# SUPREME COURT OF KENTUCKY

TENDERED
RECEIVED
JUN 26 2012
CLERK
SUPREME COURT

KENTUCKY BAR ASSOCIATION,
Appellant-Complainant

versus

NANCY OLIVER ROBERTS,
Appellee-Respondent

Nos. 2012-SC-000266-KB

Pursuant to court order

FILED
AUG 15 2012
CLERK
SUPREME COURT

## APPELLEE-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 25th day of June 2012.


Lee Huddleston
Counsel for Appellee-Respondent

*HUDDLESTON & HUDDLESTON*
Attorneys at Law PLLC
Post Office Box 2130
Bowling Green, Kentucky 42102-2130
(270) 781-9870
Fax (270) 842-1659
Email orion2279@insightbb.com

# STATEMENT OF POINTS AND AUTHORITY

# REQUEST FOR ORAL ARGUMENT

Appellee-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. Those two charges are the subject of Respondent's Brief as Appellant-Respondent. This brief covers the seven not-guilty findings.

The reason why the Court should follow the Board's not-guilty recommendation regarding the seven 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 were 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. While 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 these most serious charges and found them to be bogus at best.

[1] Copy attached as an appendix.

# STATEMENT OF THE CASE

Respondent understands that prior to reading this brief the Court will have read Respondent's brief as the Appellant-Respondent, filed May 31, 2012. Accordingly, Respondent did not want to burden the Court with a repetition of the introductory information set out in the Statement Of The Case in that brief. In the event that the Respondent's understanding is incorrect, the introductory information has been included as an appendix to this brief. In this brief Respondent has only included additional information that will be helpful to the Court in deciding the issues only raised by the Bar as Appellant-Complainant.

One point that Respondent would like to reiterate in this brief, however, is that **NONE** of the charges was brought by a client or aggrieved lay person. All of the charges were brought by adverse, rival attorneys who also did not suffer any loss or injury other than to their egos.

# ARGUMENT

**KBA 13737, Count I:** The Bar claimed that Respondent violated SCR 3.130-1.4 "Communication" which provides in subpart (b) that, "A lawyer should explain a matter **to the extent reasonably necessary** to permit the client to make informed decisions regarding the representation."[2] The Board, on the other hand, unanimously found that this charge was not supported by the facts or law.

Nancy Roberts spent over 1,030 hours working with and for David Manning.[3] For a month and a half before the trial she spent almost every evening and night talking with David in the Warren County Jail.[4] On many occasions she did not leave the jail until well after midnight.[5]

---

[2] Emphasis added.
[3] Roberts, pp. 59, 349
[4] Roberts, pp. 188, 367
[5] *Id.*

For a person who practices law by herself and has the responsibility of hundreds of cases at all times, the allocation of over 1,030 hours of time and energy listening to and explaining things to a client was an extraordinary commitment.[6] There are physical and mental limits to what any lawyer can provide. Rule 1.4(b) does not require a lawyer to exceed those limits.

"To the extent reasonably necessary" shows that the drafters of the Rule knew that some clients are smarter than other clients. Some clients have practical experience in an area far exceeding that of the lawyer. David was one of those clients. David was/is a professional criminal.[7] He has spent most of his adult life in prison (obviously not very good at this profession).[8] At the last count he had been charged with eight separate felonies.[9] "Reasonably necessary" about criminal law was a very low bar for David Manning. Ms. Roberts far exceeded that standard.

Ms. Roberts repeatedly testified that she thoroughly discussed the entire case with David, especially the really tough decisions.[10] For example, she stated, "My job was to present the strengths and weaknesses of his case or all these alibi witnesses, the strengths and weaknesses or the possibilities of them testifying correctly at trial, or correctly as we knew it to be."[11] In another example Ms. Roberts testified: "No. I did not advise him to do either (accept or reject a plea offer). I advised him of the strengths of witnesses, his alibi witnesses, the – how Lunell's (David's wife) statement would hurt him, but I did not tell him, 'You have to accept it or you have to reject it,' or I didn't say, 'You should do this.' It – I said, 'It was your choice.'"[12] In his deposition David had the opportunity to complain about how or how much Ms. Roberts

---

[6] Roberts, p. 355
[7] Roberts, p 374
[8] *Id.*
[9] *Id.*
[10] Roberts, pp. 367, 373
[11] Roberts, p. 367
[12] Roberts, p. 373

explained things to him but did not so much as hint that he was dissatisfied. In fact, he said, "We done a lot of talking."[13] When he was asked, "[S]he'd come over to the jail in September and, I mean, you all spent night after night after night trying to get ready, didn't you?" He answered, "Yeah."[14] Then he was asked, "Okay. And – and then she fought like a tiger in court to try to keep out some of that testimony and everything?" He answered, "Yeah."[15] Later when he was asked about Ms. Roberts' records of over 1,030 hours work on his case he acknowledged, "She spent a lot of time on it."[16] There were only two people present when all the "explaining" was going on. Both confirm that Ms. Roberts met the requirements of Rule 1.4(b). Other than gross speculation and confirmation bias, there is not any other evidence to the contrary.

In support of its argument that Ms. Roberts violated Rule 1.4(b) the Bar stated that Ms. Roberts had not discussed her contingency-fee arrangement with David and had not discussed how said contingency-fee arrangement could impact her representation of him.[17] The Bar conceded that Ms. Roberts said repeatedly and unequivocally that she could not have discussed "her contingency-fee arrangement and its impact" with David because she did not have a contingency-fee arrangement with David.[18]

In his decision in the RCr 11.42 proceeding Judge Grise noted that David should have accepted the plea bargain of five years offered by the Commonwealth's Attorney. Of course, Judge Grise had not been told that the offer really would have resulted in up to **eighteen** years in prison. And, of course, with the advantage of hindsight and after the trial and the years of hard-fought appeals, the conclusion that David should have taken the offer was a lot clearer. But in

---

[13] Manning, p. 7
[14] Manning, p. 20
[15] *Id.*
[16] Manning, p. 29
[17] Bar Brief, p. 26
[18] *Id.*

the heat of the moment the choice was not so obvious. It is also critically important to know **when** the choice had to be made.

Steve Wilson (then Commonwealth's Attorney) came to the jail the night David was arrested.[19] Neither Ms. Roberts nor any other lawyer was representing David at that time.[20] According to David, Mr. Wilson made the settlement offer to David of five years in prison [later Judge Wilson admitted that it would really have been eighteen years].[21] Mr. Wilson had just tried and failed to convict Earl Manning of molesting children.[22] As David put it, "Because he had just tried him – he had just tried the old man for sexual molestation charges and stuff. I guess he wanted to reassure in his own mind that he was right, which he was."[23] Then David said, "And he [Steve Wilson] wanted me to tell him about him [Earl Manning] molesting us, his kids, and – and that's why I killed him. That's what he wanted me to do and he offered me five years."[24] Without any input from **any** lawyer, especially not Ms. Roberts, David immediately rejected the offer.[25]

Besides being convinced that he could win at trial, the primary reason David rejected the plea offer was so strong that even if Ms. Roberts had tried to influence David's choice it would have been futile. When asked by Bar Counsel why he rejected the settlement offer, David said with a level of passion only visible on the DVD of the deposition, "Because I didn't feel like I deserved to do no time for what I did." Bar Counsel tried to tie Ms. Roberts into the process by asking, "What did Ms. Roberts tell you about the evidence against you?" David brushed aside the question and stated the real reason, "I don't remember. I just didn't want to take the five

---

[19] Roberts, p. 362, 365-66; Manning, pp. 33-34
[20] Roberts, p. 362; Manning, p. 34
[21] Roberts, p. 362; Manning, pp. 12, 34-35
[22] Manning, p. 34-35
[23] Roberts, p. 363; Manning, p. 34
[24] *Id.*
[25] Roberts, p. 362; Manning, pp. 12, 35

years because I didn't feel like I **deserved** to take no time for what I did. He molested us growing up, and I felt like I was **justified in killing him**. **And I still do to this day**."[26] David talked about how Earl Manning had molested him, his brother Andy, Lunell's son Scott Roddy, David's cousin's children, and probably others.[27] The next time in the deposition that he gave a similar answer, David got so emotionally upset that the deposition was paused to give him a chance to recover.[28] David was simply not going to plead guilty to murdering Earl Manning. According to David, Earl deserved to die and David did not deserve to be punished. David may have been a victim of confirmation bias; his burning hatred of Earl and his feeling of justification may have altered his evaluation of the strength of his case and the weakness of the Commonwealth's case. Nevertheless, as long as there was any chance of winning at trial, there was nothing Ms. Roberts could have said that would have changed David's decision.

Ms. Roberts consistently testified that she did not advise, encourage, or order David to reject the plea offer. She most certainly did not cause David to reject the offer for her own benefit (since there would be no benefit to her if the trial were lost). David is the one who made the decision. Even in the RCr 11.42 hearing testimony cited by the Bar, David admitted that he had made the decision. But, David was trying to win his freedom in the 11.42 proceedings, so he did just what his inmate counsel told him to do, claim that Ms. Roberts did advise him to reject the offer so that his rejection could be tied to the fake contingency-fee contract.[29] Outside of the 11.42 hearing David has clearly stated that he and he alone made the decision. Given that it was his life on the line, counsel asked, "So who should make the call?" David did not hesitate, "Me." "Who did make the call?" Again David stated emphatically, "Me." In his letter to Ms. Roberts

---

[26] Manning, p. 12; Ms. Roberts was shocked. Up until this point she was convinced the David was innocent.
[27] Manning, p. 35
[28] *Id.*
[29] Manning, pp. 30-33

after the trial, received by her on November 2, 2010, David also acknowledged that he was the one who made the call, "I really thought that we would win. I guess I should of coped out, but I didn't kill anyone." Bar Counsel tried valiantly to reconnect Ms. Roberts to the decision by asking, "Did you discuss that [the state of the evidence] with Nancy?"[30] David's answer showed his independence and his ability to make the decision on his own, "I didn't have to discuss that with Nancy, I knew that. You know, they didn't have no gun, they didn't have no knife, they didn't have no eyewitnesses, they didn't have nothing."[31] David was capable of and did make his decision about the plea offer based on the state of the case prior to trial.

Almost all circuit court judges require that settlement offers be accepted or rejected before trial so that citizens are not called to jury duty and then told part-way through a trial to just go home. This normal procedure was also in effect in the David Manning case. The decision to take or reject the plea offer had to be made prior to trial. Accordingly, it is the state of the case **at the time of the settlement offer deadline** that is relevant; not the state of the case in the middle of the trial and certainly not after all the appeals were done. If witnesses recanted their testimony, if the trial judge made unexpectedly adverse decisions, or if the case just started falling apart during the trial, it is completely irrelevant to the wisdom of rejecting the settlement offer.

The claim that "she made me do it" is familiar to all parents of young children. And, granted, David is very good at conning people, but it took a wholesale suspension of disbelief to get this whopper swallowed. How can experienced prosecutors call a man a liar on one hand and then accept an unlikely scenario as the gospel truth simply because the liar says it was so?

---

[30] Manning, p. 49
[31] *Id.*

The Bar argued in its Brief that Ms. Roberts wanted an unspecified piece of David's inheritance from Earl Manning and was willing to advise David to reject the settlement offer so that she could get her hands on that property. Unfortunately for the Bar, the story is **internally inconsistent** (kind of an oxymoron) and illogical.

Ms. Roberts may have been influenced by the client's optimism to be more optimistic herself. But to claim that Ms. Roberts would let David delude himself into believing that he could establish his innocence when she "knew" that he had no chance is **patently absurd**. What would she gain from that – years of extremely hard work and disappointment and many thousands of dollars in expenditures rather than income from other cases, fighting a battle she "knew" she would lose, which, in turn, would preclude any access to David's possible inheritance. In order to believe that greed would cause Ms. Roberts to let David make the "wrong" choice when the plea bargain was offered, one has to assume that Ms. Roberts was convinced that she could get a "not guilty" verdict. Otherwise the supposed "greed-induced choice" would be ineffective. If she did not wholeheartedly believe that she had a reasonable chance of winning at trial, the correct "greed choice" would have been to convince David take the plea, get out of prison, go to work, and start paying Ms. Roberts' much smaller hourly fees. Instead of doing what was best for herself (according to the greed theory), Ms. Roberts did what the client wanted and what she and David believed in good faith was best for him. Despite our best efforts, the law is extremely unpredictable. It is the height of hubris to claim after the fact that one would have chosen differently.

The Board was correct to unanimously find that Ms. Roberts was not guilty of this charge.

**KBA 13737, Count II:** The Bar claimed the Respondent violated SRC 3.130-1.5 "Fees" which provides in subpart (d)(2) that, "A lawyer shall not enter into an arrangement for, charge, or collect: A contingency fee for representing a defendant in a criminal case." The Board, on the other hand, unanimously found that this charge was not supported by the facts or law.

**(i) The Language:** All of the contracts that are the subject of this case clearly stated in writing: "I agree that monthly statements will be mailed itemizing each charge to the nearest one-tenth of an **hour** based upon our standard $100.00 per **hour** and paralegal rates are $45.00 per **hour**."[32] In the very first contract signed on January 24, 1998, attention was specifically drawn to the terms "$100.00 per hour" by underlining them at the time of the signing.

And while it is "preferred" that hourly-fee contracts be in writing, contingency-fee contracts **have** to be in writing that clearly and unequivocally sets out the nature of the contingency, the funds or property from which the fee will be taken, and the percentage of the funds or property that will be taken.[33] The written contracts between Ms. Roberts and David do not meet any of those requirements. The words "if," "contingency," or "winning your case" do not appear. No percentage of David's inheritance is mentioned. In fact, the inheritance, itself, is not mentioned at all. Clearly, Ms. Roberts never intended to form a contingency-fee contract.

The parole evidence rule was adopted in English courts hundreds of years ago because it was obvious that the written language in a contract was significantly more reliable than the memory and verbal interpretations of parties with competing incentives and rampant confirmation biases. In this instance the written language unambiguously stated that Ms. Roberts would be paid an hourly fee. Other than surplus language stating, "This is not a contingency-fee

[32] Emphasis added.
[33] SCR 3.130-1.5(b) and (c)

arrangement," there is nothing more that Ms. Roberts could have done to make the fee agreement any clearer.

In addition, long before Ms. Roberts or David had any inkling that he later would need to accuse Ms. Roberts of entering into a contingency-fee agreement to gain his freedom, Ms. Roberts' actions were completely consistent with the hourly-fee contracts. She kept meticulous, burdensome records of all the time she spent working for David, a considerable expense in time and staff. She sent David regular, monthly statements spelling out how many hours she had worked for him. Unless Ms. Roberts could foretell the future, there is no way that she could have known that it would be wise to keep detailed hourly records so that she could "hide the real contingency-fee arrangement."

**(ii) Liability Versus Collection:** The description of permissible contingency fee arrangements in SCR 130-1.5(c) leads to a misunderstanding when the term "contingency fee" is latter used in reference to criminal cases. In most financial arrangements other than a civil trial contingency-fee situation, there is a difference between liability and collection.[34] A brief visit to bankruptcy court would illustrate this point well.[35] Every banker with any experience has made a "good" loan with "bad" or no collateral. The liability of the debtor is not contingent; the potential collection of the debt may be quite contingent. Every lawyer who provides services for hourly fees without getting a cash-deposit in advance is doing the same thing.[36] The client's liability for the fees is not contingent yet the ability of the lawyer to collect those fees may be

[34] Roberts, p. 341
[35] Roberts, p. 340
[36] Roberts, p. 341

very contingent.[37] **Uncertain collectability does not make the arrangement a contingent-fee agreement.**[38]

By the same token, a lawyer's efforts to improve the odds of getting her hourly-fees paid do not convert an hourly-fee arrangement into a contingency-fee arrangement. On three of the four employment contracts in this case (even though one was a contract with Lunell Manning on which David apparently agreed to cover Lunell's fees) Ms. Roberts added, sometimes at David's insistence, precatory language to encourage David to pay the hourly fees if and when he ever could. Ms. Roberts did not get a cash advance or any transfer of assets in lieu of cash, which apparently is quite acceptable. Nor did she acquire **any** legal or equitable interest in anything owned by David or possibly to be owned by David in the future. As the Court will know, everything that is put into a contract or lease does not legally do what a lay person might think it does. The precatory language added to the contracts in this case did not have any legal significance—no liens, no mortgages, no transfers of ownership, and no binding promises. All the language could do was bluff and encourage. It certainly did not and could not override the plain, written words of the contracts and distort hourly-fee contracts into contingency-fee arrangements.[39]

There are **no** cases, state or federal, that define "contingency fee," in the context of a criminal case as only relating to the collection of a fee earned by a non-contingent means. There are **no** rules, regulations, commentaries, encyclopedia, or hornbooks that define "contingency

---

[37] *Id.*

[38] Roberts, pp. 341-43

[39] If, as some have suggested, the added sentences converted the pre-printed hourly-fee contracts into contingency-fee contracts, then what kind of fee arrangement is established by the November 16, 1998, contract? That contract did not have any added language. If we are to ignore the plain wording of the pre-printed portion of the other three contracts, should we not do the same for the November 16 contract? Are we then to conclude that the November 16 contract did not provide for any fee arrangement? The foolishness of that proposition points out the inappropriateness of ignoring the hourly-fee language in any of the contracts. Copy attached as Appendix.

fee" in that way. Black's Law Dictionary[40] defines it as follows: "Fee – A contingent fee is a fee stipulated to be paid to an attorney for his services in conducting a suit or other forensic proceeding only in case he wins it; it **may** be a percentage of the amount recovered."[41] The fee is **earned** by winning the case. The collection of the earned fee is not relevant; it may or may not be a percentage.

There are three possibilities regarding contingencies: (1) the earning of the fee is contingent but the collection of the fee is not contingent; (2) both the earning of the fee and the collection of the fee are contingent; and (3) the earning of the fee is not contingent but the collection of the fee is contingent. The first possibility is found in *McCall v. Courier-Journal*, 623 S.W.2d 882, 889-893 (Ky. 1981), the only case in Kentucky to deal even peripherally with a contingency fee in a criminal case. The arrangement was determined to be a contingency fee because the fee was to be **earned** by winning the case. The way in which the fee was to be collected was not contingent; it was to be paid in advance. The second possibility is found in the only other case in the entire United States that has dealt with a contingency fee in a criminal case, *Simon v. Murphy*, 349 F.Supp. 818 (E.D. Penn. 1972). In that case **both** the earning **and** the collection of the fee were contingent upon winning the case. The third possibility is found in the case at bar. The earning of the fee was not contingent while the collection might be contingent.

In the case at bar the fee was to be **earned** and the amount determined on an hourly-fee basis. The **collection** of the fee, on the other hand, was unlikely at best and may or may not have been contingent (even assuming that there was any real expectation of collecting the fee at all). But, that would have been true even if there had not been a single word of extra language hand-

---

[40] Revised 4th ed., p. 741
[41] Emphasis added

written on the pre-printed contracts. After all, it was no secret that David was not in any position to pay Ms. Roberts over $100,000 in fees. So, if extra language had not been added, would the Bar still believe that they were contingency fee arrangements? If so, is that because everybody involved thought that the only way the fees would be paid was if David inherited from Earl? Then, what, if anything, did the hand-written language really add? Ms. Roberts has shown unequivocally that the language had no legal effect and created no legal interest at all. So, does the language override the printed language not because it legally does anything, but because it articulates what was obvious to everyone? If the Court were to rule that the contingency relates to the collection of a fee even earned by non-contingent means, would not every criminal case that is handled on credit be a contingency fee case? Such a ruling might be attractive if there were a desire to dispose of this case quickly, but such a decision would have far-reaching implications and very serious unintended consequences.

Another obstacle to the Bar's conclusion is the method by which a contingency fee can be created. According to the Court, a lawyer who does not follow the required procedure, does not create a contingency fee. SCR 3.130-1.5(c) has been interpreted to mean, "An agreement for a contingency fee can never be implied, but must be a matter expressly contracted for by the attorney and the client."[42] The rule does not contemplate fuzzy language that might be stretched to suggest a contingency. The rule does not permit the contingency fee to be established by facts external to the written contract. The rule is meant to require language in the contract that is so clear that an uneducated layperson would understand the exact nature of the fee.

The Board was correct to unanimously find that Ms. Roberts did not have a contingency fee arrangement with David and was not guilty of this charge.

---

[42] *Sullivan v. Fawver*, 58 Ill. App.2d 37, 206 N.E.2d 492; cited in 7 AmJur2d Attorneys at Law §273

**KBA 13737, Count III:** The Bar claimed that Respondent violated SCR 3.130-1.7 "Conflict of interest; general rule" which provides 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 own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." The Board, on the other hand, unanimously found that this charge was not supported by the facts or law.

Not only did the precatory language not convert the contracts into different fee arrangements, the language did not create **any** "ownership, possessory, security or other pecuniary interest," especially not any interest that was adverse to David. Once again, people suffering from confirmation bias interpreted the precatory language to create what they wanted the language to create, not what it really created. If it had been laypersons without any knowledge about contracts, property law, and the Statute of Frauds, the mistaken interpretations would have been more understandable.

In the first contract, signed on January 24, 1998, this precatory language was added: "I agree that Nancy Oliver Roberts can be paid $2,500.00 from my funds in any cash, bank account or any source in Lawrence Williams' possession." Lawrence Williams was the original executor of the Earl Manning estate. In an effort to get Ms. Roberts to start representing him, David told her that he had some cash and that he and Lunell had some money in a joint checking account.[43] Both statements turned out to be false.[44] David asked Ms. Roberts to put in the additional language about any assets in the hands of Mr. Lawrence.[45] Of course, this implication that David might really have any assets in the hands of William Lawrence was also false.[46] David had no

[43] Roberts, pp. 330-33
[44] Roberts, pp. 332-33
[45] Roberts, p. 333
[46] *Id.*

cash, no money in a bank account, and no assets in the hands of Mr. Lawrence.[47] The language did not create any interest in nonexistent property.[48] One cannot have a lien on nothing.[49] Clearly the language was wishful at best, not legally binding or effective.[50]

The contract signed on January 28, 1998, had added precatory language stating that David would sign a promissory note for $25,000 and execute a mortgage.[51] David did sign what purported to be a promissory note.[52] The "note," however, was invalid on its face.[53] Literally on its face; there were glaring blank lines on the first page where indispensable terms needed to be written.[54] Consequently, the "note" was a legal nullity only meant to bluff or encourage David into paying Ms. Roberts.[55] Even if the note had been valid, what would it have added? David had already signed a contract obligating him to pay Ms. Roberts. Signing an unsecured note that also obligated him to pay Ms. Roberts would have simply been redundant. No fake mortgage was even drafted, much less signed, because the note had already been adequate to encourage David to pay the hourly fees and, more importantly, because there was nothing to be mortgaged; David owned nothing.[56] No interest, secured or unsecured, was created by the precatory language in this contract.[57]

The contract signed on March 10, 1998, was actually entered into by Lunell Manning rather than David.[58] David signed onto the contract as well, waiving any conflict of interests and

---

[47] Roberts, pp. 332-33
[48] Roberts, p. 334
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Roberts, p. 335
[54] *Id.*
[55] *Id.*
[56] Roberts, p. 336
[57] Roberts, pp. 336-37
[58] Roberts, p. 337

essentially agreeing to stand good for Lunell's fees.[59] The added language stated, "I agree to pay Nancy from sale of timber as **method of payment**, after the payment of the retainer."[60] By its own terms it referred to the method of payment, not the liability for the hourly fees.[61] There is nothing in the added sentence that overrides or even remotely modifies the hourly-fee language in the contract.[62] The added sentence does not say that liability only attaches to the extent of the mentioned collateral. The words do not even imply that the debt-certain created by the hourly fees can only be collected from that collateral. The sentence definitely does not say that the liability is contingent in any way. If the added language had done anything at all (which it did not), it would have simply created an unenforceable lien to aid in collecting the already "vested" liability. If the supposed collateral was not available when the time came to collect the debt, the amount and certainty of the debt would not change by one penny. The liability would have still been certain; only the collectability would have been uncertain.

And, the added language in Lunell's contract about the timber was not legally adequate to do anything. Standing timber is real estate.[63] The contract was not sufficient to satisfy the requirements of the Statute of Frauds.[64] In addition, according to Mr. David Miller, the lumberman who cruised the woods on the Earl Manning farm, there was no marketable timber on the Earl Manning farm.[65] The language was simply a bluff, meant to accomplish a different task.

What do you call a boomerang that does not work? A stick. What do you call something labeled "promissory note" that does not have the minimum elements required by law to create a promissory note? A piece of paper. When counsel taught property law in law school, he had his

---

[59] Roberts, pp. 337-38
[60] Roberts, p. 337; emphasis added
[61] Roberts, p. 338
[62] *Id.*
[63] Roberts, p. 339
[64] *Id.*
[65] Roberts, pp. 252-53

students draft the shortest deed possible to illustrate the bare minimum of elements that were necessary. The same could be done with a promissory note. It would have to identify the parties, have a present promise to pay, consideration, the amount, when the money is to be repaid, and how the money is to be repaid. If the drafter leaves out any of those elements what do you have? A piece of paper. The document labeled "promissory note" that was associated with the January 28, 1998, contract did not have any information on when and how the note was to be paid. Without that critical information it was just a piece of paper. Call it what you will, it was **not** a promissory note. How does one get around those minimum requirements? One does not get around them.

The Board was correct to unanimously find that Ms. Roberts did not have any interest adverse to David and was not guilty of this charge.

**KBA 13737, Count IV:** The Bar claimed that Respondent violated SCR 3.130-1.8 "Conflict of interest: prohibited transactions" which provides in subpart (a) that: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interests adverse to a client unless: ...the client is given a reasonable opportunity to seek the advice of an independent counsel in the transaction." The Board, on the other hand, unanimously found that this charge was not supported by the facts or law.

The Bar claimed in its briefs that David did not have any opportunity to check with other attorneys about the hourly-fee contracts that he entered into with Ms. Roberts. Not only did David have an opportunity, David actually did consult with another attorney, Joe Kirwan.[66] Mr. Kirwan informed David that Mr. Kirwan would only take the case if David paid him $25,000 in cash up front, while Ms. Roberts was willing to handle the case on an hourly-fee basis and not

[66] Manning, p. 26

require any cash up front.[67] David was no fool. He knew a great deal when he saw it. The only person who probably should have consulted with another attorney before entering into such a one-sided contract was Ms. Roberts. But, of course, she knew that she was not likely to get paid and took the case anyway because of her profound respect for and love of David's adoptive mother, Lola Bell Manning.[68]

The Bar also faulted Ms. Roberts for not suggesting that David consult with another attorney before signing the "promissory note." This complaint shows a lack of understanding of the resources of a man without any assets or connections. Nevertheless, there was no reason for David to consult with another attorney about a legally ineffective document purporting to be a promissory note. If the note had been valid and if a mortgage had secured it, the complaint might have more merit. As it was, the complaint is disconnected from reality.

David was also well aware that he could get a public defender for free. He was capable of comparing "free" with the offer made by Ms. Roberts. There are numerous criminal defense lawyers in Bowling Green. Every person in the Warren County Jail could quote those lawyers' phone numbers and predict their fee arrangements. The Jail allowed inmates to make collect calls to any criminal defense attorney they wanted to contact. To claim that David did not have any opportunity to consult with other lawyers or compare fee arrangements ignores reality and should be embarrassing. In addition, David was not a neophyte. He had a lifetime of experience comparing fee arrangements for handling criminal matters. To pretend that he was a poor lamb being led to the slaughter is disingenuous at best.

The Board was correct to unanimously find that Ms. Roberts was not guilty of this charge.

---

[67] *Id.*
[68] Roberts, pp. 351-54, Manning, pp. 26-27

**KBA 17411, Count I:** The Bar claimed that Respondent violated SRC 3.130-1.1 "Competence" which provides that, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The Board, on the other hand, unanimously found that this charge was not supported by the facts or law.

If Rule 1.1 were a criminal statute, it would be declared unconstitutional due to its vagueness. It does not give even the slightest guidance to inform an attorney where the boundary between adequate and inadequate may lie. If "competent representation" were not open enough to unlimited interpretation, the term is further broadened by "reasonably necessary." Under the Rule competence is in the eye of the beholder. Since there is no objective standard, the Court should require truly egregious conduct to convict—not just conduct that may or may not have gotten close to some nonexistent line.

For those who are fans of the University of Louisville and the University of Kentucky basketball teams, it is well known that even a championship team can lose a game or two. If a person were to try to judge the quality of either team on a "bad" night, the person would get a false impression. Judging whether a lawyer provides competent representation to clients requires looking at more than one isolated case. In addition, the standard of care for a criminal defense trial lawyer should be quite different from the standard for office lawyers. Criminal trials tend to be very stressful, fast-changing, and messy. Often there is no time to think before having to make split-second, yet important, decisions. The analogy of the standard of care of emergency room doctors comes to mind.

The Bar has definitely failed to meet its burden of proof on this issue. The Bar's brief only cited the ruling in the RCr 11.42 proceedings and the lawyers involved with those

proceedings. Judge Grise's ruling in the RCr 11.42 proceedings was based on extremely distorted testimony and unfounded assumptions.[69] As Ms. Roberts has clearly shown earlier in her brief as Appellant-Respondent, the RCr 11.42 proceedings were not fair and did not reveal the truth. The proceedings did not prove anything other than: (1) a prison inmate facing a life term will say and do anything to get free; and (2) confirmation bias can drastically change the conduct of otherwise very capable people; or (3) it is very dangerous to make Commonwealth's Attorneys and judges "livid."

The Bar cited Judge Wilson, Judge Brown, and Chris Cohron as though they had been listed in the pretrial as expert witnesses. They were not listed as experts and counsel objected. In any court in Kentucky they would not have been allowed to give their opinions. They were fact witnesses and could freely testify to facts that the Court could use to draw its own conclusions. The Justices do not need other lawyers to tell them how to interpret facts about legal competence. Expert witnesses are normally reserved for situations when the area of expertise is beyond the normal knowledge or experience of regular jurors. That condition does not exist in this case. The Court can think for itself.

Bar Counsel asked Judge Wilson, "What is your opinion of Respondent's representation of Alan David Manning in his criminal matter?"[70] Judge Wilson answered, "Poor." Not "incompetent," just poor.[71] Then Judge Wilson went on to explain why he felt that the representation was poor. At first, Judge Wilson focused on the failure of David to accept the settlement offer. He said, "The risk that was taken, given the fact that it was a five-year sentence, even though on top of whatever he was going to do, and I don't know what the parole ramifications would have been on the 15 to 18 years, was one that **needed to be seriously taken**

[69] KBA Ex. 10A
[70] Wilson, pp. 84
[71] *Id.*

**into consideration before you turned it down**."[72] How did Judge Wilson come to the conclusion that Ms. Roberts and David did not give the settlement offer "serious consideration" before David turned it down? Perhaps Judge Wilson was thinking of the first night David was in jail when Judge Wilson gave David the settlement offer. David did immediately reject that offer. But that was pre-Ms. Roberts. Once Ms. Roberts was hired, she and David spent many hours and days giving the offer serious consideration. And why would David be willing to go to prison for eighteen years when a life sentence could even be less? What did he have to loose by gambling on a trial? Judge Wilson did not address those questions.

After talking about not giving the offer serious consideration, Judge Wilson then talked about the **real** reason he gave Ms. Roberts a "poor" rating. He stated with obviously restrained strong emotions, "I did not care about it. I did not care for Ms. Roberts' handling of the matter during the trial, the allegations that were made, unfounded, untrue. ... She made an allegation against Assistant Attorney – Commonwealth Attorney John Brown that he had had sex with a material witness. And it was a matter that was very serious."[73] Judge Wilson went on to discuss the event in detail. He then finished up with, "And so anyway, that, and it just being totally untrue and unfounded and reckless, that I thought her handling of **it** in general was very poor."[74] In context the "it" Judge Wilson was referring to was the accusations against John Brown, not Ms. Roberts' overall representation of David.

Judge Brown said, "[I] think that the plea offer should have been considered a little more strongly...."[75] Of course, Judge Brown, just like Judge Wilson, did not know how strongly the

---

[72] Wilson, pp. 84 -85
[73] Wilson, p. 85
[74] Wilson, p. 86; emphasis added
[75] Brown, p. 124

offer had been considered. He also apparently did not know about the "shelf time" that Judge Wilson revealed.

The Bar then quoted Judge Brown's testimony about Ms. Roberts calling him to the witness stand. He did not include the reason Ms. Roberts took that unusual step. She felt that Judge Brown had made a deal with one of David's primary alibi witnesses and caused the witness to change her testimony 180 degrees against David. When Ms. Roberts asked the Trial Judge to let the information about the deal in, the Judge refused. Because of the importance of the witness, Ms. Roberts thought that the benefit of discrediting the witness outweighed the danger of calling John Brown to the witness stand. It was a gamble. That is what happens in a criminal trial. Sometimes desperate, unforeseen developments force a defense attorney to take such a gamble.

Even the small amount of Mr. Cohron's testimony cited by the Bar showed the effects of emotional bias. The overall tone of the testimony was negative, but there were only two specific items: (1) using a contingency-fee contract, and (2) allowing the Manning Estate to pay for a ballistics expert for David. Ms. Roberts has shown that there was no contingency-fee contract. As for the expert, while it might or might not be an issue regarding the Estate, it actually shows how hard and competently Ms. Roberts was working to win David's criminal case. She is vilified for letting Russell Justice and Andy Manning do what they wanted to do to help their beloved David [pay for the expert out of the Estate funds that they thought were going to David anyway] yet would have been vilified for not working hard enough to save David if she had failed to get the expert.

**None** of the Bar's experts said that Ms. Roberts failed to provide competent representation. None of the experts offered any opinion about Ms. Roberts' overall ability to

represent clients or cited any of the hundreds of cases she handles. The only other mention of another case being handled by Ms. Roberts was by Judge Wilson when he spoke about the major, medical-malpractice case that Ms. Roberts was currently handling in his court. He seemed to be comfortable that she is providing adequate representation in that very complex case.

Another problem in the trial that the Bar did not mention but which came up on appeal was the testimony of Lunell Manning. David's love of Lunell created an extraordinary trap for both David and Ms. Roberts. Lunell and David had lived together as wife and husband for over eleven years.[76] Prior to the trial, through heroic efforts by Nancy, they were formally married.[77] Ms. Roberts was ready, willing, and able to get tough with Lunell and impeach Lunell's testimony. Unfortunately, David emphatically and specifically instructed Ms. Roberts not to go after Lunell. When David was asked at his deposition, "[Y]ou told Nancy to kind of go easy on her, didn't you?" David answered, "Yeah. I was head – I was head over heels in love with her at the time. ... And I asked Nancy to, yeah, be easy on her. Yeah, I think I did."[78] Nancy did exactly what David insisted she do, and it probably made a big difference in the outcome of the trial.

The Board was correct to unanimously find that Ms. Roberts was competent and was not guilty of this charge.

**KBA 17411, Count IV:** The Bar claimed that Respondent violated SRC 3.130-3.2 "Expediting litigation" which provides that, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client." The Board, on the other hand, unanimously found that this charge was not supported by the facts or law.

---

[76] Manning, p. 24
[77] *Id.*
[78] Manning, p. 25

A lawyer cannot make a client cooperate. A lawyer cannot even make a client contact her. In this case Ms. Roberts had expended a lot of hours working for the Earl Manning Estate. She had successfully worked on the estate tax return and saved the Estate many thousands of dollars by taking advantage of a tax amnesty. Her job was made all the more difficult by the independence of the Executor, Mr. Russell Justice, and his unwillingness to keep Ms. Roberts informed or to do what she suggested.[79] Still, Ms. Roberts was willing and able to continue representing the Estate. Mr. Justice never told her to stop or that he was talking to Mike Reynolds. No motion to substitute counsel or order substituting counsel was ever filed until March of 2008. Ms. Roberts did not withdraw as counsel on her own because she assumed that Mr. Justice would eventually get back in touch with her to file a final settlement. And she was right; when Mr. Justice was ready to file a final settlement he contacted a lawyer, just not Ms. Roberts. Ms. Roberts was surprised to find that Mr. Reynolds had suddenly become the new attorney for the Estate without any notice to or conversation with her.

Very early on, Mr. Justice took the Estate check book and proceeded to handle the Estate on his own.[80] He rented property and dealt with funds the opposite of what Ms. Roberts told him he needed to do.[81] He would not even let Ms. Roberts know what he was doing much of the time.[82] Eventually he refused to respond to Ms. Roberts' repeated calls, letters, and efforts to personally track him down.[83] Ms. Roberts certainly did not have any control over Mr. Justice.

The Trial Commissioner stated, "Mr. Justice did not recall that the Respondent explained [his duties as executor or conflicts of interest]...." Mr. Justice was suffering from Alzheimer's

---

[79] Roberts, pp. 530-31
[80] Justice, p. 234; Roberts, pp. 530-31, 33-34
[81] *Id.*
[82] *Id.*
[83] Justice, pp. 240-41

disease at the time of the trial.[84] There were a lot of things that he did not remember. That did not mean that the events failed to occur. Absence of proof is not proof of absence.

When Mr. Justice failed to contact Ms. Roberts, she did about all that she could to contact him. She telephoned him several times, leaving messages to "please call me." Mr. Justice never returned the calls. Ms. Roberts wrote letters to Mr. Justice asking him to come to her office or at least call her. Mr. Justice never responded. Ms. Roberts asked a friend of Mr. Justice's to pass on a message for him to contact her. That effort failed as well. Ms. Roberts tracked down Mr. Justice at her church when his singing group came to perform one Sunday. Even that face-to-face meeting was not enough to get Mr. Justice in to see her.

The Bar's charge that nothing was done **of record** in the Estate for an extended period was technically correct. That did not mean, however, that nothing was being done off of the record. Ms. Roberts did all that a lawyer reasonably could have done to communicate with Mr. Justice and get him to communicate with her. Ms. Roberts definitely made "reasonable efforts to expedite litigation consistent with the interest of the client." Unfortunately, the client just did not make equally reasonable efforts.

And, as with all of the charges relating to the Estate, who complained and felt themselves aggrieved? It was not Mr. Justice, David, or Andy. It was the lawyer who took the Estate over from Respondent and was offended when Ms. Roberts called his hand on mistakes he made in his proposed final settlement.

The Board was correct to unanimously find that Respondent did make reasonable efforts to expedite the case and that Respondent was not guilty of this charge.

---

[84] Justice, p. 228

**(i) KBA 17411, Count V:** The Bar claimed that Respondent violated SRC 3.130-3.4 "Fairness to opposing party and counsel" which provides in subpart (c) that, "A lawyer shall not: Knowingly or intentionally disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." The Board, on the other hand, unanimously found that this charge was not supported by the facts or law.

When the Bar stated the various Rules in its brief, it did not include the titles of the Rules. In most instances that did not make much difference. With regard to this Rule, however, the omission is important. The title gives the purpose of the Rule, a purpose that all of the subparts follow.[85] When that purpose is compared to the conduct the Bar criticizes, one finds that the Bar is using this Rule out of context. The Rule applies when a lawyer refuses to divulge discoverable information in compliance with CR 93 or a court order compelling discovery. This disciplinary case has absolutely nothing to do with that subject matter. The cited Rule is really irrelevant.

The Bar complained about Ms. Roberts filing an objection to the proposed final settlement in the Manning Estate after Mr. Reynolds had taken over. Rule 3.4 does not apply to those facts and it certainly does not prohibit a lawyer from trying to inform a court of serious errors of which the lawyer is aware. Instead, a lawyer who believes that a court is being misled and just stands by silently ought to be punished. It should be the obligation of every lawyer to alert judges of material misinformation, no matter what the lawyer's standing might be. Lawyers cannot be neutral when it comes to justice. Omission can be just as damaging to justice as commission.

Ms. Roberts filed her objections to the final settlement in the Manning Estate because she felt that there were very serious errors in the settlement that had been submitted by Mr.

[85] SCR 3.130-3.4 (a), (b), (d), (e), and (f)

Reynolds.[86] There were items included that simply were not true and other items that were left out.[87] Ms. Roberts was still on the certificate of service and receiving copies of all pleadings.[88] While Mr. Reynolds may have resented Ms. Roberts criticizing him, Judge Potter, the District Judge overseeing the Estate, did not object to her participating in the hearing and, in fact, seemed pleased to have her information and input.[89] Mr. Reynolds responded to Ms. Roberts' objections and changed the final settlement.[90] Ms. Roberts' objections and information had a very positive effect on the Estate.[91]

The Bar's actual complaint in this Count V was that in her objection to the final settlement in the Manning Estate she revealed that she had been hit with a Bar complaint involving the Estate. That issue did not have anything to do with Rule 3.4. The correct Rule would have been SCR 3.150 that deals with confidentiality, but that Rule is not part of the ethics Rules.

In its Brief the Bar neglected to include language from SCR 3.150(2)(a)(i) which clearly contemplates that a respondent to a Bar complaint **can** waive the confidentiality.[92] After all, the bias in favor of open records and proceedings is only restrained to protect the respondent, not the Bar. To do otherwise would violate both the Kentucky and United States Constitutions and invite successful challenges from the news media. The same type of waiver is possible under Kentucky's open records laws. A pubic body cannot discuss a personnel matter in private if the employee waives the confidentiality.

---

[86] Roberts, pp. 529-531
[87] *Id.*
[88] Roberts, p. 529
[89] Roberts, pp. 526, 538
[90] Roberts, p. 536
[91] Roberts, pp. 537-38
[92] "The Respondent has waived confidentiality."

Even the portion of SCR 3.150 cited by the Bar specifically gives a respondent the right to reveal the pending bar complaint to potential witnesses and any tribunal to assist in her defense. That is precisely what Ms. Roberts was doing.[93] She revealed the existence of the complaint to Judge Potter, who was dealing with the Estate, and potential witnesses, Mr. Reynolds, Mr. Justice, and the warning order attorney.[94] Ms. Roberts was trying to discover who had filed the complaint and why, so that she could be prepared to show bias and other factors that would assist her defense.[95]

And, again, who complained? Not the Judge, who was pleased to have Ms. Roberts' input that solved several problems. It was the lawyer whose mistakes were exposed.

It was necessary and appropriate for Ms. Roberts to try to find out who had induced the Bar to file charges against her. There should be a tremendous difference between such charges leveled by a lawyer's clients and the same charges leveled by a disgruntled attorney. As the target of the charges, Ms. Roberts had the **right** to reveal them voluntarily. She most certainly had the right to do so in an effort to prepare her defenses to the charges. And, finally, who was harmed by the revelation? The Judge? No. The former clients? No. The unhappy lawyer who generated the charges? No. Maybe the Bar Association. But if Ms. Roberts' revelation of her plight helped expose the Bar to the cleansing light of public opinion, that would have been a point of pride. Wrongfully prosecuting just one Member of the Bar Association can wipe out the good done by hundreds of disciplinary cases when justice was scrupulously served.

The Board was correct to unanimously find that Respondent was not guilty of this charge.

---

[93] Roberts, pp. 527, 569-70
[94] *Id.*
[95] *Id.*

## 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 requested by Bar Counsel is, of course, because Ms. Roberts is not guilty of the charges. But even if the Court were to find that Ms. Roberts were guilty of any 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 many of the 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, the punishment requested by Bar Counsel would be fatal.

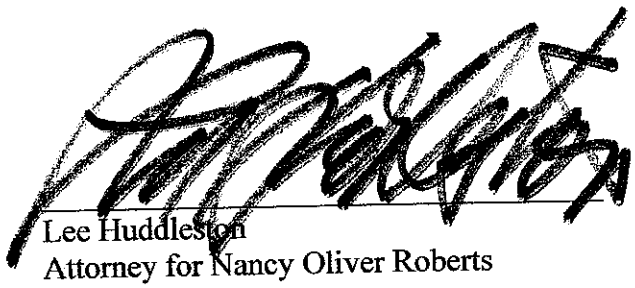
## ALLOCATION OF COSTS

The Court should not make Ms. Roberts pay any of the Bar Association's costs because she is not guilty of any of the charges. But if the Court were to find that she is guilty of any of the charges, Ms. Roberts should only pay her fair share of the costs, not all of the costs. Ms. Roberts should not have to pay the Bar for bringing completely unfounded charges against her and putting her through unnecessary agony for years.

## CONCLUSION

Ms. Roberts and her counsel will be eternally grateful for the willingness of the Board to actually look at the facts and law rationally. Ms. Roberts 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 and law very carefully. And, in turn, the actual facts, law, and the Court's own rules and commentary will lead the Court to the inevitable conclusion that Ms. Roberts did not violate any of the Court's Rules of Professional Behavior.

Respectfully submitted this 25th day of June 2012.



Lee Huddleston
Attorney for Nancy Oliver Roberts

# APPENDIX

1. Findings Of Fact, Conclusions Of Law, And Recommendations Of The Board Of Governors Of The Kentucky Bar Association, May 1, 2012
2. Statement of the Case from Appellant-Respondent's Brief
3. Hourly fee employment contract dated November 16, 1998