IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
SETH D. SHUMAKER,	**)**	**Supreme Court #SC91076**
	)	
Respondent.	**)**	

INFORMANT'S REPLY BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL

SHARON K. WEEDIN #30526
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400
Sharon.Weedin@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF FACTS

Informant stands by the Statement of Facts set forth in Informant's brief.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN ADVERSE INTEREST IN CLIENT PLUNKETT'S PROPERTY (PROMISSORY NOTE AND DEED OF TRUST) ON TERMS THAT WERE UNREASONABLE AND UNFAIR, WERE NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING, DID NOT ALLOW PLUNKETT REASONABLE OPPORTUNITY TO SEEK ADVICE OF INDEPENDENT COUNSEL, AND TO WHICH PLUNKETT DID NOT CONSENT IN WRITING.

POINT RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.7(b) AND RULE 4-1.8(b) IN THAT RESPONDENT'S REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS WAS MATERIALLY LIMITED BY HIS OWN INTERESTS AND THOSE OF MR. PLUNKETT'S, RESPONDENT COULD NOT HAVE REASONABLY BELIEVED HIS REPRESENTATION OF MR. PLUNKETT WOULD NOT ADVERSELY AFFECT HIS REPRESENTATION OF THE JOHNSON CLIENTS, AND IN THAT HE USED INFORMATION RELATING TO THE REPRESENTATION TO MR. PLUNKETT'S DISADVANTAGE AFTER THE CLIENT TOLD HIM NOT TO.

POINT RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN INTEREST ADVERSE TO THE SKINTAS (WARRANTY DEED AND LEASE) ON TERMS THAT WERE NOT FAIR AND REASONABLE, NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING TO THE CLIENTS, AND TO WHICH THE CLIENTS WERE NOT GIVEN A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL, AND DID NOT GIVE WRITTEN CONSENT.

POINT RELIED ON

IV.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE HE KNOWINGLY AND BY SUBTERFUGE ACQUIRED OWNERSHIP OF OR INTEREST ADVERSE TO CLIENTS' PROPERTY IN THAT THE CLIENTS WERE IN VULNERABLE SITUATIONS, RESPONDENT DID NOT DISCLOSE IN WRITING THE TERMS OF THE TRANSACTIONS AND DID NOT OBTAIN WRITTEN INFORMED CONSENT TO THE CONFLICTS INHERENT IN THE TRANSACTIONS.

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN ADVERSE INTEREST IN CLIENT PLUNKETT'S PROPERTY (PROMISSORY NOTE AND DEED OF TRUST) ON TERMS THAT WERE UNREASONABLE AND UNFAIR, WERE NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING, DID NOT ALLOW PLUNKETT REASONABLE OPPORTUNITY TO SEEK ADVICE OF INDEPENDENT COUNSEL, AND TO WHICH PLUNKETT DID NOT CONSENT IN WRITING.

Supreme Court Rule 4-1.8(a) (2006), set forth in its entirety in both Informant's and Respondent's briefs, is introduced with the following clause: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless . . . ." This opening clause is followed by three subparagraphs stated in the conjunctive, i.e., all the conditions set forth in the three subdivisions must be satisfied in order for the business transaction to pass ethical muster. This "heightened scrutiny," as it is called in *In re Snyder*, 35 S.W.3d 380, 383 (Mo. banc 2000) (per curiam), is necessary due to the fiduciary nature of the attorney client relationship, the position of trust held by the

attorney, and the potential for overreaching by the lawyer, a position fully exploited by Respondent Shumaker in his dealings with Mr. Plunkett and the Skintas.

Before turning to the specific arguments raised in Respondent's brief, it is helpful to reiterate the business transaction at issue under Informant's Count I and first Point Relied On. In September of 2006, Respondent prepared a Promissory Note whereby his personal injury client and business associate, Mr. Plunkett, promised to pay Respondent and his wife $250,000.00 in annual increments of $35,000.00. The note was backed up by a deed of trust granted to the Shumakers in Plunkett's Boone County home. The deed of trust was also drafted by Respondent and signed by Plunkett in September of 2006. The deed contained a provision that if Plunkett defaulted in any payment of the Promissory Note, it constituted a default under the terms of the deed of trust.

Respondent Shumaker acknowledges in his brief that Mr. Plunkett was his client before, during, and after the business transaction at issue, which occurred in September of 2006.

In return for signing the note and deed, both documents drafted by Respondent, Mr. Plunkett, a non-lawyer whose education culminated with a high school diploma, received one of two possible forms of consideration. According to Mr. Plunkett, he got a much needed check for $2,000.00 in exchange for signing the documents, with assurances from Respondent that Respondent would never do anything with the note and would not file the deed – that Respondent needed the signed paperwork only to provide some sort of reassurance to their fellow MACB members.

According to Mr. Shumaker, the consideration Plunkett received for signing the note and deed was that the Shumakers put several hundred thousand dollars additional capital into MACB. Respondent reasons that the Shumakers' additional capital infusion allowed MACB to continue operating and allowed Plunkett to continue working for and drawing a salary from MACB, both matters, so testified Mr. Shumaker, of great benefit to Plunkett. Although the Shumakers' additional capital infusion into MACB was made, according to Respondent's testimony, on Mr. Plunkett's behalf and because Mr. Plunkett urged him to do it, none of the other LLC members were told it was done until after the fact, and not one page of MACB paperwork was produced (nor has Respondent claimed that any such documentation exists) attributing the September – October 2006 additional capital contributions to Mr. Plunkett. According to the terms of the note and deed, however, Mr. Plunkett owes the Shumakers half a million dollars, and the Shumakers are the grantees of a deed of trust against Mr. Plunkett's home.

Respondent argues that because Mr. Plunkett had experience signing deeds of trust and promissory notes prior to the September 2006 transaction in question, his signature on the promissory note and deed "constituted consent in writing." Respondent's brief, p. 31-33. This argument, if accepted, would gut the rule. And, it further substantiates Informant's contention that Respondent, to this day, fails to "get" that his position as Plunkett's attorney imposed on him a fiduciary duty toward Mr. Plunkett.

In *In re Trewin*, 684 N.W.2d 121 (Wis. 2004) (per curiam), the Wisconsin Supreme Court rejected the argument that a client's signature on loan documents satisfied the written consent requirement of 1.8(a). The Wisconsin court noted the rule's purpose

is to "ensure that the client is aware of and acknowledges all the risks and conflicts present in entering into a business transaction with an attorney with whom they have a fiduciary relationship." *In re Trewin*, 684 N.W.2d at 130. The court concluded that the only interpretation of the rule that would give effect to all three subsections of the rule is that "the client must give separate consent to the transaction with the lawyer, waiving the conflict of interest, and the client must indicate in writing he or she has been given a reasonable opportunity to consult with independent counsel." 684 N.W.2d at 131. As in *Trewin*, Mr. Plunkett's signature on the deed of trust and promissory note does not translate to client consent to the conflict inherent in a prohibited business transaction with a client.

Respondent goes so far as to argue under his Point I that it is reasonable to presume that Plunkett's signature on the documents established that he understood and accepted the terms of the documents. The law runs completely contrary to Respondent's argument. "When a conveyance from a client to an attorney is attacked it is considered presumptively fraudulent and the burden is on the attorney to prove by convincing evidence that the transaction evidenced by the conveyance, as well as the conveyance itself, was fair and equitable in every respect." *Laspy v. Anderson*, 361 S.W.2d 680, 682 (Mo. 1962). Similarly, the court of appeals recognized that "Rule 4-1.8(a) essentially codifies the fiduciary duties attorneys owe to their clients when attorneys enter into a business transaction with their clients, establishing the burden attorneys must meet to show that there was no undue advantage and the clients were sufficiently advised and

knowingly entered into the transaction." *McRentals, Inc. v. Barber*, 62 S.W.3d 684, 697 (Mo. App. 2001).

The balance of Respondent's arguments against Informant's Point I are a reiteration of his rancor toward Plunkett and his belief that he was the victim in all matters having to do with Plunkett. As stated in Informant's brief, it was Respondent's choice to invest initially in MACB on the terms described in the Operating Agreement, and it was Respondent's choice to invest additional capital in the company in September and October. The fact that he lost a lot of money in that venture did not give him carte blanche to degrade the integrity of the bar by using his position as a lawyer in an effort to hedge his losses against Mr. Plunkett.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.7(b) AND RULE 4-1.8(b) IN THAT RESPONDENT'S REPRESENTATION OF THE JOHNSON V. KELLY PLAINTIFFS WAS MATERIALLY LIMITED BY HIS OWN INTERESTS AND THOSE OF MR. PLUNKETT'S, RESPONDENT COULD NOT HAVE REASONABLY BELIEVED HIS REPRESENTATION OF MR. PLUNKETT WOULD NOT ADVERSELY AFFECT HIS REPRESENTATION OF THE JOHNSON CLIENTS, AND IN THAT HE USED INFORMATION RELATING TO THE REPRESENTATION TO MR. PLUNKETT'S DISADVANTAGE AFTER THE CLIENT TOLD HIM NOT TO.

Supreme Court Rule 4-1.7, in 2006 and today (although, it should be noted, disciplinary counsel consistently pled and tried this case on the 2006 version of the Rules – Informant has never argued that post-2006 rule amendments apply to Respondent's conduct in this case) contains two main subdivisions. Subsection (a) addresses concurrent conflicts of interest as between current clients. Subsection (a) clearly proscribes representation of clients in concurrent conflict of interest situations, "when the representation of one client would be directly adverse to the other." Comment, Rule 4-1.7 (2006). Subsection (a) of Rule 4-1.7 is not, however, in this case. Disciplinary counsel did not plead that Respondent violated Rule 4-1.7(a), nor was it argued that he

did. Respondent's extensive discussion of Rule 4-1.7(a) in his brief is, therefore, inapposite.

Rather, Respondent was charged with violating, and the disciplinary hearing panel concluded that he did violate, Rule 4-1.7(b). See **App. 14, 145**. Subsection (b) addresses conditions under which a client may consent to a conflict.

> Loyalty to a client is also 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. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations.

Comment, Rule 4-1.7 (2006). Specifically, Shumaker was charged with violating Rule 4-1.7(b) in that his representation of the federal plaintiffs was materially limited by his responsibilities to his preexisting client, Mr. Plunkett; in that he could not reasonably have believed his representation of Plunkett would not be adversely affected by his representation of the federal plaintiffs; and in that he failed to even ask the federal plaintiffs for consent to the conflict until seven months after he filed their three page complaint in federal court.

Disciplinary counsel has supported his Rule 4-1.7(b) argument in his initial brief and stands by that argument.

Respondent does not address the Count II, Rule 4-1.8(b) charge in his brief, other than to insist that Mr. Plunkett "directed" him to write the letter to Mr. Bixby.

Disciplinary counsel, then, lets stand his Rule 4-1.8(b) argument as set forth in the opening brief. The question of credibility is addressed under Point Relied On IV.

ARGUMENT

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE HE VIOLATED RULE 4-1.8(a) IN THAT HE ENTERED INTO A BUSINESS TRANSACTION AND ACQUIRED AN INTEREST ADVERSE TO THE SKINTAS (WARRANTY DEED AND LEASE) ON TERMS THAT WERE NOT FAIR AND REASONABLE, NOT FULLY DISCLOSED AND TRANSMITTED IN WRITING TO THE CLIENTS, AND TO WHICH THE CLIENTS WERE NOT GIVEN A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL, AND DID NOT GIVE WRITTEN CONSENT.

The business transaction on October 27, 2006, between Respondent and the Skintas was one between an attorney and his clients. Disciplinary counsel and Respondent are in agreement that Mr. Skinta telephoned Respondent on October 24, 2006, and told him the Skintas were in a lot of trouble. He asked for Respondent's help in negotiating with the bank to postpone the foreclosure or to exercise their statutory right of redemption. Respondent Shumaker agreed to contact the bank on the Skintas' behalf and did so. These facts are undisputed. The transaction on October 27, 2006, was not one between arms-length buyers and sellers of real estate. Mr. Skinta did not call Respondent on October 24 to ask him if he would buy the Skintas' realty; indeed, when Respondent posed that possibility during the conversation, Mr. Skinta hastened to tell

him that that would have to be a last resort, and he would have to discuss it first with his wife. It is important to bear in mind that only three to four days, at most, passed between the time of the initial phone call and when the Skintas were presented with the deed and lease at Respondent's law office.

The Restatement of the Law Governing Lawyers (Third), provides as follows regarding the formation of an attorney-client relationship:

> § 14. Formation of a Client-Lawyer Relationship
>
> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.

In ascertaining whether an attorney-client relationship is formed, this Court has cited the Preamble to Rule 4, which states that whether an attorney-client relationship exists "for any specific purpose can depend on the circumstances and may be a question of fact." *McFadden v. State*, 256 S.W.3d 103, 106 (Mo. banc 2008). *McFadden* looked to the Court's prior cases of *Flanagan v. DeLapp*, 533 S.W.2d 592 (Mo. banc 1976), and *In re Disney*, 922 S.W.2d 12 (Mo. banc 1996), for help in evaluating whether an attorney-

client relationship is formed. The professional relationship was concluded to have formed when the substantive nature of the contacts within the relationship so indicated, regardless of what formal or procedural incidents may have occurred. See also *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591 (Mo. App. 2010).

In *In re Disney*, the Court concluded that an attorney-client relationship did not exist at the time of the challenged conduct. In *Disney*, however, the complainant/putative client involved in the business transaction with the lawyer testified that he knew he and the lawyer were on opposite sides of the transaction and that the transaction was "strictly business." 922 S.W.2d at 14-15. The same does not hold true here. The Skintas clearly manifested their belief that Respondent had taken on their legal cause by expressing thanks to Respondent for anything he could do to help them, **App. 213 (T. 204-205), 447 (T. 998)**, and by their shocked reactions when presented with the deed and lease and Respondent's secretary's undisputed remark that "Seth wouldn't screw you." **App. 209 (T. 183), 450 (T. 891)**. Both the Skintas were shocked to discover they had been asked to Respondent's law office that morning to sign a warranty deed and lease, because they were under the impression, never corrected in any way by Respondent, that he was representing their interests. Indeed, it was their faith in the attorney-client relationship that ultimately convinced them to sign the documents.

There is no question but that Respondent's prior representation of Mr. Skinta in the license revocation matter had concluded several years before 2006. It is submitted, however, that the fact of the prior representation is further evidence of the reasonableness of the conclusion that an attorney-client relationship formed between the Skintas and

Respondent when Mr. Skinta called Respondent on October 24 and asked for his help, and Respondent agreed to give it. The Skintas had relied on Respondent successfully in the past for legal services, substantiating the reasonableness of their belief that an attorney-client relationship formed. Mr. Skinta quickly all but squelched Respondent's suggestion on October 24 that Respondent might purchase the property. Had Mr. Skinta not clearly done so, the conversation could conceivably have morphed into one between buyer and seller, but it did not. Most importantly, Respondent said or did nothing at the time to substantiate his hearing contention that the attorney-client relationship ended before the business transaction commenced.

Much of the rest of Respondent's argument under his Point III rests on the credibility of conversations he testified occurred between him and Mr. Skinta after October 24, 2006. Mr. Skinta denied that any such conversations occurred. In Informant's brief, at Point Relied On IV, disciplinary counsel has suggested that Respondent's testimony is not credible, and specifically not credible on the issue of the alleged telephone conversations between him and Mr. Skinta after October 24. Under Point Relied On IV in Informant's opening brief, several reasons for disbelieving Mr. Shumaker's testimony on whether such telephone calls occurred are offered. Disciplinary counsel stands behind the arguments presented in Points III and IV of Informant's brief.

Mr. Skinta's call for help to a lawyer from whom he had received legal services, Mr. Skinta's disinclination to convert the telephone call into a negotiation for the sale of realty, and Respondent's agreement to do what he could for the Skintas established an

attorney-client relationship. The subsequent October 27 business transaction, whereby the Skintas conveyed all of their interests in their home and store to Respondent's straw party for nothing and agreed to rent the property back from him for more than they had been able to pay the mortgagee bank, violated Rule 4-1.8(a) because it was unfair. Respondent gave them no written explanation of the transaction, did not advise them to seek the advice of outside counsel, and did not obtain their written consent to the transaction, all in gross violation of Rule 4-1.8(a).

ARGUMENT

IV.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR TWO YEARS BECAUSE HE KNOWINGLY AND BY SUBTERFUGE ACQUIRED OWNERSHIP OF OR INTEREST ADVERSE TO CLIENTS' PROPERTY IN THAT THE CLIENTS WERE IN VULNERABLE SITUATIONS, RESPONDENT DID NOT DISCLOSE IN WRITING THE TERMS OF THE TRANSACTIONS AND DID NOT OBTAIN WRITTEN INFORMED CONSENT TO THE CONFLICTS INHERENT IN THE TRANSACTIONS.

The Missouri Supreme Court has inherent power to sanction the law licenses granted, as a privilege, to members of its roll of attorneys. *In re Richards*, 63 S.W.2d 672 (Mo. banc 1933). It is an inherent power belonging to the Court, not subject to limitation. See *In re Wilson*, 391 S.W.2d 914, 919 (Mo. banc 1965). A master's, or as in this case, disciplinary hearing panel's, "findings, conclusions and recommendation, although necessary to this Court's orderly supervision of the bar, are still essentially advisory." *In re Staab*, 719 S.W.2d 780, 781(Mo. banc 1986). The Court itself reviews the evidence, assigns credibility to witness testimony, and makes all necessary factual determinations. Id. Credibility determinations are not delegated in attorney discipline cases.

It is true that disciplinary counsel's recommendation to the panel, and to this Court, of an actual suspension without leave to apply for reinstatement for two years rests largely on testimony that is disputed by Respondent. It is also true, however, that a strong disciplinary case against Respondent exists for violation of Rules 4-1.7(b) and multiple violations of Rule 4-1.8(a) (b) on the undisputed evidence, i.e., without reliance on those parts of complainants' testimony with which Respondent takes issue. The essential, and undisputed, elements of Informant's case are set forth in the argument section of Informant's opening brief. Now, even Respondent appears to concede that a public reprimand, at a minimum, is appropriate in this case (at the hearing's conclusion, Respondent asked the panel to "let him go with no discipline." **App. 562 (T.1238)).**

The disciplinary hearing panel concluded that each of the complainants' testimony was "largely non-credible." **App. 134-135**. It did so, however, without citing specific instances of complainant testimony that were inconsistent or contrary to the evidence, with the exception of Mr. Plunkett's testimony regarding the tangential issue of whether his MACB pay had been discontinued. Regardless of its credibility findings, it must be remembered that the panel also concluded that Respondent violated each of the rules charged (and one not charged).

Disciplinary counsel has offered specific reasons supporting his contention that it was Respondent's testimony that lacked credibility, not the complainants'. See Informant's brief, Point Relied On IV. For example, why did Mr. Shumaker make no mention of the putative telephone calls, providing cover for the October 27 Skinta transaction, prior to the hearing? There is no suggestion of the "covering telephone calls"

in Respondent's response to the complaint or his answer to the information. If matters transpired as Mr. Shumaker testified they did with respect to Plunkett's signing of the note and deed, why did no one at MACB know anything about the complex "quarter million dollar note for capital contributions on your behalf" deal until weeks after it allegedly happened? Why was Mr. Plunkett so angry with Respondent after he found out about the Bixby letter if Plunkett "directed" Respondent to send it? Why are there so many similarities in the independently filed complaints of Mr. Plunkett and the Skintas? How can Mr. Plunkett be both not very bright and the conniving snake oil salesman described by Respondent and his secretaries? Why does Mr. Plunkett's one $400.00 fine by the Department of Insurance discredit Mr. Plunkett beyond redemption, while Respondent's admonition for filing a pleading containing false or misleading statements is trivialized by Respondent as the opinion of one OCDC staff attorney? Informant has not, as Respondent unctuously contends, questioned the reasonableness of his fee in Johnson v. Kelly; Informant has however suggested Respondent's hypocrisy in demonizing Mr. Plunkett given the generous fee Respondent earned from representing the RHI victims in their claims against the restitution fund set up by the federal Department of Justice.

Respondent makes much of the fact that Mr. Plunkett asserted in his complaint, and testified at his deposition, and Informant pled in the information, that MACB had reduced or discontinued paying him some time during the summer of 2006. After being shown the payroll records, Mr. Plunkett realized his belief was mistaken, i.e., that he received full pay until he ceased working for MACB. Mr. Plunkett so testified at the

hearing on direct examination. Mr. Plunkett's mistaken belief that his pay had been cut is understandable; the undisputed evidence reflects that pay cuts were discussed and written about among the MACB members in the summer of 2006. And, by Mr. Shumaker's own admission, Mr. Plunkett is not a "member of MENSA by any means." **App. 533 (T. 1123-1124)**. If anything, Mr. Plunkett's mistaken impression about the pay issue reinforces the impression this record suggests that Respondent took advantage of Mr. Plunkett's lack of business sophistication and financial vulnerability in impressing him to sign a quarter million dollar promissory note.

The record in this case establishes that Mr. Shumaker today owns the Skintas' one bedroom house and the pole barn store on which they based their modest hopes for retirement. He also holds a deed of trust on Mr. Plunkett's house and a promissory note wherein Mr. Plunkett, a high school graduate who has been selling insurance door to door for twenty plus years, promises to pay him $250,000.00. The record establishes that Mr. Shumaker acquired the property from his clients at an extremely harrowing and vulnerable time in their lives. He provided no written explanation for either "deal"; obtained no written client consent to the conflict-laden transactions. The Skintas and Mr. Plunkett came away from the transactions with virtually no consideration in exchange for their property. Because Respondent, with his "superior knowledge and education," became personally involved in the affairs of his clients, the Court must hold him to the highest standards of conduct. *In re Lowther*, 611 S.W.2d 1, 2 (Mo. banc 1981). He leveraged his position as their attorney to take advantage of them.

Mr. Shumaker has shown no remorse, has insisted on aggressively litigating every element of the case, and has only now, at the briefing stage, been willing to admit that his conduct merits any level of sanction. A lawyer's refusal to acknowledge the wrongful nature of his conduct is an aggravating factor to be considered in sanction analysis under ABA Standards for Imposing Lawyer Sanctions, Rule 9.22 (g) (1991 ed). As is routine in disciplinary cases, an overture was made to Respondent early (June 9, 2009) in the case (before the Skinta complaint was received) to see whether the case could be resolved by stipulation. Informant offered to stipulate to a stayed one year suspension with a year of probation if Respondent were willing to concede certain "material facts" (not including the collateral pay cut issue). **App. 131**. No acknowledgment or response from Respondent followed OCDC's overture. Informant's counsel alluded to the June 9 letter in closing argument. The reference was appropriate, given that Respondent's refusal to acknowledge the wrongful nature of his conduct is an aggravating factor under the Standards and, conversely, a Respondent's cooperative attitude toward the proceedings can be a mitigating factor. Standard Rule 9.32(e).

Respondent's conduct throughout this disciplinary proceeding, and more importantly, his misconduct in instigating business transactions with clients that were laden with flagrant conflicts of interest, impel a recommendation of actual suspension. Mr. Shumaker apparently has, MACB notwithstanding, been a successful small businessman. He should not be permitted to continue uninterrupted on a course that gives to him the advantage of a law license in negotiating business deals with clients.

CONCLUSION

Respondent's business transactions with Mr. Plunkett and the Skintas in September and October of 2006 generated gross conflicts of interest that cannot, and were not, explained by negligence or inadvertence. Respondent has not acknowledged any wrongdoing, insists his clients were not vulnerable, and has shown no remorse. Protection of the public and the integrity of the profession require actual suspension of Respondent's license with no leave to file for reinstatement for two years.

Respectfully submitted,

ALAN D. PRATZEL #29141
Chief Disciplinary Counsel

By: _____
Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Sharon.Weedin@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2010, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Clifford Mayberry
Attorney at Law
401 N. Elson
Kirksville, MO 63501

Danieal Miller
Attorney at Law
740 W Sexton
Columbia, MO 65203

_____
Sharon K. Weedin

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 4868 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Micro Trend software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin