. Mulkey as trustee of the Forbeck Living Trust without Mr. Forbeck's knowledge or consent. **App. 75;**
- In *Count II*, Respondent violated Rule 4-1.16 (d) (declining or terminating representation) by failing to surrender Mr. Forbeck's client file to Mr. Forbeck after Mr. Forbeck had terminated his representation and after Mr. Forbeck had, on several occasions, requested his client file from Respondent. **App. 76;**
- In *Count II*, Respondent violated 4-3.4 (fairness to opposing party and counsel) by suggesting to Attorney Hagemeyer that he would be amenable to extending professional courtesies of granting more time (with respect to Mr. Forbeck's

response to Respondent's appellate brief) if the disciplinary complaint filed against him was dropped or stayed. **App. 76;**

- In *Count II*, Respondent violated Rule 4-8.4 (c) (misconduct) by misrepresenting his status to the court in filing a notice of appeal on Mr. Forbeck's behalf without Mr. Forbeck's consent or knowledge after Mr. Forbeck stated he did not want to be represented by Respondent. **App. 76-77;** and
- In *Count III*, Respondent violated Rule 4-1.1 (competence) by failing to meet alone with either Ms. Holtz or Mr. Boliance to ascertain their mental capacity, by failing to make independent inquiries with medical personnel in order to ascertain Ms. Holt or Mr. Boliance's mental capacity, by failing to inquire as to whether Ms. Holtz or Mr. Boliance already had estate plans in place, and by advising Ms. Zehnle to use her power of attorney to transfer ownership of Ms. Holtz and Mr. Boliance's residence. **App. 83-84;**
- In *Count III*, Respondent violated Rule 4-1.3 (diligence) by failing to turn over to Ms. Holtz or Mr. Boliance's personal representative information regarding their estate assets in a timely manner. **App. 84;**
- In *Count III*, Respondent violated Rule 4-1.7 (a) (conflict of interest: current clients) by materially limiting his representation of Ms. Zehnle, Ms. Holtz, and Mr. Boliance in that he represented the attorney-in-fact (Ms. Zehnle) and the principals (Ms. Holtz and Mr. Boliance, respectively) of the same power of attorney at the same time. **App. 84;**



- In *Count III*, Respondent violated Rule 4-1.7 (b) (conflict of interest: current clients) by failing to obtain informed, written consents from either Ms. Zehnle, Ms. Holtz, or Mr. Boliance for his representation of both Ms. Holtz and Mr. Boliance as the principals under their respective powers of attorney and Ms. Zehnle as both Ms. Holtz and Mr. Boliance's attorney-in-fact. **App. 85;**
- In *Count III*, Respondent violated 4-3.4 (d) (fairness to opposing party and counsel) by not making a reasonably diligent effort to provide all potentially responsive documents related to a discovery request in a pending lawsuit. **App. 85;** and
- In *Count III*, Respondent violated Rule 4-8.4 (d) (misconduct) by failing to make a reasonably diligent effort to locate all potentially responsive documents in response to a production request in Cause No. 0922-CC01005). **App. 85-86.**

Following an analysis of relevant decisions from this Court and the ABA's *Standards for Imposing Lawyer Sanctions*, the Panel recommended that this Court issue an indefinite suspension with leave to apply for reinstatement after two years. **App. 86.** Informant accepted the Panel's recommendation on February 7, 2014. **App. 305.** Respondent was deemed to have accepted the Panel's recommendation on or about March 5, 2014. **App. 308.**

**POINT RELIED ON**

**I.**

**IN COUNT I, RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:**

- (A) FAILING TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT IN VIOLATION OF RULE 4-1.3;**
- (B) FAILING TO KEEP THE CLIENT REASONABLY INFORMED ABOUT THE STATUS OF THE MATTER IN VIOLATION OF RULE 4-1.4 (a); AND**
- (C) FAILING TO MAKE REASONABLE EFFORTS TO ENSURE A NON-LAWYER'S CONDUCT WAS COMPATIBLE WITH THE PROFESSIONAL OBLIGATIONS OF THE LAWYER IN VIOLATION OF RULE 4-5.3 (b).**

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, Rule of Professional Conduct (2007) (amended effective July 1, 2007)

**POINT RELIED ON**

**II.**

**IN COUNT II, RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:**

**(A) FAILING TO ABIDE BY A CLIENT'S DECISION  
CONERNING THE OBJECTIVES OF  
REPRESENTATION IN VIOLATION OF RULE 4-1.2**

**(a);**

**(B) CHARGING AN UNREASONABLE FEE IN  
VIOLATION OF RULE 4-1.5 (a);**

**(C) ENGAGING IN A CONFLICT OF INTEREST  
BETWEEN CURRENT CLIENTS THEREBY  
CREATING A SIGNIFICANT RISK THAT THE  
REPRESENTATION OF ONE CLIENT WOULD BE  
MATERIALLY LIMITED BY THE LAWYER'S  
RESPONSIBILITIES TO ANTOHER CLIENT IN  
VIOLATION OF RULE 4-1.7;**

**(D) ACCEPTING COMPENSATION FOR  
REPRESENTING A CLIENT FROM ONE OTHER  
THAN THE CLINET IN VIOLATION OF RULE 4-1.8 (f);**

**(E) FAILING TO PROTECT A CLIENT'S INTEREST  
BY NOT SURRENDING PAPERS AND PROPERTY TO**

**WHICH THE CLIENT WAS ENTITLED IN  
VIOLATION OF RULE 4-1.16 (d);**

**(F) ENGAGING IN ACTION PROHIBITIVE TO FAIR  
COMPETITION IN THE ADVERSARY SYSTEM IN  
VIOLATION OF RULE 4-3.4; AND**

**(G) ENGAGING IN CONDUCT INVOLVING  
DISHONESTY, FRAUD, DECEIT, OR  
MISREPRESENTATION IN VIOLATION OF RULE 4-  
8.4 (c).**

Rule 4-1.2, Rules of Professional Conduct (2009)

Rule 4-1.7, Rules of Professional Conduct (2005)

Rule 4-1.8, Rules of Professional Conduct (2009)

Rule 4-8.4, Rules of Professional Conduct (2009)

**POINT RELIED ON**

**III.**

**IN COUNT III, RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:**

**(A) FAILING TO PROVIDE COMPETENT REPRESENTATION TO A CLIENT IN VIOLATION OF RULE 4-1.1;**

**(B) FAILING TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT IN VIOLATION OF RULE 4-1.3;**

**(C) ENGAGING IN A CONFLICT OF INTEREST BETWEEN CURRENT CLIENTS THEREBY CREATING A SIGNIFICANT RISK THAT THE REPRESENTATION OF ONE CLIENT WOULD BE MATERIALLY LIMITED BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT IN VIOLATION OF RULE 4-1.7;**

**(D) FAILING TO MAKE A REASONABLY DILIGENT EFFORT TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST BY AN OPPOSING PARTY IN VIOLATION OF RULE 4-3.4 (d); AND**

**(G) ENGAGING IN CONDUCT THAT IS PREJUDICIAL  
TO THE ADMINISTRATION OF JUSTICE IN  
VIOLATION OF RULE 4-8.4 (d).**

Rule 4-1.1, Rules of Professional Conduct (2007) (amended effective July 1, 2007)

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

Rule 4-1.7, Rules of Professional Conduct (2007) (amended effective July 1, 2007)

Rule 4-8.4, Rules of Professional Conduct (2009)

**POINT RELIED ON**

**IV.**

**PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE  
ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS  
SUGGEST SUSPENSION IS THE APPROPRIATE SANCTION IN  
THIS CASE WHERE RESPONDENT:**

- (A) ENGAGED IN CONFLICTS OF INTEREST  
BETWEEN CURRENT CLIENTS; AND**
- (B) ENGAGED IN CONDUCT INVOLVING  
DISHONESTY, FRAUD, DECEIT, OR  
MISREPRESENTATION.**

*In re Weier*, 994 S.W.2d 554 (Mo. banc 1999)

*In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009)

*In re Carey*, S.W.3d 477 (Mo. banc 2002)

*ABA Standards for Imposing Lawyer Sanctions* (1991 ed.)

## **ARGUMENT**

### **I.**

**IN COUNT I, RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:**

- (A) FAILING TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT IN VIOLATION OF RULE 4-1.3;**
- (B) FAILING TO KEEP THE CLIENT REASONABLY INFORMED ABOUT THE STATUS OF THE MATTER IN VIOLATION OF RULE 4-1.4 (a); AND**
- (C) FAILING TO MAKE REASONABLE EFFORTS TO ENSURE A NON-LAWYER’S CONDUCT WAS COMPATIBLE WITH THE PROFESIONAL OBLIGATIONS OF THE LAWYER IN VIOLATION OF RULE 4-5.3 (b).**

*Violation of Rule 4-1.3.* Respondent admits he did not make himself aware as to the status of Mrs. Giess’ cases and failed to personally act after Mrs. Giess had complained of Ms. Wanner’s ineffective handling of her case. **App. 66.** By that conduct, Respondent violated Rule 4-1.3 (diligence).

Rule 4-1.3 provides, in pertinent part, that:

A lawyer shall act with reasonable diligence and promptness in representing a client. Rule 4-1.3 (2007) (amended effective July 1, 2007).



A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. Comment [1] to Rule 4-1.3 (2007) (amended effective July 1, 2007). A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. *Id.* The public should be able to rely on an attorney's devotion to his clients' interests. *In re Donaho*, 98 S.W.3d 871, 873 (Mo. banc 2003) (citing *In re Haggerty*, 661 S.W.2d 8, 10 (Mo. banc 1983)).

Here, Respondent failed to act with commitment and dedication to the interests of Mrs. Giess by not making himself aware as to the status of Mrs. Giess' cases and failing to personally act after Mrs. Giess complained of Ms. Wanner's ineffectiveness.

*Violation of Rule 4-1.4 (a).* Respondent admits he neglected to contact Mrs. Giess after her case had been transferred to him following the departure of the original attorney assigned to her case. **App. 66.** By that conduct, Respondent violated Rule 4-1.4 (a).

Rule 4-1.4 (a) states, in pertinent part, that:

(a) A lawyer shall keep a client reasonably informed about the status of the matter... Rule 4-1.4 (a) (2007) (amended effective July 1, 2007).

Reasonable communication between the client and the lawyer is necessary for the client effectively to participate in the representation. Comment [1] to Rule 4-1.4 (2007) (amended effective July 1, 2007). The client should have sufficient information to participate in decisions concerning the objectives of the representation and the means by

which they are to be pursued. Comment [2] to Rule 4-1.4 (2007) (amended effective July 1, 2007).

Here, Respondent failed to provide Mrs. Giess with sufficient information to participate in the means by which the objectives of her representation were to be pursued.

*Violation of Rule 4-5.3 (b).* Respondent admits he failed to supervise the work of Ms. Wanner in handling Mrs. Giess' cases. **App. 67.** By that conduct, Respondent violated Rule 4-5.3 (b) (2007) (amended effective July 1, 2007).

Rule 4-5.3 provides, in pertinent part, that:

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

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Rule 4-5.3 (b) (2007) (amended effective July 1, 2007).

Lawyers generally employ assistants in their practice, including secretaries and paraprofessionals. Comment [1] to Rule 4-5.3 (b) (2007) (amended effective July 1, 2007). Such assistants act for the lawyer in rendition of the lawyer's professional services and must be given appropriate instruction and supervision concerning the ethical aspects of their employment and should be responsible for their work product. *Id.*

Here, Respondent failed to provide appropriate supervision of Ms. Wanner.

**ARGUMENT**

**II.**

**IN COUNT II, RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:**

**(A) FAILING TO ABIDE BY A CLIENT'S DECISION  
CONERNING THE OBJECTIVES OF  
REPRESENTATION IN VIOLATION OF RULE 4-1.2;**

**(B) CHARGING AN UNREASONABLE FEE IN  
VIOLATION OF RULE 4-1.5 (a);**

**(C) ENGAGING IN A CONFLICT OF INTEREST  
BETWEEN CURRENT CLIENTS THEREBY  
CREATING A SIGNIFICANT RISK THAT THE  
REPRESENTATION OF ONE CLIENT WOULD BE  
MATERIALLY LIMITED BY THE LAWYER'S  
RESPONSIBILITIES TO ANTOHER CLIENT IN  
VIOLATION OF RULE 4-1.7;**

**(D) ACCEPTING COMPENSATION FOR  
REPRESENTING A CLIENT FROM ONE OTHER  
THAN THE CLINET IN VIOLATION OF RULE 4-1.8 (f);**

**(E) FAILING TO PROCTECT A CLIENT'S INTEREST  
BY NOT SURRENDING PAPERS AND PROPERTY TO**

WHICH THE CLIENT WAS ENTITLED IN  
 VIOLATION OF RULE 4-1.16 (d);  
 (F) ENGAGING IN ACTION PROHIBITIVE TO FAIR  
 COMPETITION IN THE ADVERSARY SYSTEM IN  
 VIOLATION OF RULE 4-3.4; AND  
 (G) ENGAGING IN CONDUCT INVOLVING  
 DISHONESTY, FRAUD, DECEIT, OR  
 MISREPRESENTATION IN VIOLATION OF RULE 4-  
 8.4 (c).

*Violation of Rule 4-1.2 (a).* Respondent admits he failed to abide by Mr. Forbeck's decisions when he continued to represent him after Mr. Forbeck had testified in Cause No. 09L6-PR00030 that he no longer wanted to be represented by Respondent. **App. 75.** By that conduct, Respondent violated Rule 4-1.2 (a).

Rule 4-1.2 (a) provides, in pertinent part, that:

A lawyer shall abide by a client's decisions concerning the objections of representation...and shall consult with the client as to the means by which they are to be pursued. Rule 4-1.2 (a) (2009).

Attorneys generally must follow their client's instructions. *In re Mirabile*, 975 S.W.2d 936, 939 (Mo. banc 1998). The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Comment [1] to Rule 4-1.2 (2009). When an attorney is

discharged he no longer acts for his former client. *McLaughlin v. McLaughlin*, 427 S.W.2d 767, 768-69 (Mo. Ct. App. 1968).

Here, Respondent failed to follow Mr. Forbeck's instructions and continued to act for him as his attorney after being discharged.

*Violation of Rule 4-1.5 (a).* Respondent admits he continued to accrue fees and expenses for time and services related to Cause No. 09L6-PR00030 and the subsequent appeal after being discharged by Mr. Forbeck. **App. 75.** By that conduct, Respondent violated Rule 4-1.5 (a).

Rule 4-1.5 states, in pertinent part, that:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Rule 4-1.5 (a) (2009).

Rule 4-1.5 (a) requires that lawyers charge fees that are reasonable under the circumstances. Comment [1] to Rule 4-1.5 (2009). If the client is dissatisfied with his attorney, however, he has the legal right to discharge him and employ other counsel (subject to the attorney's right under certain conditions to be paid a fee). *Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d 316, 320 (Mo. banc 1979).

Here, Respondent had no right to be paid a fee, much less to continue accruing fees, after being discharged by Mr. Forbeck.

*Violation of Rule 4-1.7.* Respondent admits to engaging in a concurrent conflict of interest when Purcell & Amen LLC was appointed as a special co-trustee of the Forbeck Living Trust while Respondent continued to represent Mr. Forbeck. **App. 74.** At no time

did Respondent make Mr. Forbeck aware of the conflict of interest that existed, inform him that his representation of the Forbeck Living Trust and himself at the same time created a significant risk that representation of one could materially limit his representation of the other, or solicit or obtain waivers from either Mr. Forbeck or the Forbeck Living Trust for their respective representations. By that conduct, Respondent violated Rule 4-1.7.

Rule 4-1.7 provides, in pertinent part, that:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. Rule 4-1.7 (2005).

Loyalty is an essential element in the lawyer's relationship to a client. Comment [Loyalty to a Client] to Rule 4-1.7 (2005). Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. *Id.* A possible conflict does not itself preclude representation. *Id.* A client may consent to representation notwithstanding a conflict, however, when more than one client is involved, the question of conflict must be resolved as to each client. Comment [Consultation and Consent] to Rule 4-1.7 (2005).

Here, Respondent's loyalty to both Mr. Forbeck and the Forbeck Living Trust was impaired by his concurrent representation of both in that Respondent could no longer

recommend or advocate all possible positions that each might take. The conflict of interest, in effect, foreclosed alternatives to each that would have otherwise been available. And while the conflict of interest did not preclude his representation of either, his failure to resolve the conflict as to each did.

*Violation of Rule 4-1.8 (f).* Respondent admits that he accepted \$12,500.00 from Ms. Mulkey as trustee of the Forbeck Living Trust without Mr. Forbeck's knowledge or consent. **App. 75.** By that conduct, Respondent violated Rule 4-1.8 (f).

Rule 4-1.8 provides, in pertinent part, that:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent. Rule 4-1.8 (f) (2009).

Because third-party payers frequently have interests that differ from those of the client, lawyers are prohibited from accepting or continuing representations in which a third person will compensate the lawyer, in whole or in part, unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. Comment [11] to Rule 4-1.8 (2009).

Here, Respondent failed to obtain Mr. Forbeck's informed consent regarding Ms. Mulkey's payment of legal fees on his behalf.

*Violation of Rule 4-1.16 (d).* Respondent admits to failing to surrender Mr. Forbeck's client's file after Mr. Forbeck terminated his representation and after Mr. Forbeck had, on several occasions, requested his client file from Respondent. **App. 76.** By that conduct, Respondent violated Rule 4-1.16 (d).

Rule 4-1.16 states, in pertinent part, that:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled. Rule 4-1.16 (d) (2009).

A client has a right to discharge a lawyer at any time, with or without cause (subject to liability for payment for the lawyer's services). Comment [4] to Rule 4-1.16 (2009). Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Comment [9] to Rule 4-1.16 (2009).

Here, Respondent failed to take all reasonable steps to mitigate the consequences of his discharge by Mr. Forbeck.

*Violation of Rule 4-3.4.* Respondent admits to suggesting to Attorney Hagemeyer that he would be amenable to extending professional courtesies of granting more time (with respect to Mr. Forbeck's response to Respondent's appellate brief) if the disciplinary complaint filed against him was dropped or stayed. By that conduct, Respondent violated Rule 4-3.4.

Rule 4-3.4 contemplates fair competition in the adversary system, which is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. Comment [1] to Rule 4-3.4 (2009).

Here, Respondent engaged in action prohibitive to fair competition in the adversary system.



*Violation of Rule 4-8.4 (c).* Respondent admits that he misrepresented his status to the court when he filed a notice of appeal on Mr. Forbeck's behalf without Mr. Forbeck's consent or knowledge and after Mr. Forbeck had stated he did not want to be represented by Respondent. By that conduct, Respondent violated Rule 4-8.4 (c).

Rule 4-8.4 states, in pertinent part, that:

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 4-8.4 (2009).

A lawyer should be professionally answerable for offenses that indicate lack of those characteristics relevant to law practice. Comment [2] to Rule 4-8.4 (2009). Offenses involving dishonesty, breach of trust, or serious interference with the administration of justice are in that category. *Id.*

Here, Respondent's misrepresentation to the court that he represented Mr. Forbeck when in fact he did not (and after it had been explicitly stated Mr. Forbeck did not want to be represented by Respondent) indicates a lack of those characteristics relevant to law practice.

**ARUGMENT**

**III.**

**IN COUNT III, RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:**

**(A) FAILING TO PROVIDE COMPETENT REPRESENTATION TO A CLIENT IN VIOLATION OF RULE 4-1.1;**

**(B) FAILING TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT IN VIOLATION OF RULE 4-1.3;**

**(C) ENGAGING IN A CONFLICT OF INTEREST BETWEEN CURRENT CLIENTS THEREBY CREATING A SIGNIFICANT RISK THAT THE REPRESENTATION OF ONE CLIENT WOULD BE MATERIALLY LIMITED BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT IN VIOLATION OF RULE 4-1.7;**

**(D) FAILING TO MAKE A REASONABLY DILIGENT EFFORT TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST BY AN OPPOSING PARTY IN VIOLATION OF RULE 4-3.4 (d); AND**

**(G) ENGAGING IN CONDUCT THAT IS PREJUDICIAL  
TO THE ADMINISTRATION OF JUSTICE IN  
VIOLATION OF RULE 4-8.4 (d).**

*Violation of Rule 4-1.1.* Respondent admits he failed to meet alone with either Ms. Holtz or Mr. Boliance to ascertain their mental capacity, failed to make independent inquiries with medical personnel in order to ascertain Ms. Holtz or Mr. Boliance's mental capacity, failed to inquire as to whether Ms. Holtz or Mr. Boliance already had estate in plans in place, and advised Ms. Zehnle to use her power of attorney to transfer ownership of Ms. Holtz and Mr. Boliance's residence. **App. 83-84.** By that conduct, Respondent violated Rule 4-1.1.

Rule 4-1.1 states, in pertinent part, that:

A lawyer shall provide competent representation to a client. Client representation requires the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation. Rule 4-1.1 (2007) (amended effective July 1, 2007).

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. Comment [5] to Rule 4-1.1 (2007) (amended effective July 1, 2007). It also includes adequate preparation. *Id.*

Here, Respondent failed to use methods and procedures meeting the standards of competent practitioners.

*Violation of Rule 4-1.3.* Respondent admits he failed to turn over to Mr. Holtz or Mr. Boliance's personal representative information regarding their estate assets in a timely manner. By that conduct, Respondent violated Rule 4-1.3.

Rule 4-1.3 provides, in pertinent part, that:

A lawyer shall act with reasonable diligence and promptness in representing a client. Rule 4-1.3 (2007) (amended effective July 1, 2007).

Perhaps no professional shortcoming is more widely resented than procrastination. Comment [3] to Rule 4-1.3 (2007) (amended effective July 1, 2007). A client's interests often can be adversely affected by the passage of time or the change of conditions. *Id.* Even when the client's interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. *Id.*

Here, Respondent's procrastination adversely affected Mr. Holtz or Mr. Boliance's personal representative and undoubtedly contributed to, if not caused, the retention of Attorney Butsch to file suit in Estate No. 0822-PR00029.

*Violation of Rule 4-1.7.* Respondent admits to engaging in a concurrent conflict of interest when he represented Ms. Zehnle as the attorney-in-fact and Ms. Holt and Mr. Boliance as the principals under their respective powers of attorney at the same. At no time did Respondent make Ms. Zehnle, Ms. Holtz, or Mr. Boliance aware of the conflict of interest that existed, inform them that his representation of the attorney-in-fact and principal under the same power of attorney created a significant risk that representation of one could materially limit his representation of the other, or solicit or obtain waivers from

either Ms. Zehnle, Ms. Holtz, or Mr. Boliance for their respective representations. By that conduct, Respondent violated Rule 4-1.7.

Rule 4-1.7 provides, in pertinent part, that:

(a) Except as provided in Rule 4-1.7 (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client...

(b) Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7 (a), a lawyer may represent a client if:

(4) each affected client gives informed consent, confirmed in writing.

Rule 4-1.7. Rule 4-1.7 (2007) (amended effective July 1, 2007).

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Comment [1] to Rule 4-1.7 (2007) (amended effective July 1, 2007). A conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. Comment [8] to Rule 4-1.7 (2007) (amended effective July 1, 2007). The conflict of interest forecloses alternatives that would otherwise be available to the client. *Id.* A possible conflict does not itself preclude representation. A client may consent to representation, however, Rule 4-1.7 (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Comment

[20] to Rule 4-1.7 (2007) (amended effective July 1, 2007). Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. Comment [18] to Rule 4-1.7 (2007) (amended effective July 1, 2007).

Here, Respondent's loyalty to Ms. Zehnle, Ms. Holtz, and Mr. Boliance was impaired by his concurrent representation of all three of them in that Respondent could no longer recommend or advocate all possible positions that each might take. The conflict of interest, in effect, foreclosed alternatives to each that would have otherwise been available. And while the conflict of interest did not preclude Respondent's representation of any of them, his failure to make each aware of the circumstances and the material and reasonably foreseeable ways that the conflict could have adverse effects on each them (and confirm that understanding in writing) did.

*Violation of Rule 4-3.4 (d).* Respondent admits to not making a reasonably diligent effort to provide all potentially responsive documents related to a discovery request in a pending lawsuit (Cause No 0922-CC01005). **App. 85.** By that conduct, Respondent violated Rule 4-3.4 (d).

Rule 4-3.4 states, in pertinent part, that:

A lawyer shall not:

(d) In pretrial procedure...fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Rule 4-3.4 (d) (2009).

Documents and other items of evidence are often essential to establish a claim or defense. Comment [2] to Rule 4-3.4 (2009). Subject to evidentiary privileges, the right of an opposing party to obtain evidence through discovery or subpoena is an important procedural right. *Id.* The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. *Id.*

Here, Respondent frustrated opposing party's right to obtain evidence through discovery.

*Violation of Rule 4-8.4 (d).* Respondent admits to failing to make a reasonably diligent effort to locate all potentially responsive documents in response to a production request in Cause No. 0922-CC01005. By that conduct, Respondent violated Rule 4-8.4 (d).

Rule 4-8.4 states, in pertinent part, that:

It is professional misconduct for a lawyer to:

(d) Engage in conduct that is prejudicial to the administration of justice. Rule 4-8.4 (d) (2009).

A lawyer should be professionally answerable for offenses that indicate lack of those characteristics relevant to law practice. Comment [2] to Rule 4-8.4 (2009). Offenses involving dishonesty, breach of trust, or serious interference with the administration of justice are in that category. *Id.*

Here, Respondent's failure to locate all potentially responsive documents in response to a production request indicates a lack of those characteristics relevant to law practice.

## ARGUMENT

### IV.

**PREVIOUS MISSOURI SUPREME COURT DECISIONS AND THE  
ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS  
SUGGEST SUSPENSION IS THE APPROPRIATE SANCTION IN  
THIS CASE WHERE RESPONDENT:**

- (A) ENGAGED IN CONFLICTS OF INTEREST  
BETWEEN CURRENT CLIENTS; AND**
- (B) ENGAGED IN CONDUCT INVOLVING  
DISHONESTY, FRAUD, DECEIT, OR  
MISREPRESENTATION.**

The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003). Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the bar from engaging in similar conduct. *Id.* (citing *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986)).

This Court often refers to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (hereinafter referred to as the "ABA Standards") in determining appropriate (*i.e.* direct or indirect) discipline. The ABA Standards recommend baseline discipline for specific acts of misconduct taking into consideration the duty violated, the lawyer's mental state, and the extent of injury or potential injury. *In re Griffey*, 873 S.W.2d



600 (Mo. banc 1994). Once the baseline discipline is known, the ABA *Standards* allow consideration of aggravating and mitigating circumstances. ABA *Standards for Imposing Lawyer Sanctions* (1991 ed.)(p.6). The ABA *Standards* “assume that the most important ethical duties are those obligations which a lawyer owes to clients” and provides that the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations. ABA *Standards: Theoretical Framework* (p.5-6).

Here, Respondent’s most serious violation was breaching the duty of loyalty to his clients by failing to avoid conflicts of interest. Failure to avoid conflicts of interest is addressed in ABA Standard 4.3, and having considered the case at bar, Informant believes that Standard 4.32 is applicable: **Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.** ABA Standard 4.32.

In *Count II*, Respondent breached the duty of loyalty owed to his clients by failing to avoid a conflict of interest when Purcell & Amen LLC was appointed as special co-trustee of the Forbeck Living Trust while Respondent continued to represent Mr. Forbeck. Similarly, in *Count III*, Respondent failed to avoid a conflict interest when he represented Ms. Zehnle as the attorney-in-fact and Ms. Holt and Mr. Boliance as the principals under their respective powers of attorney at the same time.

This Court has had prior opportunities to address the issues presented by this case, specifically the appropriate sanction for attorneys found to have engaged in conflicts of interest. In *In re Weier*, 994 S.W.2d 554 (Mo. banc 1999), this Court found that Attorney’s

violation of the conflict of interest rules warranted public reprimand. In *Weier*, Attorney represented a partnership of urologists who owned a medical device that was leased to a corporation in which Attorney was a shareholder. *Id.* at 557. This Court reasoned that the circumstances of the case “fit squarely” into the language of ABA *Standard* 4.33 and the comments thereto which note that reprimand is the most appropriate sanction where, “a lawyer engages in a single instance of misconduct involving a conflict of interest when the lawyer has merely been negligent and there is no overreaching or serious injury to the client.” *See id.* at 559.

In *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009), this Court found that Attorney’s violation of the conflict of interest rules warranted a stayed suspension, subject to Attorney’s completion of a one year term of probation. *Id.* at 859. Attorney was hired by Client to represent her in three separate civil actions. *Id.* The fee agreement in each case originally required non-refundable retainers, but was eventually converted to contingent fee agreements giving Attorney the “exclusive right to determine when and for how much” to settle her cases. *Id.* at 860. Attorney subsequently attempted to settle one of Client’s three cases, against her wishes, and when he was unable to do so, withdrew from all three cases; but not before one of Client’s cases was dismissed and summary judgment had been rendered against her in another. *Id.* at 860-61. This Court found Attorney had “improperly” contracted with Client to for the exclusive right to settle her cases and furthermore, that it was unreasonable for Attorney to believe that his interests would not adversely affect his representation of Client. *Id.* at 865. In applying the ABA

*Standards*, this Court reasoned that the nature of Attorney's conduct justified a stayed suspension. *Id.* at 870-71.

Informant submits that Respondent's conduct is more egregious than that found in *In re Weir* and *In re Coleman* and warrants an indefinite suspension. In both *Counts II* and *III*, Respondent undertook a series of representations which not only violated Rule 4-1.7, but caused discernable harm to his clients. In *Count II*, for example, Respondent's representation of Ms. Zehnle as the attorney-in-fact and Ms. Holt and Mr. Boliance as the principals under their respective powers of attorney at the same time undoubtedly paved the way for two different lawsuits (Estate No. 0822-PR00029 and Cause No. 0922-CC01005), one of which resulted in a verdict in favor of Respondent's client in the amount of \$256,896.52 in compensatory damages.

Additionally, since 2005, Respondent has repeatedly violated rules related to diligence (Rule 4-1.3), fairness to opposing counsel (Rule 4-3.4), and misconduct (Rule 4-8.4). Suspension is similarly appropriate for Respondent's violation of Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Engaging in professional misconduct is addressed in ABA Standard 4.6, and having considered the case at bar, Informant believes that Standard 4.62 is applicable: **Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to a client.** ABA Standard 4.62.

In *Count III*, Respondent breached his duty to the general public by engaging in conduct involving deceit and misrepresentation when Respondent filed a notice of appeal on Mr. Forbeck's behalf without Mr. Forbeck's consent or knowledge and after Mr.

Forbeck had stated he did not want to be represented by Respondent. Respondent knew his was making a false statement to the court and his action involves deceit and misrepresentation requiring discipline.

Disciplinary actions involving false statements have resulted in suspension before. In *In re Carey*, for example, the submission of false discovery responses in a pending case resulted in the attorneys being suspended. *See In re Carey*, S.W.3d 477 (Mo. banc 2002). Disciplinary actions involving false statements have also resulted in more serious discipline. In *In re Caranchini*, a lawyer's use of a forged document in legal proceeding after she discovered it was forged resulted in disbarment. *See In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997).

This Court has long held that the purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. *In re Kazanas*, 96 S.W.3d at 807-08 (Mo. banc 2003). Respondent has practiced law since 1973 and while only receiving one admonition prior to 2005 for communication concerning a lawyer's services, since 2005, there has been a pattern of misconduct that requires protection of the public.

The integrity of the legal profession has been adversely affected by Respondent's conduct. Respondent has made extremely poor choices over the past six years which adversely affect his fitness to practice law and seriously affect his professional abilities. Most importantly, there was serious harm to the public and the integrity of the law as a result of Respondent's professional misconduct.

The ABA *Standards* do not account for multiple charges of misconduct. ABA *Standards* (p.6). And while the ultimate sanction imposed should at least be consistent with the sanction for most serious instance of misconduct among a number of violations, it might well be and generally should be greater than the sanction for the most serious misconduct. *Id.*

Once the baseline discipline is known, it is appropriate to allow consideration of aggravating and mitigating circumstances. *Id.* Respondent's previous disciplinary offenses and substantial experience in the practice of law can be considered aggravating factors. *Id.* (p.49). There are, however, several mitigating factors, including the absence of a selfish or dishonest motive, timely good faith effort to make restitution or to rectify consequences of misconduct, and full and free disclosure to the disciplinary board and cooperative attitude toward proceedings. *Id.* (p. 50)

On the basis of its analysis of this Court's decisions and the guidance provided by the ABA *Standards*, the Panel recommended that this Court issue an indefinite suspension with leave to apply for reinstatement after two years. Informant concurs in the Panel's well-reasoned recommendation and believes that such is adequate to protect the public and maintain the integrity of the legal profession.

## CONCLUSION

Respondent committed professional misconduct in violating Rules 4-1.1, 4-1.2 (a), 4-1.3, 4-1.4 (a), 4-1.5 (a), 4-1.7, 4-1.8 (f), 4-1.16 (d), 4-3.4, and 4-8.4 (c) and (d). Respondent's actions not only reflect adversely on his ability to practice law, meeting the ABA Standard for a suspension, they rise to the level such that it "seriously adversely" reflects on his fitness to practice as required for more stringent discipline. Accordingly, Informant respectfully requests that the Court issue an indefinite suspension with leave to apply for reinstatement after two years for his violations of the Rules of Professional Conduct.

Respectfully submitted,

ALAN D. PRATZEL            #29141  
Chief Disciplinary Counsel



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MAIA BRODIE                            #38442  
Special Representative, Division 4  
222 S. Central, Suite 708  
St. Louis, MO 63105  
Telephone: (314) 726-5155  
[mbrodie@keefebrodie.com](mailto:mbrodie@keefebrodie.com)

ATTORNEY FOR INFORMANT  
CHIEF DISCIPLINARY COUNSEL

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of June, 2014, the Informant's Brief was sent through the Missouri Supreme Court e-filing system to:

Edward J. Rolwes  
13321 N. Outer Forty Rd., Ste. 300  
St. Louis, Missouri 63017

**Attorney for Respondent**



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Maia Brodie

**CERTIFICATION: RULE 84.06(c)**

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 10,661 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



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Maia Brodie