SUPREME COURT OF KENTUCKY

NANCY OLIVER ROBERTS, Appellant-Respondent	)	
versus	)	Nos. 2012-SC-000266-KB
KENTUCKY BAR ASSOCIATION, Appellee-Complainant	)	

APPELLANT-RESPONDENT'S BRIEF ON REVIEW

On review to the Supreme Court of the decision of the Kentucky Bar Association Board of Governors and Lay Members

Service of this Brief was effected by mailing a copy to Ms. Jane Herrick, Deputy Bar Counsel, Kentucky Bar Association, 514 Main Street, Frankfort, Kentucky 40601-1883; and Mr. Thomas L. Rouse, Presiding Officer of the Board and Vice-President of the Kentucky Bar Association, 514 Main Street, Frankfort, Kentucky 40601-1883 this 31st day of May 2012.

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REQUEST FOR ORAL ARGUMENT

Appellant-Respondent [hereinafter referred to as "Respondent"] requests that the Court allow the parties to orally argue this case before the Court. The stakes are so high for Respondent that the extra effort to avoid a judgment based on a misunderstanding would be consistent with the Court's genuine dedication to justice.

INTRODUCTION

As the Court knows from reading the Findings Of Fact, Conclusions Of Law, And Recommendations Of The Board Of Governors Of The Kentucky Bar Association,[1] Respondent, Nancy Oliver Roberts, was charged during a three-year period with nine violations of the Rules of Professional Conduct. The Board found that Respondent was not guilty of almost all of the charges brought against her. The Board did find that Respondent was guilty of two charges that were minor relative to the other charges.

The reason why the Court should not follow the Board's recommendation regarding the two remaining charges is that the charges are not supported by the facts or the law. The proceedings prior to the Board's consideration of the charges was downright frightening and way below the standards found in the Court of Justice. On the other hand, the Board's diligence and rational review of the facts and law restored Respondent's and her counsel's faith that the disciplinary process can be fair and reasonable. Nevertheless, even a hard-working and fair-minded Board can make mistakes, especially when confronted with a huge record and ninety-one plus page briefs. The Board correctly focused its limited time and energy on the most serious

[1] Copy attached as an appendix.

charges, which the Board found to be bogus at best. Respondent feels that the two remaining charges were so minor in comparison to the seven rejected charges that the Board was not able to focus as much attention on those charges and recognize that they actually were not supported by the facts or law. Of course, even more likely, counsel for Respondent just failed to clearly present the facts and law to the Board on these two remaining charges. Fortunately, with only two charges remaining, the Court will be able to concentrate on a considerably smaller record and applicable law. And counsel will get a second chance to do a better job of pointing out the lack of support for the charges.

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STATEMENT OF THE CASE

The Human Being on the Professional Gallows: Respondent, Nancy Oliver Roberts, is a lawyer who loves her clients and who is loved by her clients. It is notable that these disciplinary charges were **not brought by her clients** but by adverse attorneys. As for genuinely caring for her clients as fellow human beings, the very essence of the Rules of Professional Conduct, the Court would be hard-pressed to find any Kentucky attorney who could best Nancy Roberts. The willingness of Ms. Roberts' clients to take time from their lives, travel to Louisville, and share their respect and reverence for Ms. Roberts at the trial of these charges was just a small sample of the hundreds who would have come. Even Circuit Judge Steve Wilson,

one of the witnesses against Ms. Roberts, acknowledged that Ms. Roberts really did have the best interests of her clients at heart.[2]

Ms. Roberts has been practicing law for almost twenty-four years. She came from a rural Warren County background, and her life has been guided by strong rural values of honesty, fairness, and faithfulness, qualities that make for a highly ethical attorney. She served as a high school teacher for many years. Only later in life did she decide that she could do more good by practicing "people" law. And, as with more lawyers than the public realizes, this desire to serve has resulted, more often than good business practices would dictate, in her handling huge cases for free or with very little chance of getting paid.[3] Nothing strange here; just what good lawyers do. Nothing strange, except that in this case Ms. Roberts' personal values and generosity were viewed by other, differently-motivated lawyers as suspicious conduct. Such suspicions then led in part to these disciplinary charges and an unwillingness to view the facts objectively.

By including every conceivable charge and waiting for over a year to combine the two multi-part complaints, the Bar Association tried to create the impression that Ms. Roberts is totally incompetent and ought to be disbarred to protect the public, even if she is not guilty of any of the individual complaints. As the trial testimony clearly showed, nothing could be further from the truth. Given her many large judgments and settlements in civil cases and her considerable success in criminal cases, Nancy Roberts is either quite competent or remarkably lucky.

Like a lot of lawyers who practice in smaller communities, especially those who enjoy the personal contact of working with clients, Ms. Roberts handles a wide range of civil and criminal cases: estates, divorce, employment discrimination, personal injury, contract disputes,

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[2] Judge Wilson testified, "Nancy – Ms. Roberts' problem is not caring about her client. She has a great regard for her clients, absolutely. She has shown that repeatedly." Wilson, Vol. I, p. 95

[3] Roberts, pp. 341-42, 350

and practically all aspects of criminal defense. She has had great clients and terrible clients. She has had clients who lied to her and clients who turned out to be incompetent witnesses when it came time for trial. And, just like every other trial lawyer, she has won cases that could not be won and lost cases that could not be lost.

Ms. Roberts is a fighter for her clients, and that is where all of these charges started. She feels that her duty to her clients is more important than her duty to herself. She has a reputation for bluntly speaking truth to power when she believes that it is necessary to protect her clients. She will stand up for her clients even when it is dangerous to her professional safety, as this case demonstrates. Frankly, while Ms. Roberts makes a formidable fighter for her clients, she probably would not make a good diplomat. But being undiplomatic on occasion is not unethical.

The David Manning Criminal Case: In 1998 a former client of Ms. Roberts, Cheryl Justice, was working at the Warren County Jail.[4] Cheryl knew a criminal defendant named David Manning, who had been arrested for killing his adoptive father, Earl Manning. Cheryl's former husband, Russell Justice [who would later be named as executor of Earl Manning's Estate], was a very close friend of David and David's brother, Andy Manning.[5] When David was not able to hire another criminal defense attorney to represent him, Cheryl asked Ms. Roberts to talk with David, which she did.[6] David was financially eligible for the appointment of a public defender, but was not comfortable that a public defender would do the best job for him.

As luck would have it, David's deceased, adoptive mother, Lola Bell Manning, had been extremely close to Ms. Roberts and her family. As Ms. Roberts expressed it during the trial, "She was as good, in my way of thinking, as anybody that walks on the earth. She was an

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[4] Roberts, pp. 55-56
[5] *Id.*
[6] *Id.*

extremely good woman."[7] Just talking about Lola Bell at the disciplinary trial was enough to choke up Ms. Roberts and bring tears to her eyes.. Ms. Roberts related how Lola Bell had been so wonderful and loving to her family. Ms. Roberts would have done anything for Lola Bell, and David was Lola Bell's son. Therefore it followed that Ms. Roberts would do whatever she could do to help David regardless of whether or not she ever got paid.[8] As Ms. Roberts put it, "I saw a need to help him [David]. I see a need to help a lot of people."[9] Ms. Roberts then related a conversation she had with one of her doctors who asked her why she worked so hard to go to law school when she was already a revered high school teacher and she answered, "To help people. And that's exactly what it was for David. I was just trying to help him. As I said, David was [Lola Bell's] adopted child."[10] Helping people is a theme that runs through all of Ms. Roberts' practice; helping a certain person, Lola Bell's son, for free if necessary, was virtually imperative.

Ms. Roberts began working on David's case harder than one would ever have expected for an almost certainly free case.[11] She went to the jail and worked with David on Saturdays and evenings almost every weekday, night after night, sometimes as late as midnight.[12] Later David expressed it this way in his deposition, "We done a lot of talking."[13] Ms. Roberts and David discussed every aspect of his case over and over again. She spent over a thousand hours working for David.[14] The entire time, David insisted vehemently and convincingly that he was innocent.[15] Ms. Roberts believed him.[16] This drove her to strive even harder because she felt that she was responsible for the life of an innocent man.

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[7] Roberts, pp. 351-54; Manning, pp. 26-27
[8] *Id.*
[9] Roberts, p. 353
[10] Roberts, pp. 353-54
[11] Roberts, p. 188, 367-68; Manning, pp. 7, 20
[12] *Id.*
[13] Manning, p. 7; see also, Manning, p. 29
[14] Roberts, p. 59
[15] Manning, p. 22

Long before Ms. Roberts started helping David, Steve Wilson, then the Commonwealth's Attorney, had made an extremely unusual personal visit to David in jail on the day David had been arrested.[17] Steve had prosecuted Earl Manning for child molestation but lost the case. Steve wanted to know about Earl's molestation of David and Andy apparently to reassure Steve that he had been on the right track.[18] While there, Steve made David a plea offer that was exceptionally light for a charge of manslaughter, five years in prison [later Steve revealed that with "shelf time" David would actually have spent up to eighteen years in prison if he had accepted the offer].[19] Even thinking at the time that the offer was for a genuine total of five years and without any advice from counsel, David adamantly rejected Steve's offer and told Steve unequivocally that he had not murdered Earl.[20] Later David would testify that the plea offer just reinforced his assessment that the Commonwealth did not have a case against him.[21]

Later when Ms. Roberts started representing David, he had convinced her that he was truly innocent.[22] So she did not try to force David to take the plea offer.[23] Given David's level of knowledge of criminal law and the huge number of hours they had gone over every bit of the case, Ms. Roberts knew that David was as prepared as anyone could be to make the decision.[24] Later, when David was asked at his deposition about accepting or rejecting a plea offer he was asked, "So, who should make the call?" He answered, "Me." Then he was asked, "And who did make the call?" And he answered unequivocally, "Me."[25]

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[16] *Id.*
[17] Roberts, pp. 362-66; Manning, pp. 33-35, 37-38
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Roberts, p. 375; Manning, p. 22
[23] Roberts, pp. 366, 373-75, 474-75
[24] Id.
[25] Manning, p. 39; Roberts, pp. 378-79

After the plea deadline had passed and the trial began, the defense started looking worse and worse. With numerous unanticipated reversals and witnesses who changed their testimony during the trial, it was no wonder that the jury found David guilty. Of course, Ms. Roberts filed all of the normal post-trial motions to try to overturn the verdict. She could have walked away from David at that point with a clear conscience that she had fulfilled any obligation she owed to her beloved Lola Bell Manning. But, instead, Ms. Roberts filed an appeal to the Kentucky Supreme Court, then filed an action in the United States District Court, and finally filed an appeal to the United States Sixth Circuit Court of Appeals. When all of that failed to win David's freedom, Ms. Roberts even started working on getting David pardoned by the Governor. During this time David wrote to Ms. Roberts several times thanking her for all of her hard work and apologizing for his rejection of the plea offer.

The Mother of All Bar Complaints: After the trial and before all the appeals, Ms. Roberts was approached by David's wife, Lunell Manning, and David who insisted that Assistant Commonwealth's Attorney John Brown had suborned perjury by having sex with a material witness. At that time Ms. Roberts was not personally familiar with Mr. Brown other than from the trial and, consequently, was not able to recognize the unlikelihood of such claimed facts. With the pressure from David and Lunell and three affidavits from other witnesses, Ms. Roberts felt that she had to file a motion for a new trial based on the allegations. Before filing the motion, however, Ms. Roberts contacted Steve Wilson, told him of the accusation, and demanded that Steve agree to a new trial for David.[26] Steve did not agree, so Ms. Roberts filed the motion. At the closed hearing on the motion it turned out that Mr. Brown had just spoken to

[26] Brown, pp. 140-41

the alleged "material witness" but she was never called to the stand during the trial.[27] Then the three people who signed the affidavits backed off of their testimony and left Ms. Roberts to "hang out to dry."[28] They acted as though they had not even known what they were signing.[29] They also indicated that the "John" in their affidavits was a person from Glasgow, not John Brown.[30] Of course, Judge Minton denied the motion. Unfortunately, Ms. Roberts' eagerness to believe her client and fight hard for his freedom started a chain of events that led in large part to this disciplinary case.

Later District Judge Brown testified at the disciplinary trial that, "I was very angry about it at the time."[31] A married man certainly does not want false accusations of infidelity spread on the public record. Judge Brown was also very angry "because she was placing my job in jeopardy by making these false statements."[32]

As angry as Judge Brown was, his feelings apparently could not match the hot anger of Mr. Wilson and the rest of his staff. At the disciplinary trial many years later, now Circuit Judge Wilson, with some effort, was composed and judicial. But it was obviously hard to contain the extremely negative emotions the memory of the events revived.[33] Judge Wilson said, "[I]t just being totally untrue and unfounded and reckless, that I thought her handling of it in general was very poor"[34] Then Judge Wilson allowed, "It made me very upset. It sure did."[35] When asked by counsel, "It probably made everybody in your office livid?" Judge Wilson answered, "It did.

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Brown, pp. 140-41; When Judge Minton, serving as the Trial Judge, asked the accusing witness, "Did you say you were having sex with John Brown?" the witness started laughing. Wilson, p. 86
[31] Brown, p. 142
[32] *Id.*
[33] Wilson, pp. 85-87
[34] Wilson, p. 86
[35] Wilson, p. 87

It did."[36] Then counsel asked, "...[T]o this day I can sense that you're still upset and angry about it." Judge Wilson about lost and then regained his composure, "It was one of the most – it – yes. I didn't care for it at all"[37]

While Chris Cohron was not working at the Commonwealth's Attorney's office when Ms. Roberts filed the infamous motion for a new trial accusing Mr. Brown of improper conduct, when he subsequently became Commonwealth's Attorney, Mr. Cohron was fully informed about the incident by his predecessor, friend, and mentor, Judge Wilson.[38] When counsel asked Mr. Cohron, "And you knew that Steve Wilson and John Brown were <u>livid</u> about it?" Mr. Cohron answered, "Yes."[39] Then counsel asked, "You were aware that – that there was some really bad blood there from that [Manning] case?" and Mr. Cohron answered, "Yes."[40] As later events would show, the anger felt by Mr. Brown and Mr. Wilson apparently infected Mr. Cohron as well in full force. Ironically Mr. Cohron was not quite as good as Judge Wilson or Judge Brown at hiding his feelings. The smoldering, vicarious, anger appeared to be about as hot as if the events had occurred the previous month.

<u>Rules of Criminal Procedure (RCr) 11.42</u>:[41]

As the Court knows full well, RCr 11.42 motions are fairly common. Prisoners have a lot of time on their hands and a whole lot of desire to be free.

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[36] *Id.*
[37] *Id.*
[38] Cohron, p. 151
[39] Cohron, pp. 155-56
[40] Cohron, p. 156
[41] RCr 11.42(1) provides, "A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it." RCr 11.42(4) provides, "The clerk of the court shall notify the **attorney general** and the **Commonwealth's attorney** in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the Commonwealth's attorney shall have 20 days after the date of mailing of notice by the clerk to the Commonwealth's attorney in which to serve an answer on the movant." RCr 11.42(7) provides, "Either the **movant** or the **Commonwealth's attorney** may appeal from the final order or judgment of the trial court in a proceeding brought under this rule." Emphasis added

RCr 11.42 motions work rather well to accomplish their intended purpose of assuring a constitutionally fair trial, but when used as a basis for Bar complaints, they are extremely ineffective and cause considerable harm. The defense attorney does not even get served with the motion and is unrepresented at the hearing on the motion.[42] If the Commonwealth's Attorney is angry with the defense attorney, the opportunity for gutting the attorney is great and the attorney has no way to protect her/his self.

When all of Nancy's post-conviction work had not gained David his freedom, he, too, turned to a jailhouse lawyer, more officially called an "inmate counsel," another prisoner who has taken his free time to learn criminal law and procedure. David's inmate counsel read David's complete trial record and talked to David in search of possible grounds for an RCr 11.42 motion. The inmate counsel drafted the motion and, according to David, called all of the shots.

At the disciplinary trial Judge Wilson testified that David had called him from prison to talk with him about the case. According to Judge Wilson, after talking with David on the phone he told David to be sure and tell his inmate counsel about Nancy charging David a contingency-fee. And, David did just what Judge Wilson told him to do. [Fortunately, the Board looked at Nancy's written, hourly-fee contracts and unanimously found that the accusation of a contingency fee in the criminal case was totally false.]

Of course, David was highly motivated to say whatever it might take to gain his freedom. This, of course, was the same David who had an extensive criminal record and truly was a "persistent felony offender" if there ever was one.[43] This is the same fellow that a detective in the case said could not keep his story straight.[44] When counsel asked if David would even say that he had been abducted by aliens if it got him his freedom, Judge Brown said of David's

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[42] *Id.*
[43] Wilson, p. 71, 97; Cohron, p. 156
[44] Wilson, p. 99

veracity, "I mean, anyone – anyone that would brutally murder their adoptive grandfather the way he did, I'd say he's capable of doing about much any –about anything."[45] When Judge Wilson was asked if David would lie when it might benefit David, Judge Wilson agreed, "I'm sure he would, yeah. Sure."[46] Judge Wilson also agreed that an inmate facing life imprisonment has enormous incentive to say whatever it takes to be free.[47] And if the inmate got caught telling a lie there would not be any consequences.[48] When Judge Wilson was asked about David perhaps claiming abduction by aliens, Judge Wilson said, "I'm sure David would have said whatever."[49] When Mr. Cohron was asked if David had a huge incentive to lie on his RCr 11.42 motion and in his live testimony at the RCr 11.42 hearing, Mr. Cohron stated, "Couldn't agree more."[50] Yet these gentlemen and Bar Counsel asked the Board to believe that what David said in the RCr 11.42 proceedings was true but ignore what he said prior to and after the RCr 11.42 motion and hearing. Again fortunately, the Board did not succumb to this absurd contention.

Mr. Cohron was so thoroughly eaten up with vicarious anger that he did not even share a copy of the RCr 11.42 motion and memorandum with Ms. Roberts, did not once speak with Ms. Roberts to at least hear her side of the issues, failed to alert Ms. Roberts that he did not represent her and would not make any effort at all to protect her at the hearing, did not prepare Ms. Roberts as a witness, and did not give Ms. Roberts any opportunity at the hearing to tell her story. During the hearing Ms. Roberts was "double-teamed" by both the Public Advocate, Ms. Sarah Nielson, and Mr. Cohron. There was no one to object to questions or ask Ms. Roberts appropriate questions. There was no one to keep her from being gutted. The result was a

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[45] Brown, p. 14
[46] Wilson, p. 99
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Cohron, p. 160

nightmare worthy of Franz Kafka. When the RCr 11.42 hearing had concluded, Judge Grise invited Ms. Nielsen and Mr. Cohron into his chambers. Before anyone else said anything Mr. Cohron declared that someone needed to file a Bar complaint against Ms. Roberts. When neither Judge Grise nor Ms. Nielsen responded, Mr. Cohron volunteered that he would file the complaint.

A Failure to Communicate: The Kentucky Public Advocate's office was appointed to represent David in the RCr 11.42 hearing. Ms. Nielsen contacted Ms. Roberts and demanded that Ms. Roberts turn over **all** of her files regarding David. After the many years that Ms. Roberts had fought for David, the file had grown to many linear feet wide and was somewhat jumbled. Ms. Roberts was heavily involved with another case at the time Ms. Nielsen called[51], so Ms. Roberts asked that they get together shortly and figure out what Ms. Nielsen wanted from the files. Apparently there was a failure to communicate. Without any further effort to work with Ms. Roberts, Ms. Nielsen filed a motion with Judge Grise, to whom the RCr 11.42 motion had been assigned, demanding an order that Ms. Roberts immediately turn over **all** of the file to Ms. Nielsen immediately, despite the fact that the only ethical guideline relevant to the subject does not require a lawyer to turn over **all** of her file.

The Earl Manning Estate: William Lawrence of Louisville was originally appointed as executor of the Earl Manning Estate but he became ill and had to resign. Ms. Roberts asked Russell Justice, a very close friend of David and his brother, Andy, if he would be willing to serve as executor. He agreed to do so because of his relationship with "the boys," David and Andy. Shortly after Ms. Roberts got Mr. Justice appointed as executor, however, Mr. Justice took the Estate checkbook from Ms. Roberts and began to operate almost entirely independently.

[51] The Board found incorrectly that Ms. Nielsen had contacted Ms. Roberts several times. Actually Ms. Nielsen called one time for sure and two times at most.

At times it was nearly impossible for Ms. Roberts to get Mr. Justice to do anything that she advised.

There was no conflict between David and Andy because of their genuine love for each other. It was understood at the time that if David did not inherit everything of Earl's, Andy would. And both men were completely happy with that situation. There was no conflict between Mr. Justice and either of David or Andy because of their long-standing and deep friendship with Mr. Justice. They were as close to being a loving family as unrelated people can be.

Ms. Roberts had not heard any complaint from any of the three men about her representation of the Estate. Mr. Justice, however, was extremely independent and at one point he simply stopped getting in touch with Ms. Roberts. She called him, sent letters, and even tracked him down at a church gospel singing performance, but Mr. Justice just would not respond. Then, when Mr. Justice got word that David was preparing the RCr 11.42 motion, Mr. Justice suddenly decided that there might be some conflict of interest. Ironically, at that time there was no conflict or even potential conflict since Ms. Roberts no longer represented David or Andy. David was represented by the Public Advocate and Andy had his own attorney. Nevertheless, Mr. Justice hired Mike Reynolds to take over the representation of the Estate.

Ms. Roberts remained on the Estate mailing list and received the proposed final settlement submitted by Mr. Reynolds. Nancy saw that there were several mistakes in the proposed settlement, so she filed a paper with the District Court setting out the mistakes. At the hearing on the matter, District Judge Sam Potter was pleased to have Ms. Roberts' input and several changes were made in the final settlement. In addition, Ms. Roberts was able to help the Court locate an heir that the Warning Order Attorney had been unable to find. Mr. Reynolds, on

the other hand, was embarrassed and angered. He then supplied the information to the Bar for the complaints regarding the Estate.

ARGUMENT

KBA 17411, Count II: The Bar claimed that Respondent violated SCR 3.130-1.7 which provides: "Conflict of interest: general rule" states in subpart (b) that, "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (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."[52]

As the underlined portion shows, the Rule contemplates the representation of multiple clients in a single matter. In the 1989 Supreme Court Commentary it is written, "Paragraph (a) applies only when the representation of one client would be directly adverse to the other."[53] Further the Commentary states, "A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. **Consideration should be given to whether the client wishes to accommodate the other interest involved**."[54]

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[52] Emphasis added.
[53] 1989 Commentary, ¶ 2
[54] 1989 Commentary, ¶3; emphasis added

The Bar faulted Nancy for working with Russell Justice, Andy Manning, and David Manning at the same time. It was understood by all three that if David did not inherit essentially all of Earl's assets, Andy would inherit it all.[55] Theoretically there could have been a conflict between David and Andy. In this case, however, theory was not reflected in reality. Andy and David were extremely close adoptive brothers. Their loyalty to each other was very strong. Andy would have been glad if David inherited the assets, and Andy did everything he could to make that happen. David would have been perfectly happy if Andy could inherit the assets.[56] The bond between these brothers had been forged in the heat of their molestation by Earl when they were young boys.[57] Their interests were in perfect synchronization. And, Mr. Justice was one hundred percent loyal to the two "boys." Whatever they wanted was fine with him.[58] Mr. Justice was asked, "[Y]ou had known them for quite some time?" He responded enthusiastically, "Oh, right. Yeah. We growed up kids, went to church together, and the whole family, you know. … And sort of, in long distance, kin. Just a hair, you know."[59] Then he was asked, "So, I mean, you-all – you-all got along?" He answered with feeling, "Oh, yeah." Then, "I mean, you-all were working together?" Again, he responded with a tone of voice to match his words, "Yeah. In fact, I talked to Andy here the other day. He was supposed to come in to our 25-year [church] reunion that we had. And he come in, but he didn't make it in time to get to the singing we had, but I had talked to him a week before, yeah, and stuff"[60] Mr. Justice and Andy, in

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[55] Manning, pp. 46-48
[56] *Id.*
[57] Manning, p. 48
[58] Justice, pp. 225, 234, 243, 245
[59] Justice, p. 245
[60] *Id.*

particular, had a father-son relationship.[61] There could hardly be any other estate where all the parties were in any tighter agreement than this estate.[62]

- Conflicts of interests were discussed with all parties.
- All parties wanted Ms. Roberts to keep representing all parties.
- Almost all of the parties signed written waivers of any conflict of interests.
- During the entire time Ms. Roberts represented all parties there were no conflicts.
- None of the parties have ever complained about any conflict of interests.
- None of the parties filed any complaint with the Bar.
- None of the parties ever suffered any harm from representation by Ms. Roberts.
- Ms. Roberts was able to keep the Estate from paying many thousands in taxes.

It is normal for attorneys who have clients of long standing to then handle an estate where the client is one of multiple heirs, especially when the estate is small. All the persons involved can read the will and see what each one is supposed to receive. There is always a possibility of a conflict, but until a conflict actually arises, it is not economical or reasonable to hire multiple attorneys. After all, lawyers do not come cheap. Of course, the lawyer handling the estate must keep everyone informed and be constantly vigilant for any unfairness, just as Ms. Roberts did with the Manning Estate. Fortunately most possible conflicts in estates, as well as life in general, do not ignite.

David was asked by Bar Counsel, "Did she discuss conflicts of interest with you?" David answered, "She discussed conflict of interest with me, with me and my brother [Andy] and me and my wife both. .... And we waived all that."[63] Of course, Mr. Justice knew that Ms. Roberts

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[61] Roberts, p. 588
[62] *Id.*
[63] Manning, pp. 13-14

was representing David in the criminal matter, was helping Andy with a child support issue, and serving as attorney for the Estate, and **did not object at any time in any way**.[64] He did not remember what Ms. Roberts discussed with him about any ramifications of the representations that were not already obvious, but as he said, "I've got Alzheimer's too, a little bit. I'm getting old now, remembering all that."[65] Just as with Mr. Justice, Ms. Roberts discussed the possibility of conflicts with David and Andy since they were the ones who had the possible competing claims to the estate. As evidence of the discussion and consent of David and Andy she got them to sign a waiver of any conflict of interests.[66] Mr. Justice, of course, knew Andy was on board since Mr. Justice and Andy had signed the Estate employment contract together.

"Consideration should be given to whether the client wishes to accommodate the other interest involved." Mr. Justice knew what was going on and was happy. David knew what was going on and was happy. And Andy knew what was going on and was happy. What standing does the Bar have to say that these adult men should have been unhappy?

- Ms. Roberts did not request, demand, or direct Mr. Justice to write checks from the estate to help David with his criminal defense.
- Andy came up with the idea of borrowing money from the estate to assist David.
- Andy asked Mr. Justice to write the two checks from the estate.
- Ms. Roberts explained to Mr. Justice the ramifications of writing the checks.
- Mr. Justice chose independently to write the checks.
- All parties approved of Mr. Justice writing the checks.

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[64] Justice, p. 230

[65] Justice, pp. 228, 230 ; The Trial Commissioner incorrectly equated Mr. Justice not remembering as proof that Ms. Roberts had not discussed conflicts of interest with him. Ms. Roberts did discuss conflicts of interest with Mr. Justice.

[66] KBA Ex. 7

- None of the parties ever complained about the checks.
- None of the parties filed any complaint with the Bar regarding the checks.

Contrary to what the Board found, Andy, the only other person who was thought to have a claim to the inheritance, is the one who initiated the idea of borrowing money from the Estate to pay for the ballistics expert for David.[67] This by itself showed just how close the brothers were. Andy wanted very much for David to win and inherit. Ms. Roberts **did not** suggest or instruct Mr. Justice to loan the money to David.[68] Frankly, Ms. Roberts could not instruct Mr. Justice on anything. Mr. Justice was extremely independent and secretive.[69] He did not rely on Ms. Roberts.[70] Mr. Justice took the Estate checkbook early on and failed to even let Ms. Roberts know what he was doing from that point on.[71] At the behest of Andy and David, Mr. Justice made the loan (or early distribution) on his own. Since it was assumed that either David or Andy was going to inherit almost all of the Estate, the idea of an early distribution was quite reasonable. David, Andy, Mr. Justice, and even David's wife, Lunell, all agreed to repay the money as a loan.[72] Also, Ms. Roberts had been involved with other estates where the executor made a loan or early partial distribution to one of the potential heir because of a medical emergency.[73] Clearly an executor does have the power to distribute assets early, so long as the executor is willing to take the risk.[74] Here Mr. Justice was willing to take the risk, which turned out to be a safe gamble. No one, including David's son who ended up with most[75] of the Estate, objected or complained in any way. Everyone involved wanted David to be found not guilty. It

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[67] Roberts, pp. 543-44
[68] *Id.*
[69] Roberts, pp. 530-31, 533-34
[70] *Id.*
[71] *Id.*
[72] Roberts, pp. 592-93
[73] Roberts, p. 592
[74] Roberts, p. 993
[75] Andy's son received 10 acres.

is also interesting to note that the loan/distribution never made it into the final settlement prepared by Mike Reynolds, the lawyer who took over the Estate from Ms. Roberts and who eventually supplied the information to the Bar regarding this very charge.[76]

It is important to note an important absence in the Bar's "proof." Mr. Justice had an opportunity to complain about Ms. Roberts representing the Estate and working with all three men or about the loan of $2,000 to pay for the ballistics expert, but Mr. Justice did not complain or voice the least objection at the trial or at any other time. He seemed to be entirely comfortable that Ms. Roberts worked with him and the two "boys" as a unified group and with what he had done at Andy's request. Certainly David and Andy did not complain. Nor did David's son, who ended up inheriting most of the Estate, complain. The only person to complain was Mr. Reynolds, the lawyer who took the Estate over from Nancy and who was upset when Ms. Roberts pointed out to the District Judge that Mr. Reynolds had made mistakes in the proposed final settlement.

The Bar called upon a person listed in the pre-trial compliance as a fact witness and had him improperly serve as an expert witness. Counsel objected to no avail. Besides usurping the role of the Court, the Bar asked Mr. Reynolds to give his opinions about his own personal views, not about any subject that required expertise that the Court could not understand on its own. The Bar treated Mr. Reynolds as though he were an expert about estate practice, yet Mr. Reynolds and Ms. Roberts have very similar experience and Mr. Reynolds has on occasion come to Ms. Roberts for advice on handling an estate. Mr. Reynolds was asked what he would do, not what was required. When he did give his personal opinion about the Rules of Professional Conduct, he showed clearly that he really did not know what they required. Mr. Reynolds also showed

[76] Roberts, p. 494

that even an "expert" can make mistakes that jumped out to an old property law professor such as Respondent's counsel. He called the willing of real estate a "bequest" when he later agreed that the correct name was "devise."[77] And while Ms. Roberts was handling the Estate, he had insisted that the Estate give his client, Roxy Duke, a deed to property Ms. Duke received in the will, when he later admitted that the land transferred automatically and immediately upon the death of the testator.[78] In an interesting comparison with Ms. Roberts' habit of doing what clients want, Mr. Reynolds revealed that he insisted on the deed because that was what Ms. Duke wanted, despite the fact that the deed was a legal nullity.[79]

Mr. Justice came to see Mr. Reynolds in late 2007, many years after Mr. Justice had stopped cooperating with Ms. Roberts and **nine years** after David had been convicted and thus eliminated as a potential heir.[80] Finally Mr. Justice was ready to wrap up the Estate.[81] Mr. Reynolds filed an entry of appearance on March 13, 2008.[82]

Mr. Reynolds was improperly asked if he would have represented Mr. Justice, David, and Andy at the same time. He said that he, personally, would not have done that.[83] He gave as his first reason that multiple representations are against the ethics Rules.[84] This "expert" testimony was, of course, starkly incorrect. As pointed out above, Rule 1.7 specifically contemplates multiple representations. As his second reason why he, personally, would not have represented the three men, Mr. Reynolds stated that they presented conflicts of interest that "would have happened."[85] Again, Rule 1.7 and the Commentary make it clear that possible conflicts do not

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[77] Reynolds, pp. 202, 215
[78] Reynolds, pp. 201, 215-16
[79] Reynolds, p. 216
[80] Reynolds, p. 202
[81] *Id.*
[82] Reynolds, p. 203
[83] Reynolds, pp. 210-11
[84] Reynolds, p. 211
[85] *Id.*

equal real conflicts. The Commentary specifically states, "A possible conflict does not itself preclude the representation."[86] Mr. Reynolds then went on to opine that real conflicts did eventually occur.[87] Once again, Mr. Reynolds was wrong. Ms. Roberts had ceased to be involved with the Estate long after David had become disqualified and long after Andy had gotten his own attorney. **No** actual conflicts ever occurred while Ms. Roberts was working with Mr. Justice, David, and Andy.

Mr. Reynolds also said that he disapproved of the Estate loaning money to David to pay for the ballistics expert.[88] Yet at the time David was the primary heir while the only alternative heir as far as everyone thought, Andy, was the one who asked that the loan be made (contrary to what the Board found). And, as Ms. Roberts said, advanced distributions in special circumstances and emergencies do occur occasionally. When the loan was made, no one had the advantage of hindsight. It was unquestionably what Mr. Justice, David, and Andy **wanted to do**. By the same token, **no one has complained about the loan** – no one who ended up with any interest, no one who was involved in any way with the Estate, expect Mr. Reynolds, who was not affected in any way. There was absolutely no harm to anyone and no foul.

Representing multiple clients is not *per se* a violation of this rule. As with a question of negligence, there must be damages proximately caused for there to be a tort. In this case, who was damaged and how? In fact, who complained about it? It was not Mr. Justice or the "boys."[89] It was just the lawyer who took over the case from Ms. Roberts.

The Bar also faulted Ms. Roberts for not discussing conflicts with the three men. In that portion of Mr. Justice's testimony that the Trial Commissioner ignored, his words and manner

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[86] 1989 Commentary, ¶3
[87] Reynolds, p. 211
[88] Reynolds, pp. 212-13
[89] Justice, pp. 225, 231-232,234, 245

showed how very close he and "the boys" were.[90] Not all families fight over the bones of the deceased. Mr. Justice gladly did whatever "the boys" wanted him to do. No one ever so much as complained, until prompted to do so well after the fact. Andy and Mr. Justice signed the employment contract together. Andy and David signed a waiver.[91] These documents support Nancy and David's testimony that she did discuss the issue of conflicts with all the parties.

The absence of proof is not the proof of absence. It is a symptom of selective perception for the Trial Commissioner to quote a man with Alzheimer's that he did not remember Ms. Roberts talking to him about conflicts and instructing him on his duties as executor and treating that lack of memory as overriding Ms. Roberts' testimony to the contrary.[92]

Mr. Justice said that he was lying in bed when he suddenly thought that there might be a conflict. Of course, that sudden revelation occurred at the same time David was trying to get out of prison with an RCr 11.42 motion, when it might look strange for David to be accusing Ms. Roberts of faults while David's close friend was still employing Ms. Roberts. It is also interesting that the Bar faulted Ms. Roberts for allegedly not talking with Mr. Justice about conflicts (which was not at all true), yet Mr. Justice was able to understand the concept of conflicts when it suited him. Ironically, when Mr. Justice suddenly started worrying about a conflict, there really was no conflict – Ms. Roberts no longer represented David or anyone else. Of course Mr. Justice never contacted Ms. Roberts to ask her if there really was a conflict.

Ms. Roberts did her best to represent the Estate and to accomplish what the relevant parties wanted. The wishes of the parties took precedence over rigidity and formality. The Rule and Commentary contemplate and permit such flexibility.

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[90] Justice, p. 245
[91] Justice, p. 230
[92] Justice, p. 228

KBA 17411, Count III: The Bar claimed that Ms. Roberts violated SRC 3.130-1.16 which provides: "Confidentiality of information" states in subpart (d) that, "Upon termination of representation, a lawyer shall take steps **to the extent reasonably practicable** to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property **to which the client is entitled** and refunding any advance payment of fee that has not been earned."[93] By its own language the rule shows an appreciation of the realities of law practice. The phrases "to the extent reasonably practicable" and "to which the client is entitled" recognize that what items are to be turned over to the client is not always black and white. There can be good-faith disagreements that require discussions to resolve. The phrase also recognizes that lawyers are often extremely pressed for time and may need some "slack" to carry out the transfer of the file.

As the character Dub Taylor said in the movie Cool Hand Luke, "What we have here is failure to communicate."[94] That failure arose partly as a result of differing experiences and points of view. A lawyer who works for a law firm or a governmental agency cannot even contemplate the near chaos of the office of a single practitioner. The expression, "a gypsy camp after a flash flood," is sometime applicable. In such an office, a client's "file" is likely to not contain everything associated with that client. While, on the other hand, the file might contain things that are only temporarily in the file such as general research papers. When a demand is made for a client's "file," the term does not have the same meaning as it does in a well-regulated law firm or government agency. The single practitioner who really wants to comply with the demand will often have to get a clearer designation of what is wanted. Except for those on a pure "fishing expedition," this more detailed request should not prove too difficult. It does not

[93] Emphasis added.
[94] Dub Taylor, "Cool Hand Luke" 1967

help if the person making the demand simply becomes more strident. Speaking louder to someone who does not understand your language rarely accomplishes much other than to irritate all parties. In this case the Public Advocate, Ms. Sarah Nielsen, was a relatively young lawyer in a hurry.

David had effectively discharged Ms. Roberts and turned his next move over to Ms. Nielsen. In addition to the extensive court record, Ms. Nielsen wanted to have David's entire "file" to see if there was anything that could help her gain his freedom. Having fought extremely hard for over one thousand hours to gain David's freedom, Ms. Roberts had all of the motivation in the world to **help** Ms. Nielsen get whatever she needed so that Ms. Nielsen could get his freedom. Ms. Roberts did not think of Ms. Nielsen as an adversary, despite the unfounded grounds claimed by David in his RCr 11.42 motion. Ms. Roberts still fully believed that David was innocent and should be free.

Ms. Roberts understood the requirement to give a client a copy of most of the file to the extent reasonably practicable. But, having not had this situation come up before, Ms. Roberts did not know clearly what to do about "attorney work product." Ms. Nielsen spoke to Ms. Roberts **only one time over the phone**.[95] Ms. Roberts was concerned about what she was supposed to turn over.[96] She asked Ms. Nielsen to be more specific, especially about "attorney work product."[97] Ms. Roberts was very busy with other cases on the day that Ms. Nielsen called about the file. Ms. Roberts asked when they could schedule a time to review the file and figure out what Ms. Nielsen was entitled to get.[98] Ms. Nielsen's only response was to repeat, "I want

[95] Two very short phone calls at the most; Nielsen, pp. 603, 605, 610
[96] Nielsen, p. 609-10
[97] Nielsen, pp. 606, 610
[98] Nielsen, pp. 608-09

the **whole** file."[99] Ms. Roberts offered for Ms. Nielsen to come to Ms. Roberts' office.[100] Ms. Nielsen was very insistent and not too kind.[101] She demanded the entire file and wanted it the very next day.[102] When Ms. Roberts told Ms. Nielsen that Ms. Roberts had to be out of town the next day, Ms. Nielsen got upset and immediately filed her motion.[103] Ms. Nielsen said, "I posed it as we misunderstood each other."[104] The reason given in the motion was not that Ms. Roberts had refused to turn over what the rules require. The motion, itself, stated that the reason was **"to simply expedite this process."**[105]

- Ms. Nielsen phoned Ms. Roberts one time for sure and two times at most.
- Ms. Nielsen demanded that Ms. Roberts turn over the **entire** file including "attorney work product."
- Ms. Nielsen demanded that Ms. Roberts turn over the file the next day.
- Ms. Roberts never, ever refused to turn over the file to Ms. Nielsen.
- Ms. Roberts did express concern about turning over "attorney work product."
- Ethics Advisory Opinion E-395 relating to client files is internally inconsistent and confusing.[106]
- Ms. Roberts was extremely busy serving other clients when Ms. Nielsen called.
- Ms. Roberts did ask for additional time to discuss and turn over the file.
- Ms. Nielsen's motion to compel does not claim that Ms. Roberts refused to turn over anything other than "attorney work product."

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[99] *Id.*
[100] Roberts, p. 415
[101] *Id.*
[102] *Id.*
[103] Roberts, p. 415; copy of motion attached as appendix
[104] Nielsen, p. 608
[105] KBA Ex. 10A
[106] Copy of opinion attached as appendix

- Ms. Nielsen's motion simply cites "to expedite the process" as its basis.
- Neither Ms. Nielsen nor David filed any complaint with the Bar.

The Trial Commissioner opined that: "Ms. Nielsen testified as to her recollection: 'I don't think [Respondent] would agree to give me any of it.'" In doing so the Trial Commissioner misquoted Ms. Nielsen and completely changed her meaning. Ms. Nielsen was asked, "Okay. In those conversations, did she reveal to you whether she had concerns about turning over work product to you?" Ms. Nielsen responded, "I don't recall if that was the issue – if that was an issue or not. I remember **I asked for the entire file, including the work product**, and I don't think she would agree to give me any of **it**. Now whether or not she expressly said no because of work product, I couldn't – I can't remember." The Trial Commissioner began with a sentence about the **entire file** then quoted Ms. Nielsen who was only talking about **work product**. The Trial Commissioner made it seem as though Ms. Nielsen was saying that Nancy was refusing to give Ms. Nielsen **any** of the file. The 1997 Advisory Opinion on this subject expressly excludes attorney work product from that which must be turned over to the client. So, if the Advisory Opinion is to be followed, Ms. Nielsen was demanding something to which she was not entitled. As she clearly testified, Ms. Roberts did have concerns and questions about what she should give Ms. Nielsen, and, as it turns out, what Ms. Nielsen was demanding was not proper.

The Trial Commissioner opined that: "The Respondent refused to provide the file to Ms. Nielsen." That finding is absolutely false and is unsupported by the record. Ms. Nielsen actually said, "And I posed it as we had this **miscommunication** about who actually owned the file. So I would say yes, she **probably** did refuse to give it to me because she thought that she owned it, **unless** I could give her specific documents I wanted out of it, which I couldn't because I didn't know what existed in the file at the time." "Miscommunication" "Probably" "Unless" This is not

at all the same as what the Trial Commissioner "found." Even according to Ms. Nielsen's statement Ms. Roberts did not actually refuse to deliver the file; there simply was uncertainty between Ms. Nielsen and Ms. Roberts as to what **should** be delivered. On the other hand, Ms. Roberts does recall quite well. In the very short phone call from Ms. Nielsen, Ms. Roberts expressed concerns about what needed to be turned over, expressed a willingness to have Ms. Nielsen come to the office to exchange the file, and asked for additional time to arrange the exchange.[107] **Ms. Roberts did not refuse to give Ms. Nielsen the file!**[108] In fact, Nancy said that the file belonged to David.[109]

The rules, commentaries, and decisions about what does and does not belong to a client, especially when the client has not paid a penny to the lawyer, are not nearly as black-and-white as the Bar would indicate. Contrary to the Bar's contention, Advisory Ethics Opinion E-395 issued in March of 1997 (and apparently not updated since) does not clear up the confusion. For example, "attorney work product" is excluded on the second page but "notes and memos to the file prepared by the attorney containing recitals of facts, conclusions, [and] recommendations" are included on the first page. If there is a difference between attorney work product and notes and memos prepared by the attorney giving conclusions and recommendations, it is not readily apparent. To suspend an attorney on the basis of such an internally inconsistent ethics opinion is unethical in itself. If it were a criminal statute, the Court would throw it out as too ambiguous. Right or wrong, Ms. Roberts was uncertain about what she was required to turn over to Ms. Nielsen, and Ms. Nielsen knew that. Also Ms. Roberts just could not drop everything she was doing and get the entire file to Ms. Nielsen the very next day, as Ms. Nielsen was demanding. One telephone call was not sufficient to resolve the attorney work product issue or to even make

[107] Roberts, pp. 415, 419-21, 544, 547, 549-51
[108] Roberts, p. 414
[109] Roberts, pp. 419-20

arrangements to meet and try to resolve it. Filing a motion to compel after such a brief effort to obtain compliance was premature and discourteous. Endangering a lawyer's professional license and livelihood on the basis of what both lawyers involved acknowledge was a misunderstanding is entirely inappropriate.

PRIOR PRIVATE REPRIMANDS

In 1993 Respondent was accused by a check-kitting gambler who was the husband of Ms. Roberts' personal injury client. The husband negotiated a settlement with the defendant without Ms. Roberts' knowledge after Ms. Roberts had been hired. When Ms. Roberts requested her percentage of the settlement, the husband filed the complaint against her claiming that she really did not have a contract. In 2001 Ms. Roberts was accused of *ex parte* communications with Judge Tom Lewis when the Judge, himself, directed Ms. Roberts to bring an order to him in a case involving a Kentucky State Police Trooper who had stolen over $70,000 from Ms. Roberts' client. Ms. Roberts obtained a judgment against the Trooper and apparently the Trooper and his attorney were looking for a way to get revenge. On both occasions Ms. Roberts chose not to fight the accusations because of the expense and the time it would have taken (as this case amply demonstrates) and because she understood from Deputy Bar Counsel at that time that private reprimands were relatively minor and caused no permanent harm.

PUNISHMENT

Initially the reason why the Court should not approve of the punishment recommended by the Board is, of course, because Respondent is not guilty of the charges. But even if the Court were to find that Respondent were guilty of one or both of the charges, the Court will find that

the "violations" were good-faith mistakes made under difficult circumstances. In addition, the Court will find that the law regarding both charges is remarkably unclear and does not give an attorney fair warning of the line between ethical and unethical. For a single practitioner with a very large client base, a one-month suspension is severe. Unlike an attorney in a partnership, there would be no one to help clients and attend hearings. Ironically, while trying to advance the cause of ethics, the Court would be forcing Respondent to mistreat innocent clients. A public or private reprimand would be quite adequate to reinforce the lessons Respondent has already learned. The hundreds of hours of work on and nearly-constant terror about the charges for many years combined with the significant expense of hiring defense counsel have driven home the point to be extremely careful about ethical matters in the future. Ms. Roberts' sincere desire and intent to serve the interests of clients above all else was already ingrained in her personal ethics. This case has not dampened her enthusiasm for helping clients in every way she can, but it has taught her that even when rendering *pro bono* services, it is imperative to keep a detailed, written record of all activities, especially when clients are informed about risks and conflicts. A one month suspension of law practice would just "gild the lily." A private reprimand would actually do a better job of education without killing the student.

ALLOCATION OF COSTS

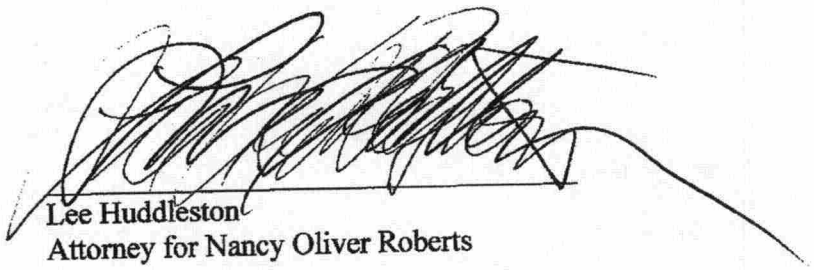
The Court should not make Respondent pay any of the Bar Association's costs because Respondent is not guilty of any of the charges. But if the Court finds Respondent guilty, Respondent should not pay all of the Bar's costs of the charges brought against her. In fairness, even if the Court were to conclude that Respondent was guilty of both of the remaining two charges, Respondent should only reimburse the Bar for **two-ninths of the Bar's costs** and the

Bar should reimburse Respondent for **seven-ninths of Respondent's costs**. Why should Respondent have to pay the Bar for bringing completely unfounded charges against her and putting her through unnecessary agony for years? Should the Bar not have to accept some responsibility for claiming that Respondent had a contingency-fee arrangement when the Bar could clearly see that Respondent had **written hourly-fee contracts**? Also for a sizable partnership $7,904.36 would be insignificant. For a single practitioner struggling to make payroll each month, $7,904.36 is definitely significant, especially on top of her own expenses and lost billable hours defending against the nine charges.

CONCLUSION

Respondent will be eternally grateful for the willingness of the Board to actually look at the facts rationally. Up until that point Respondent and her counsel had reluctantly concluded that an attorney who angers a Judge, Commonwealth's Attorney, and fellow attorney has a very short professional life despite the facts and law. Respondent is cautiously optimistic that the Court as well, with its considerable resources including highly qualified law clerks, will be even more willing and able to look at the actual facts very carefully. And, in turn, the actual facts and the Court's own rules and commentary will lead the Court to the inevitable conclusion that Respondent did not violate SCR 3-130-1.7 and 1.16.

Respectfully submitted this 31st day of May 2012.



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