STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT—SAN FRANCISCO

In the Matters of MARY BLAIR ANGUS, State Bar No. 210160, NATALIE A. DUKE, State Bar No. 269315.	)	Case Nos. SBC-20-O-30802 (Angus); SBC-20-O-30803 (Duke) (Consolidated)-PW DECISION AND ORDERS OF DISMISSAL WITH PREJUDICE

Respondents, Mary Blair Angus and Natalie A. Duke, are charged with filing a misleading petition and request for a temporary order directing medical treatment, on behalf of Humboldt County Adult Protective Services (APS) to remove patient DM's designated agent (DM's wife JM) for health care decisions.[1] Separately, Duke is alleged to have initiated a petition, on behalf of the Humboldt County Public Guardian (Public Guardian), for conservatorship of DM and over his estate based on misleading information.[2]

Angus and Duke jointly bring a motion for dismissal on due process grounds, renewing Angus's pretrial motion, arguing the inability to present materials protected under the attorney-client privilege (Evid. Code, § 954) and statutory confidentiality (Welf. & Inst. Code, § 15600, et

[1] Counts One through Four, charge the failure to perform with competence, failure to uphold the law, misleading a judge, and an act of moral turpitude.

[2] Counts Five through Eight, charge incompetence, maintaining unjust action, misleading a judge, and an act of moral turpitude.

seq.). Specifically, respondents claim that the information learned during confidential discussions with clients, APS and the Public Guardian, leading up to the decisions to file the respective petitions, are core to their defense. Separately, respondents challenge the adequacy of the evidence on the merits.

After full consideration, the court finds the record sufficient in determining the merits by way of dismissal with prejudice on varied and mixed grounds; so, the dismissal motion based on due process grounds is denied as moot.[3] With the APS proceeding, some allegations fail as a matter of law while others, on failure of proof. With the conservatorship matter, the court finds no misconduct committed by Duke, where good cause existed to question DM's capacity. The underlying allegations speak a criticism that fails to meet an ethical violation.

Procedural History

On November 23, 2020, the Office of Chief Trial Counsel of the State Bar of California (OCTC) filed separate Notices of Disciplinary Charges against Angus and Duke, the cases thereafter consolidated. (Rules Proc. of the State Bar, rule 5.47).[4] These matters flow from related legal actions brought by APS and the Public Guardian—OCTC challenging their preparation and form, content, and manner of service on the parties.

The First Amended Notices of Disciplinary Charges (FANDCs) were filed on February 18, 2021. Angus, through counsel Banks & Watson, filed her response on March 4, 2021, denying culpability; characterizing and objecting to the allegations in the FANDC as unsupported legal conclusions; neither admitting nor denying certain allegations and asserting

[3] But, addressed *post*, as to some of the allegations being dismissed on the merits, the confidential materials appear to be otherwise relevant, and potentially, further evidence supporting exoneration.

[4] Unless otherwise specified, further references to rules are to the Rules of Procedure of the State Bar.

privileges; and asserting inter alia, good faith and other mitigation. Duke, through counsel Daniel Kohls, filed her response on March 10, 2021, denying culpability; objecting or disputing the characterization of the factual allegations made by OCTC; and asserting mitigating circumstances, among them, good faith and rehabilitation.

Trial was held over eleven nonconsecutive days, starting on August 17, 2021.[5] After four days of completed testimony, OCTC filed a notice of motion and motion to amend the FANDCs on August 23, 2021. This court heard argument on August 25, 2021, the sixth day of trial, and denied the motion as untimely and violative of respondents' due process rights given the advanced stage of trial—specifically, (1) that depositions had been completed of three experts, OCTC's expert, John Hartog; respondents' experts, Joseph McMonigle and Thaddeus Pope; (2) both respondents had already testified, along with other witnesses, JM and her attorney Allison Jackson; and (3) the respondents had relied on the charges and allegations as set forth in the February 2021 FANDCs in formulating their defenses.[6]

On August 27, 2021, after OCTC rested its case-in-chief, respondents brought an oral motion to dismiss under rule 5.110(A), which was taken under submission by the court.[7] On September 2, 2021, respondents filed a written joint (renewed) motion in support of a dismissal on due process grounds.[8]

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[5] Trial was held remotely on the Zoom platform under authority of the California Rules of Court, Emergency Rule 3, adopted by the Judicial Council (eff. April 6, 2020).

[6] See August 25, 2021 Minute Order, citing *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 169; *Baker v. State Bar* (1989) 49 Cal.3d 804, 186; *In the Matter of Heiner* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559, 565, fn. 6; and *Rose v. State Bar* (1989) 49 Cal.3d 646, 654.

[7] Because respondents raised separate and different grounds for dismissal, the court deferred ruling until issuing this decision on all raised issues. And now that all counts are ordered dismissed with prejudice on the mixed grounds, the court will deem the rule 5.110(A) motion, moot.

[8] Angus had filed a *pretrial* motion to dismiss which was denied on April 14, 2021, on the failure of showing materiality of communications going to the core of the defense. But, at the

On September 9, 2021, the court granted OCTC's motions to dismiss several factual allegations to conform to the evidence that was presented at trial, relating to Count One of Angus's FANDC; and Counts One, Five, Six, Seven, and Eight in Duke's FANDC. No counts were dismissed. Evidence concluded on September 10, 2021, and the parties filed closing briefs on September 24, 2021. The matter was ordered submitted on October 1, 2021, to allow full briefing on respondents' joint motion to dismiss on due process grounds. (Rule 5.111(A).)

OCTC recommends an actual suspension of 90 days, with a one-year stayed suspension and one year of probation, for each respondent, on this court's finding of culpability. Respondents argue for dismissal.

Jurisdiction

Angus has been a California licensed attorney since her admission to the State Bar on December 6, 2000.

Duke has been licensed to practice law in California since her admission to the State Bar on April 9, 2010.

Burden and Standard of Proof

OCTC bears the burden of proof by a clear and convincing standard, presenting facts that leave no substantial doubt and sufficiently strong to command unhesitating assent of every reasonable mind. (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 288, citing *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.) This standard requires proof making the existence of a fact "highly probable" and falls between the "more likely than not" standard for proof by a preponderance of the evidence and the more rigorous standard of proof beyond a reasonable doubt. (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 995.)

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start and throughout the contested trial, OCTC was on notice that a motion to dismiss would be brought as the trial moved forward and materiality of the confidential materials shown. (See *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771 [four-part test for dismissal].)

In determining credibility and weight of the evidence, the court is guided by the rules of evidence in reaching a fair determination of the facts. (See *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 141.) Any fact may be established by a single credible witness. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 6. Cf. Evid. Code, §§ 411, 780.) But if there are two reasonable interpretations, the court adopts the inference of lack of misconduct. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

Findings of Fact[9]

At the time of the alleged misconduct, Angus was a twelve-year veteran at the County Counsel's office, assigned to represent APS and other county departments. Duke was new to the office, having begun employment just a couple of months prior, and assigned to the Public Guardian and other departments. Duke was Angus's "back-up" counsel for APS.

Background Facts—DM's Advance Health Care Directive

In August of 2011, DM executed an advance health care directive (AHCD) naming on execution, his wife JM,[10] as his agent in making health care decisions. He also named his sister, Anita Reed, as an alternate agent in case JM was unwilling or unable to serve as DM's agent. JM

[9] The parties entered into pretrial stipulations to some facts. And, pretrial testimony received on April 29, 2021, from witnesses Jefferson Billingsley (current County Counsel for Humboldt County) and Nicholas Kloeppel (attorney for Heather Ringwald) was incorporated as trial evidence.

No objection was raised to the authentication of records, but respondents' hearsay and relevancy objections were noted. (Rules 5.104(C) and (D).) Over respondents' objection, the court also allowed into evidence, the transcripts of the superior court proceedings. (*Ibid*.)

[10] Though their full names were referenced throughout the pleadings and during trial, this decision will use initials for the patient, DM, and his wife, JM, who was the subject of an elder abuse investigation. (Rules Proc. of State Bar, rule 5.4(16) [confidential information defined to include sensitive information, including medical records]; see also Cal. Const., art. I, § 1 [right to privacy].)

was nominated as DM's conservator over his person or estate, should a conservatorship be necessary.

The AHCD read, in part, that for health care decisions, the agent:

> [. . .] shall attempt to communicate with me regarding my desires unless such attempt would be futile. If I am unreachable by such communication, and my desires regarding a particular health care decision are unknown, my agent should make the health care decision guided by the following: my personal values, any preferences that I have previously expressed, preferences stated herein, and information received from the attending physician(s) concerning my prognosis, all the while having my best interests in mind. In determining my best interests, my agent shall consider my personal values to the extent known to my agent.

(Exh. 1004-11, paragraph (D) of item 4.)[11] The directive further instructed, that should DM have an "incurable or irreversible" condition, he wished "to be allowed to die without prolonging my death with medical treatment . . . that will not benefit me." (Exh. 1004-12, paragraph (A) of item 7.) Thereafter, DM's personal values are identified, including his wish that his religious beliefs be honored. (Exh. 1004-12, paragraph (A)(2) of item 7.)

In 2015, this AHCD would come to be challenged by APS, on suspicion that DM was a victim of neglect caused by JM.

APS Petitions

A mandated reporter contacts APS on DM's arrival at Redwood Memorial Hospital.

On February 21, 2015, 73-year old DM arrived at Redwood Memorial Hospital by ambulance and was diagnosed with an E. coli infection sepsis secondary to severe decubitus ulcers. A heart infection was also suspected. A mandated reporter[12] at Redwood contacted APS concerning DM.

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[11] In citing to the exhibits, all preceding zeros are dropped for ease of readership. For example, rather than "1004-0011" [page 11 of exhibit 1004], the reference appears as "1004-11."

[12] Any person who assumes care over an elder is a mandated reporter under the Elder Abuse and Dependent Adult Civil Protection Act, and required to report any suspected incident of elder abuse to the adult protective services agency. (See Welf. & Inst. Code, § 15360, et seq.)

Second mandated reporter from St. Joseph Hospital raises concerns, six days later when DM refuses intravenous antibiotics.

Because no inpatient beds were available at Redwood Memorial Hospital, DM was immediately transferred and admitted into St. Joseph Hospital. Attending physicians inventoried DM's conditions to include, endocarditis, sepsis, Clostridioides difficile (C. diff), atrial fibrillation (AFib), chronic pain, and decubitus ulcers. Medical records from St. Joseph indicate that starting on February 22, 2015, DM was treated with Vancomycin, an intravenous antibiotic used to treat endocarditis, the course requiring around six to eight weeks of treatment.[13]

DM was attended by a rotating number of hospitalists who would remain on shift for some days, go off-shift, and then sometimes, return. On February 23, 2015, hospitalist Dr. James Tang, met with DM and JM.

On February 24, 2015, cardiologist, Dr. Punit Sarna, evaluated DM's condition. Dr. Sarna discussed with DM the need for a TEE (transesophageal echocardiography) study to determine whether surgery would be recommended for endocarditis. DM thought any intervention would be "silly," and expressed that he was a born-again Christian who was prepared for death.[14] (Exh. 1022-31.) Dr. Sarna recommended that palliative care be considered.

Hospital records document a February 27, 2015 visit by Dr. Tang. Per the doctor's note, DM declined continued treatment of the intravenous Vancomycin and was unable to "take all his po med this am due to his mental status[.]" (Exh. 1022-287.) JM was at his bedside, making

[13] Respondents' hearsay objections were noted, the court receiving the medical records into evidence under rule 5.104(C) and (D). Primarily, the records are relevant in the court's fact-finding of what information was available and knowable, the timing of such, and what a reasonable person armed with that information would do.

[14] During this disciplinary trial, Dr. Sarna explained that without the TEE study, he could not say whether DM was also suffering from an abscess. He further explained that while an abscess cannot be effectively treated with intravenous antibiotics, it may be treatable by surgery, of which DM had no interest.

statements to the effect that it was time to let DM go and that she did not want DM to return home for home hospice care. (Exh. 1022-287.) "The family" then decided to go with comfort care. (Exh. 1022-0646 [notes by pharmacist Rebecca Cochrane].)

On February 27, 2015, a confidential mandated reporter at St. Joseph contacted APS concerning DM.[15] (Exh. 23-12 through 13 [March 13, 2015 email from Ringwald to Angus].) APS's Public Health Nurse, Heather Ringwald, was assigned to investigate. She would later report to Angus, that DM had arrived at the hospital with sepsis (blood infection) from wounds, due to sitting in a bathroom for eight weeks where JM would bring him food. (Exh. 23-12 through 13.) The mandated reporter was also concerned with a positive toxicology test for illicit drugs including cocaine and ecstasy while DM denied drug use.[16] The reporter also raised concerns with JM's perceived "no change" in demeanor when advised that DM would die if he was taken off antibiotics, of which he was refusing, and in JM "simply" asking if Medicare would pay "for it." (Exh. 23-12 through 13.)

APS is again contacted on March 3, 2015, from the original reporting party from St. Joseph.

On February 28, 2015, Dr. Tang met with DM. The progress note indicates that DM had now expressed he wanted to resume with the intravenous antibiotics, that he did not want to pursue comfort care only, and that he was "more alert and awake." (Exh. 1022-651.) Though unclear in what manner JM did not agree, Dr. Tang's note further indicates: "Pt clearly states no hospice care from now on . . . his wife does not agree, states can not take care of him at home, worried about Medicare not pay for his SNF replacement [sic] which apparently, pt needs to complete 6-8 weeks IV vancomycin with wound care." (Exh. 1022-649.) A nurse also reported

[15] The court is unaware whether Dr. Tang, or someone privy to the February 27, 2015 visit, made the report to APS. Dr. Tang did not testify in this disciplinary trial.

[16] This positive test result was later determined to be a lab error.

to pharmacist Rebecca Cochran on February 28, 2015, that DM's "mental status was much improved and [he] wished to restart antibiotics." (Exh. 1022-646.)

On March 2, 2015, the original reporter who had contacted APS on February 27, phoned Ringwald to provide additional information. (Exh. 23-12 through 13.) Per Ringwald, the reporter relayed that "through the weekend [Saturday was February 28 (see rule 5.104(H))], [DM] became more alert and started telling the nurse he wants his medications and wants to live. The nurse tried to give client his medication, and the wife stopped her." (Exh. 23-12.) The summary thereafter described the need for doctor intervention to allow the nurse to administer the medication, and thereafter, JM "became so angry" that she stormed out of the room. (*Ibid*.)

Sometime after that interaction, the unidentified nurse asked DM about his wounds. DM told the nurse that he was in the bathroom a lot and that his wife only helped him a little, that she was out shopping a lot and spending his money. The mandated reporter added that because DM did not decline treatment for too long, he will not die from sepsis.

DM discontinues intravenous Vancomycin on March 7, 2015; social worker contacts APS on March 9.

On March 4, DM was seen by hospitalist, Dr. Lei Han, and intravenous antibiotic treatment continued for the endocarditis.

On March 6, when visited by Dr. Frank Zazueta, DM was described as "currently stable." (Exh. 1022-664 through 665.) DM was still being treated with the intravenous Vancomycin and had agreed to begin physical therapy. Dr. Zazueta further noted that home hospice should be considered.

On March 7 through March 16, hospitalist, Dr. Stephanie Phan, took over DM's care as his primary physician at St. Joseph. On March 7, Dr. Phan spoke with JM and DM, resulting in the doctor's order of discontinuing intravenous Vancomycin and administered medications for comfort care only.

On March 9, 2015, a mandated reporter at St. Joseph reported to APS about DM. The reporter expressed concern over the appropriateness of home hospice given DM's poor condition on hospital admission. (Exh. 23-12 through 13.) The next day, APS sent Ringwald to follow up on this report to investigate whether JM was the perpetrator of abuse or neglect suffered by DM.

On the afternoon of March 12, representatives of APS contacted Angus about DM. At this time, Angus became aware that DM had an AHCD designating and appointing JM as his agent to make health care decisions; and that DM's sister, Anita Reed, was designated as DM's agent should JM become unwilling or unable to act. In short, Angus became aware of all the terms of that directive. That evening, Angus asked Duke to assist in DM's case because Angus was busy working on a short deadline in another matter.

In an email sent to Angus on Friday, March 13, 2015 at 8:46 am, Ringwald outlined the steps taken in her investigation. (Exh. 23-12 through 13.) Ringwald stated that from March 10 through March 13, 2015, she met and spoke with DM; contacted DM's "[p]rimary care provider" Dr. Francisco at the Veterans Administration (VA) Clinic; and spoke with VA psychologist, Dr. Tonya Tom, regarding scheduling a competency[17] evaluation of DM.

Ringwald reported that during her March 10 and 11 visits with DM, DM was "very confused" and thought he was hospitalized for "itching." (Exh. 23-13.) He would contradict himself and appeared to be agreeing to whatever was being proposed. DM performed poorly on a mini mental exam and the clock draw test. Ringwald suggested to JM, that DM did not appear to be competent, to which JM pulled out a copy of the AHCD, naming her as the agent and further stating that she would not let DM come home even with hospice care.

[17] The Probate Code refers to a patient having "capacity," not competency, but the words were used interchangeably here by the parties in superior court and in this disciplinary proceeding. As defined, capacity is the "ability to understand the nature and consequences of a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives." (Prob. Code, § 4609.)

Ringwald described speaking with Dr. Francisco, who confirmed that DM's previous drug screens were negative except for his prescribed medications. Noted above, St. Joseph had documented a drug screen showing positive results for illicit substances. Ringwald also noted that there was no previous diagnosis for endocarditis, which was presently treatable.

Ringwald further advised that on March 13, 2015, Dr. Tom would perform a competency examination of DM in the hospital and noted:

> SJH DR Fan [sic] states client 'has moments of clarity' and didn't wish for treatment, so SJH is going forth with no treatment for client's treatable and severe infection, as they state its [sic] client and wife's wish, although client's wife may not have client's best interests in mind and client's competency is questionable and he continues to change his mind frequently about treatment per this [Public Health Nurse] as well as per SJH own reports to APS. This situation is very concerning, as client will die without treatment. Further investigation needs to be completed.

(Exh. 23-13.)

APS consults with County Counsel to bring a petition ordering the administration of treatment and to remove JM as the agent for DM.

On March 13, Ringwald and her supervisors participated in a phone conference with Angus and Duke. During the meeting, Ringwald expressed that DM would die over the weekend unless there was court intervention.[18] After the meeting, it was agreed that County Counsel would file a petition and *ex parte* request to treat DM with antibiotics.

Duke prepares APS petitions under the Health Care Decisions Law.

Duke drafted and signed two pleadings on behalf of APS[19] in Humboldt County Superior Court (case No. CV150159), under the Health Care Decisions Law: (1) an "Ex Parte Petition for

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[18] The court finds credible both respondents' respective testimony regarding this conversation—irrespective of OCTC's cross-examination pointing that no medical record documented *imminent* death without the intravenous Vancomycin. (See Evid. Code, § 780(a), and (g).) Neither counsel reviewed the medical records prior to filing the APS petitions, and the court finds that both reasonably relied on information given by Ringwald, discussed *post*.

[19] Among those who may bring a petition are relatives, the conservator of the person, the Public Guardian for the county, or "any other interested person or friend of the patient." (Prob. Code, § 4765.)

Temporary Order Prescribing Health Care [Probate Code section 4770];" and (2) "Petition to Enforce Duties of Attorney-in-Fact for Health Care [Probate Code section 4765]," which were reviewed by Angus before filing.

The Petition to Enforce Duties of Attorney-in-Fact for Health Care was verified by Ringwald, and attachments included a copy of DM's AHCD, Ringwald's March 13, 2015 signed declaration, a March 13, 2015 declaration of Dr. Francisco, and Dr. Tom's "Capacity-Declaration-Conservatorship."[20] The petition sought: (1) a judicial determination of DM's capacity; (2) whether the acts of the agent were in the best interest of the patient; and (3) whether the agent should continue to serve.[21] (Amended Exh. 1-20.) Ringwald's 14-paragraph declaration made under penalty of perjury outlined concerns regarding the sores and physical condition of DM upon hospital admission; related an instance in the hospital of JM stopping the administration of medications DM had requested; noted that DM kept changing his mind about treatment and deferred to JM; and relayed that "[DM]'s primary care physician, Ramil Francisco, M.D. [. . .] indicated that **[DM] may very likely die over the weekend if he is not provided with treatment immediately**." (Amended Exh. 1-17 through 18, emphasis in original.) Ringwald further expressed hope that with continued medication, DM may regain capacity. (Amended Exh. 1-19.) Dr. Francisco also submitted a declaration listing DM's diagnosis,

[20] The petition must present "facts showing that the petition is authorized under this part, the grounds of the petition, and, if known to the petitioner, the terms of any advance health care directive in question." (Prob. Code, § 4767.)

[21] The purpose in bringing a petition includes, inter alia, determining whether or not the patient has capacity to make health care decisions; determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest; or declaring that the authority of an agent or surrogate is terminated, for failure to perform a duty under the directive. (Prob. Code, § 4766.)

treatment, and likely outcome without treatment to be the "worsening of clinical status, multisystem organ failure, death." (Amended Exh. 1-36.)

Neither Angus nor Duke reviewed DM's medical records before the filing of the APS pleadings. Angus testified here that she had read and considered the March 13 email communication from Ringwald, which raised concerns about whether DM had capacity in making medical decisions; and identified a potential conflict between the agent JM and principal DM. Angus believed Ringwald to be conscientious, professional, and dedicated to the client and the client's family. Angus had no cause to doubt Ringwald's veracity based on the three separate, corroborating reports from February 27 through March 9, 2015, involving suspected elder abuse.[22]

Duke explained that before preparing the pleadings, she had reviewed DM's AHCD and Probate Code sections relating to the Health Care Decisions Law. Duke could not say who made the decision to pursue the APS petition, but it was not hers, personally.[23] Nonetheless, in Duke's view, there was good cause to bring the petition based on the information received from APS and other privileged information—which was later confirmed in her mind, by a March 13 morning conversation she held with St. Joseph Hospital risk manager, Wendy Hendrickson. From the information Duke received, it was apparent to her that the doctors were listening to both JM and DM, and that DM changed his mind a lot.

Duke did not draft Dr. Francisco's declaration, nor did she personally contact Dr. Francisco to confirm the contents. She relied on APS. Duke was aware that Dr. Francisco was not DM's treater at St. Joseph, but testified that she had not intended on confusing the

[22] APS is under duty to investigate and to coordinate with law enforcement agencies when appropriate. (Welf. & Inst. Code, § 15640.) Guidelines and required training are further laid out by statute. (Welf. & Inst. Code, § 15653, et seq.)

[23] The court sustained the assertion under section 954 of the Evidence Code.

superior court as to whom the "primary physician"[24] was under the Health Care Decisions Law—and that capacity was, nonetheless, in question.[25] In fact, neither respondent was aware of Dr. Phan's identity at the time of filing the APS petitions. Duke also related that on the strong recommendation of others in the County Counsel's office, she did not attach DM's medical records to the APS petitions.[26] In drafting Ringwald's declaration, Duke relied on the information contained in Ringwald's March 13 email.

Angus filed the APS petitions and brought the filings to the court clerk on March 13, as instructed by the court executive office, with Ringwald and her supervisor made available should the court have any questions. The clerk informed Angus that the court did not wish to speak with APS, and the court (Judge Timothy Cissna) granted the petition and issued an order requiring DM be treated with antibiotics for sepsis, decubitus ulcers, and endocarditis on a temporary basis. A hearing was scheduled for April 2, 2015.

On March 16, the court's order for the administration of medical treatment was personally served on DM at St. Joseph.

On March 18, a proof of service was filed, attesting that on March 16, service to DM and JM was accomplished by mail, of the *Ex Parte* Petition for Temporary Order Prescribing Health

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[24] The law defines "primary physician" as the one designated by the patient to have primary responsibility for the patient's health care; in the absence of designation, it is the "physician who undertakes the responsibility"— i.e., the current treater. (Prob. Code, § 4631.) Here, DM's directive did not designate Dr. Francisco, or any other doctor. And, regarding capacity to make health care decisions affecting the authority of an agent or surrogate, that "shall be made by the primary physician." (Prob. Code, § 4658.)

[25] Dr. Phan testified in this trial, that she had not performed a capacity evaluation of DM.

[26] Angus recalled advising Duke not to attach DM's medical records over concern of his medical privacy, though noting that Ringwald had them available to the court should it request to review them. In Angus's view, the medical records were confidential under HIPAA. (45 C.F.R., §164.512(e)(1)(iv) [Health Insurance Portability and Accountability Act].)

Care (Probate Code section 4770); Petition to Enforce Duties of Attorney-in-Fact for Health Care (Probate Code section 4765); and Notice of Hearing. (Exh. 1-5 through 7.)

Attorney Jackson raises objections to the APS petitions; thereafter withdrawn, and a conservatorship pursued in its stead.

On March 25, Allison Jackson (representing JM) called the County Counsel's office demanding to speak with the interim head, Frank DeMarco. Because DeMarco was not available, Angus took the call. Jackson related that she took issue with the APS petitions.

In that conversation, Jackson conveyed her concerns, identifying what she believed were deficiencies based on Ringwald's "manipulation of the record." (See Exh. 23-292 through 293.) This conversation did not cause County Counsel to withdraw the petitions, or to request the removal of the temporary court order at that time. (Cf. Code of Civ. Proc., § 127.8, subd. (c) [safe harbor provision to correct or withdraw a pleading, in avoiding monetary sanction].)

In Angus's view, Jackson tended to be "hyperbolic," based on their past dealings.[27] And what Jackson identified to be problematic was inconsistent with what Angus knew at the time of the APS investigation. Angus related credibly to this court, that she saw the issues differently—that the issues were DM's capacity at the time of the decision to withdraw the intravenous antibiotics that was keeping him alive; and whether there was a conflict of interest between DM and JM.[28] In Angus's interpretation of the Probate Code, a treater is prohibited from relying on

[27] Angus described Jackson as sounding angry, which Jackson readily admitted during her testimony here. Character witnesses for respondents also commented on the reputation of Jackson, a superior court judge describing Jackson as "litigious" in comparison to Angus having high moral character. An attorney, called on Duke's behalf, described Jackson as having conflicts with County Counsel and Angus, for varied personal reasons.

[28] The court also found Angus credible in relating that in her mind, she (Angus) questioned Jackson's role as to whether her law office could represent *both* DM and JM. Jackson's law partner had drafted the AHCD for DM.

the agent JM when there was a disagreement with the principal DM. Nonetheless, Jackson's phone call did prompt Angus to review DM's medical records.[29]

On March 26, Jackson filed an opposition to the petition on behalf of JM, an objection to proffered evidence, and a motion to strike as improper evidence. She also moved for attorney's fees under section 4771 of the Probate Code. On March 30, Jackson filed a declaration from Dr. Phan, who was identified as DM's treating hospitalist from March 7 through 16, 2015. (Exh. 1-2 through 94.) Hence, Angus first learned of Dr. Phan on March 26[30] and the details contained in Dr. Phan's declaration on March 30, 2015.

Dr. Phan described a thirty-minute phone call she had with Ringwald, describing the medical decision-making in withdrawing treatment for palliative care despite concerns regarding DM's memory issues. Dr. Phan "explained that his wife was his healthcare decisionmaker, and that her desire for less aggressive care was consistent with his own refusal to undergo further treatment [. . .] I stated that the standard of care sometimes involved making decisions to withdraw care regardless of a patient's own ability to make such decisions for him/herself. In this case, his memory issues may have been perceived as a limiting factor, but was in fact not, given his wife was his designated decision-maker." (Exh. 1-93, line 26 through 1-94, line 3.)

On review of Dr. Phan's declaration, Angus testified here, that she nonetheless believed the question of capacity remained—that the doctor's framing of the standard of care involved a

[29] Though Ringwald had in her possession, DM's medical records on March 13, Angus had not gone over the records at that time. Angus estimated that she would have reviewed the records sometime between March 24 and 26, 2015.

[30] The court finds Angus credible in relating that she did not learn of Dr. Phan until the filing of this declaration. (Evid. Code, § 780(a), (g), and (i).) As noted, *supra*, Ringwald's March 13, 2015 email to Angus has a single reference to a St. Joseph Hospital's "Dr. Fan" who stated that DM has "moments of clarity" and didn't wish for treatment[.]" (Exh. 23-13.)

medical standard (i.e., whether a particular medical course was reasonable), which was not the relevant legal question of whether there was a conflict between DM and JM in decision-making.

But, Angus would later withdraw the APS petition, filing the notice on March 31,[31] based on new information provided by Dr. Robert Soper. Dr. Soper was called in to evaluate DM by Dr. Zazueta at St. Joseph, and Dr. Soper opined that a conservatorship should be pursued. At the scheduled April 2 hearing before Judge Dale Reinholtsen, Angus withdrew the APS petition, informing the court of the Public Guardian's intent to pursue a conservatorship. Jackson advised Angus, that should the conservatorship petition be filed, she (Jackson) would serve as JM's counsel.

Ringwald and Dr. Phan testify in superior court on issue of attorney's fees.

Though the petition was withdrawn by APS, the superior court held hearings on April 10 and April 13, to address JM's request for attorney's fees under section 4771 of the Probate Code.[32] (Exh. 4-16, line 24 through 4-17, line 15.) Jackson had moved to strike portions of the petition, requested the court's finding of no reasonable cause to bring the petition, and to award attorney's fees—based on APS's "end run around . . . [DM's] fundamental rights" by a "well-intentioned but misguided public health nurse who decided to manipulate the record in this matter." (Exh. 4-7, lines14 through 22; 4-8, line 27 through 4-9:1.)

Angus represented APS and Humboldt County; Duke attended as an observer. Both Ringwald and Dr. Phan testified.

Ringwald testified that DM told mandated reporters that he wanted to live and did not want hospice; that DM described having irreversible conditions, which was refuted by Dr.

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[31] Duke had personally served the notice on DM at the hospital on March 30, 2015. (April 19, 2021 Stipulation as to Facts / Respondent Natalie A. Duke, p. 3, item 14.)

[32] In relevant part, section 4771 allows the agent to recover attorney's fees if a proceeding was commenced "without any reasonable cause." (Prob. Code, § 4771.)

Francisco who believed the conditions were reversible; and that on March 11, DM made contradictory statements that he wanted to live and wanted to die, both in the same breath.

Ringwald admitted that she did not include Dr. Phan's opinion because it was not relevant to the abuse or neglect allegations. She also did not think it was relevant to put in Dr. Phan's conversation because there were several reports from different doctors saying different things. Ringwald also did not disclose Dr. Phan's opinion that on March 7, DM had the clinical capacity to make decisions. Ringwald did not believe DM had the capacity to reject treatment based on his statements that he was in the hospital for itching and allergies, and made statements that he wanted to both live and die.

Dr. Phan testified that she spoke with Ringwald who communicated her concerns about DM's condition on admission, having been sitting on the toilet for several weeks. Ringwald was concerned with neglect by JM. Dr. Phan told Ringwald that comfort care was appropriate and that two other doctors thought it was appropriate.[33] Ringwald's response—of which Dr. Phan viewed as strange—was that APS had intervened in treatment in the past which had led to the reversal of medical decisions. Dr. Phan testified that she believed that DM was competent though acknowledged that DM had a history of dementia or memory issues. Nonetheless, it was Dr. Phan's "understanding that [JM] was [DM's] health care decision-maker [which] made it appropriate for me to actually go through with making him comfort care." (Exh. 5-59, lines 15 through 20.) And because she felt there was no reason to question JM in her decision-making, Dr. Phan was not concerned with Ringwald's raising of capacity concerns. Dr. Phan did not

[33] The medical records do *not*, in fact, indicate that two other doctors approved of comfort care. Two other doctors did recommend a referral for comfort care considerations. (Exh. 18-38 [February 24, 2015 note by Dr. Sarna stating, "[p]alliative care consultation should be considered[.]; Exh. 1022-238 [March 6, 2015 note by Dr. Zazueta who noted that hospice care "should be considered."])

personally read the AHCD, and her understanding was based on some form of communication from a case manager (with a first name of Donna).

Dr. Phan did not call in an ethics panel,[34] nor a team for a palliative care consultation. Dr. Phan further related that sometimes a doctor may make a decision of comfort care where a patient cannot make that decision for oneself, if the doctor feels that continuing with care is futile or would diminish the patient's quality of life. Regarding calling in for a palliative care consultation, Dr. Phan explained that it is not always "black and white" to do so based on family conflict in decision-making. (Exh. 6-49:9.) In sum, Dr. Phan had advised Ringwald that regardless of whether DM was competent, she regarded JM as the decision-maker; and that looking at the totality, palliative care was the most appropriate action.

On July 22, 2015, Judge Reinholtsen issued an order denying JM's request for attorney's fees. This denial would later be reversed by the Court of Appeal. (Discussed, *post.*)

Public Conservatorship Proceedings

Duke represented the Public Guardian in pursuing a conservatorship for DM and his estate, initiated around March 30, 2015. This matter was also assigned to Judge Reinholtsen. OCTC alleges here that like with the APS petition, Duke misled the court by relying on hearsay supplied by Ringwald, failing to provide medical records from St. Joseph Hospital to the court, and excluding Dr. Phan's recommendation. OCTC further criticizes service of the pleadings.

Public Guardian relies on Ringwald's March 13 email in bringing the conservatorship action.

On March 30, 2015, Public Guardian Kelli Schwartz issued a notice of intent to file for temporary conservatorship relating to DM, who was personally served on that date as attested to

[34] One of Jackson's expressed criticism to Angus, as to the filing of the APS matter was that a bioethics panel had been called and its opinion considered by Dr. Phan.

by social worker Ashley Shively. Duke did not prepare this notice (nor does her name appear on the notice), as they are prepared as a matter of routine by the Public Guardian's office.

On April 3, Duke, acting as counsel for the Public Guardian, prepared and filed a petition for appointment of a temporary conservator and a petition to appoint a "permanent"[35] public conservator over DM's person and estate (the petition) on behalf of the Public Guardian, Humboldt County Superior Court case No. PR150089.[36] In preparing the petition, Duke relied on information brought by Ringwald in her March 13 email,[37] rather than on an independent review of DM's medical records.[38] Duke reviewed and signed the Judicial Council forms drafted by a legal secretary for County Counsel (Brianna Moore). The issues regarding the conservatorship involved whether DM lacked capacity—thus, requiring the appointment of a conservator; and if so, whether the Public Conservator should be appointed rather than JM based on the APS investigation. (See Prob. Code, § 2250.)

The Public Guardian signed the petitions under penalty of perjury. The petition alleged that DM had a life-threatening but treatable condition; that he lacked the capacity to make medical decisions; that though JM was DM's surrogate, she was the subject of an ongoing

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[35] The petitions were filed using Judicial Council forms which do not reference the word "permanent;" the term was used by the parties during trial to distinguish between the forms.

[36] Legal secretary for County Counsel, Brianna Moore, prepared a Proof of Service executed on April 15, 2015 and filed it with the superior court on April 16, 2015, attesting that she served the petitions on April 3, 2015, by mail to JM at a particular address and to Reed at two separate addresses. Also filed with the court on April 16, 2015, Moore attested to having served the petitions on DM at the hospital on April 8, 2015.

[37] To the extent there were communications between the Public Guardian and Duke regarding the conservatorship petition for DM, Duke was unable to testify due to the attorney-client privilege.

[38] Duke did not recall when she reviewed those medical records but had reviewed them at some point in time—those records having been subpoenaed to the superior court by the conservator for the May 2015 hearing. (Second Amended Exhibit 3-12 [Register of Actions].) Nonetheless, as early as April 13, Duke should have become aware of Dr. Phan and her decision-making process in pivoting to hospice care for DM, having witnessed the evidentiary hearing for attorney's fees held relating to the APS matter.

investigation into credible allegations of caretaker neglect and abuse; that DM clearly stated his desire to receive antibiotic therapy and refused hospice care on February 28, 2015 and March 2, 2015; and that JM did not want to follow DM's wishes. The petition did not include medical records from St. Joseph, nor mention Dr. Phan or her recommendations.

Court investigator appointed to assist the court and counsel for DM is appointed to represent his interests.

Along with the petition, a Notice of Hearing was also filed on April 3, 2015, noticing a hearing set on April 30, 2015.[39] In early April, the superior court referred DM's matter to court investigator James Dawson, who was assigned to submit a report for the April 30 hearing.[40] Duke did not recall whether she personally contacted JM or Reed, but Reed was served by mail. Duke discussed with Dawson, that the phone number County Counsel had for Reed was not working and had asked Dawson to try to contact Reed.

On April 6, the court issued an order appointing a temporary conservator for DM and permitted the conservator, Public Guardian Kelli Schwarz, to move DM into a licensed skilled nursing facility or adult residential care facility, effective until April 30, 2015.[41] The referral to the skilled nursing facility was made prior to the involvement of the Public Guardian as DM's conservator, but Schwarz signed the paperwork for the transfer.

On April 6, the court also appointed Alternative Counsel of Humboldt County (Jennifer Dixon would later be assigned by her office) to represent DM and his interests. On April 9, 2015, Duke signed a first amended petition for appointment of temporary conservatorship, to give the

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[39] Proof of service by mail was executed by Brianna Moore, serving JM at a particular address, and Reed at two separate addresses, and by leaving a copy for pick-up at the courthouse, to both the court investigator and for alternate counsel (assigned to represent DM).

[40] The court-appointed investigator is a neutral agent, serving without personal or beneficial interest in the proceedings. (Prob. Code, §1454 [definition], §1826 [duties].)

[41] Moore executed a declaration attesting that on April 16, 2015, the order was served by mail to JM, DM, and Reed.

Public Guardian additional power of "exclusive medical decision-making authority on behalf of the conservatee."[42] (Exh. 3-68.) The Public Guardian asked for this to be filed, Duke not seeking this on her own initiative.

After the filing of the April 9 pleading, Duke learned more details of the conversation Ringwald had with Dr. Phan. As an observer of the April 10 and 13 evidentiary hearings on attorney's fees in the APS matter, Duke learned that Ringwald disagreed with Dr. Phan's decision-making. Nonetheless, Duke testified here that she believed there remained good cause to question DM's capacity and the appropriateness of JM as DM's agent. Duke further testified that because there was a potential conflict between JM and DM, it was appropriate to assign separate and independent counsel, Dixon, to represent DM.

Jackson files an objection on behalf of JM, and separately petitions for JM's appointment as conservator for DM.

On April 15, 2015, after learning of the conservatorship matter, Jackson emailed Duke requesting evidence of proof of service to DM and JM of the various pleadings. Duke asked for confirmation that Jackson will be appearing for JM and thereafter, sent the documents to Jackson.[43]

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[42] Moore executed a declaration, filed in the superior court on April 16, 2015, attesting that on April 9, 2015, she mailed the amended petition to JM and DM at the same address, Reed at two separate mailing addresses; and by placing in a drop box at the courthouse, alternate counsel for DM, the Public Guardian, and the court investigator.

[43] The court credits as credible, Duke's testimony that she had not earlier served Jackson, a non-party, because of the confidential nature of the proceedings and materials—rather than for nefarious purposes, or to gain a strategic advantage. (Evid. Code, § 780(a) and (i).) OCTC did not rebut Duke's testimony that the materials were sent after the request was made. Further, there was an objective basis to believe there was a conflict in Jackson serving as both DM and JM's attorney despite Jackson's assertion of intent made to Angus, during the April 10 and 13 hearings. Finally, DM's records were nonetheless protected under state and federal privacy laws. (See Amended Exh. 2-480, lines 5-13 [Duke's representation made in a pleading filed in superior court].)

On May 1, Jackson's office filed an objection on behalf of JM, and petitioned for court appointment of JM as the conservator for DM and his estate.[44] (Exh. 1037.)

On May 6, 2015, the court issued an order returning authority to JM in making health care decisions for DM.

Trial is bifurcated, addressing the issue of capacity in the first phase.

After Jackson's motion for nonsuit was denied, the conservatorship case proceeded on the merits in May and was tried before Judge Reinholtsen. The superior court bifurcated the trial, proceeding with phase one in determining whether DM had capacity.[45] Witnesses for the Public Guardian, represented by Duke, included Dr. Soper and Schwartz.[46] DM was represented by Dixon. And Jackson represented the objector, JM.

Dr. Soper observed that DM had serious dementia with an overlay of delirium. Based on observations during his March 29 and 30, and April 2, 2015 visits, Dr. Soper's evaluation was consistent with that of Dr. Tom in questioning capacity. When asked whether DM was able to resist undue influence, Dr. Soper answered that "[DM] probably wouldn't retain awareness of whatever it was he had agreed to . . . the question is almost moot by itself. The . . . answer's no." (Exh. 11-34, lines 17-22.) Dr. Soper did not believe DM was competent to make his own medical decisions.

Schwarz related her limited observations of DM on May 8, 2015, meeting him for the first and only time after her April 6, 2015 appointment as DM's conservator on a temporary

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[44] Reed was served by mail, at the same two addresses used by the Public Guardian in serving their pleadings; JM was served by mail at two addresses, one of which was the one used by the Public Guardian in serving their pleadings.

[45] Noted *supra*, capacity is defined under the Probate Code as the "ability to understand the nature and consequences of a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives." (Prob. Code, § 4609.)

[46] The following summary of testimony does not reflect findings of this court, but rather, lays out the evidence as presented in the contested issue of capacity.

basis. DM seemed confused, though appearing to know that he was sick and aware that he was facing the end of his life and at peace with that.

Reed, Dawson, and DM were also called as witnesses. Reed had spoken with DM on the phone and visited him in person at the skilled nursing facility. She believed that he was lucid, opined that DM had a wonderful long-term memory, and was very upset about JM being accused of neglect. Dawson testified that he complied with his duties as provided under the Probate Code, and had met with DM on three occasions, April 8, May 6, and May 18, 2015. Though on April 8, DM appeared weak and faded off as Dawson asked questions, DM presented much better thereafter, stating in those conversations that he was ready to die.

DM testified, while residing at the Pacific Wellness and Rehabilitation facility, acknowledging his understanding of a conservatorship involving a person taking care of the personal matters in your life, and that the Public Guardian takes care of one's personal matters. He credited JM as the "best" and getting an easy "A" for putting up with him. (Exh. 11-205, line 3; Exh. 11-219, line 23.) DM related that the judge's role was to try to decide whether he could take care of himself or have somebody like his wife take care of things. DM did not like the fact that others were trying to take control over him and his decisions.

The superior court proceedings concluded before evidence was taken regarding APS abuse allegations.

On May 22, 2015, the superior court denied the petition for appointment of a conservator, finding that there lacked clear and convincing evidence that DM—at present day—lacked capacity to make his own decisions to overcome the presumption of having capacity under section 810 of the Probate Code. (Exh. 11-272 through 277.) The second phase was not

conducted, which would have addressed the allegations of elder abuse and the appropriateness of oversight by the Public Guardian.[47]

Court of Appeal Decision re: Attorney's Fees in APS Case (Prob. Code, § 4771)

On August 17, 2015, JM filed a notice of appeal (First Appellate District Division One, case No. A145981), seeking reversal of the superior court's July 22 order denying attorney's fees in the APS matter. Angus, representing Humboldt County, filed an opposition brief on January 26, 2016. Oral argument was held in September of 2016.

Angus argued on behalf of APS and the County, opposing attorney's fees and defending the superior court's finding. Jackson argued for JM, seeking reversal.

The Court of Appeal issued its published opinion, *Humboldt County Adult Protective Services v. Superior Court* (2016) 4 Cal.App.5th 548, 551, reversing the superior court's denial of attorney's fees. The basis for reversal was the appellate court's *de novo* review of the applicable standard for reasonable cause, that it found the lower court's ruling to be an erroneous application of subjective belief rather than on the correct, objective standard. (*Humboldt*, at p. 565.) And that even if the test involved subjective intent, APS's good faith could not be reconciled by the testimony of *Ringwald*'s lack of candor demonstrated by her testimony that she disagreed with Dr. Phan's decision for comfort care and (impliedly) held back the information deeming it personally, irrelevant. (*Id*. at p. 568.) What is more, the appellate court observed that "Humboldt *knew* failed [sic] to apprise the trial court of critical evidence—namely, the clinical assessment and opinions of [DM's] treating physician, as well as those of his prior treating

[47] Not accepted for the truth of the matter asserted, this court notes here the limitation of the record with APS's assertion of privilege—in Duke's opening statement, it was proffered that Rosy Provino, the social worker supervisor of APS, "will testify as the services that were offered to [JM], which also helps to explain why we are in a conservatorship proceeding and why a conservatorship . . . is warranted. She will testify that the adult protective services case was recently closed and that the allegations of neglect were sustained." (Exh. 11-18, lines 5 through 11.)

physician and consulting cardiologist, all of whom[48] concluded palliative care was called for." (*Humboldt, supra*, 4 Cal.App.5th at p. 567, italics in original.)

The appellate court was further troubled by Angus's appellate brief, which pointed to medical records not admitted in the trial court, which contained multiple levels of hearsay. And, the appellate court rejected the County's reliance on a line of cases discussing good faith of an employer in discharging an employee after appropriate investigation. (*Id.* at p. 571.) Going further, even assuming considerations of those medical records, the Court of Appeal observed that there was no indication that JM was acting outside the scope of the AHCD. (*Ibid*.) In sum, the appellate court found "Humboldt" not only negligent but also, deliberately misleading in presenting the law and facts to the trial court and awarded attorney's fees to JM. (*Id.* at p. 572.)

Having now summarized the findings of fact above, this court below applies the law, concluding no culpability for professional misconduct has been shown.

Disciplinary Charges—Findings and Orders of Dismissal

The Adult Protective Services Case—both respondents

Angus and Duke are both charged with misconduct flowing from the filing of the APS matter.

Count One—former rule 3-110(A) [Failure to Perform with Competence]

Former rule 3-110(A) of the Rules of Professional Conduct,[49] provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

[48] The Court of Appeal's observations are inconsistent with this court's findings on review of the medical records. Two doctors had recommended a *consultation* for comfort or palliative care; and Dr. Phan had not conducted a capacity evaluation.

[49] All references to former rules are to the former Rules of Professional Conduct, which were in effect through October 31, 2018.

Competence relates to the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service. (Former rule 3-110(B).)

Here, OCTC alleges that respondents failed to provide competent services in their filing of the petition for a temporary order directing that antibiotics be administered to DM for treatment, and its companion petition seeking removal of JM as her husband's agent for health care decisions. OCTC's allegations can be grouped into five general categories: (1) respondents' failure to investigate DM's condition and contact Dr. Phan and Reed before filing "the petition;"[50] (2) respondents' filing "the petition" without reasonable cause; (3) respondents' failure to attach supporting documentary evidence to "the petition;" (4) respondents' failure to advise the court of various salient information and law;[51] and (5) respondents' failure to timely serve "the petition."[52]

A further allegation against Angus charges that she cited to inadmissible evidence in the opposition brief on appeal.[53]

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[50] Though respondents filed two APS petitions in the DM matter, the charges in Count One of the FANDCs vaguely refer to "the petition."

[51] Category four allegations are that respondents: failed to advise the court that only DM's primary physician can determine competency under the Health Care Decisions Law; failed to advise the court "about Dr. Phan's opinion;" failed to advise the court that Dr. Francisco was not DM's primary physician for purposes of the Health Care Decisions Law; failed to advise the court that Dr. Francisco last saw DM in December 2014; and failed to advise the court that Dr. Tom had never treated DM.

[52] The court granted OCTC's September 9, 2021 motions to dismiss the allegation in Count One of each respondent's FANDC that respondents failed to advise the court that Dr. Tom was not authorized to review DM's medical records. (The FANDCs erroneously refer to Dr. Tom as "Ms. Tom.")

[53] OCTC's motion to dismiss the allegations in Count One of Angus's FANDC that Angus filed Dr. Soper's non-final report to the notice to withdraw the APS petition, and that Angus failed to move evidence into hearing during the section 4771 fee hearing, was granted by this court.

Dismissal on mixed grounds—APS Petitions, Angus and Duke

There are independent grounds to dismiss the allegations as to both respondents, some as a matter of law and others on the merits.

(1) Allegations of failure to investigate DM's condition; failure to contact Dr. Phan and Reed

The first set of allegations include: "failing to investigate DM's condition;" "failing to contact Dr. Phan before filing the petition;" and "failing to contact Reed before filing the petition." Preliminarily, the court notes that OCTC's allegations that respondents failed to contact Dr. Phan or Reed, as worded, are vague and fail to state a disciplinable offense. Based on the charging language, respondents would have performed with competence had they merely contacted Dr. Phan or Reed to discuss the weather. Hence, these two allegations fail as a matter of law.[54]

But to the extent that these assertions are restatements of the general failure to investigate, the court finds there is no basis for discipline—particularly so, under these exigent and alarming circumstances. Here, respondents were not apprised of DM's situation until Thursday, March 12, 2015, which is the day before they had to prepare and file the petitions on a rushed basis, in light of Ringwald's representation that DM would pass away over the weekend if he did not promptly receive antibiotic treatment. Indeed, had County Counsel not acted in bringing the petitions under these known facts, counsel would have ignored its duty to the client, APS. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 642 [improper withdrawal found, attorney failed to timely petition for a temporary restraining order]; see generally, *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 554 [competent performance requires taking timely, substantive action on client's behalf].)

[54] Again, and of note, Angus and Duke were not even aware of Dr. Phan until at least March 26, 2015, which is after the petitions were filed on March 13, 2015.

Arguing against the reasonableness of respondents' actions, OCTC presented an expert in probate matters, contending that because APS proceedings are "protective in nature" and section 128.7 of the Code of Civil Procedure imposes sanctions for frivolous lawsuits, County Counsel could not simply rely on Ringwald's representations and were duty-bound to independently verify Ringwald's claims. And in its closing brief, OCTC cites to *In the Matter of Copren* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 861, where culpability was found, in part, based on an attorney's failure to verify the contents of a client's bankruptcy petition.

These arguments are unpersuasive. First, section 128.7 of the Code of Civil Procedure allows for the filing of pleadings on information and belief, and the APS petition contained Ringwald's verification of facts and a declaration signed under penalty of perjury.[55] Second, this court is unaware of any provision under Division 4 of the Probate Code titled "Guardianship, Conservatorship, and Other Protective Proceeding," that provides an independent duty to investigate before bringing a suit. (See *People v. Neely* (2004) 124 Cal.App.4th 1258, 1266 [unofficial titling of a statute in West's annotated code is not dispositive of legal interpretation of the law].) Indeed, the rules of practice in civil actions govern in the underlying "protective proceedings." (Prob. Code, § 1000.) And were it otherwise—a duty to independently investigate, placed on attorneys without notice—then attorneys would not be afforded due process in either the assessment of sanctions in superior court under section 128.7, or while facing attorney discipline in the State Bar Court.

Finally, *Copren* is not controlling authority. *Copren* did not pronounce a rule of law, that an attorney has the duty to investigate claims made by a client. Rather, the only issue presented on appeal was whether to add an additional, conditional term on probation. (*Copren,* at p. 861.)

[55] On examination of OCTC's expert by Angus's counsel, the witness conceded that section 128.7 does not expressly require an attorney to independently investigate.

And because *Copren* is scant on facts (an entry of default entered against the attorney), it provides little guidance for analysis here. (Cf. *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 690 [decisions hold little precedential value where facts and circumstances are not set forth]; see rule 5.82(2) [effect of default, facts alleged in NDC deemed admitted].)

In sum, the allegations that respondents failed to independently investigate, rather than solely relying on Ringwald's representations, fail as a matter of law to support a violation under Count One. [56]

(2) Filing APS petitions without reasonable cause

Next, as to respondents having allegedly filed the petitions without reasonable cause, this is vague and conclusory language that does not rise to a violation of former rule 3-110(A), nor does the language provide adequate notice of the theory of culpability. This allegation is dismissed as a matter of law. (See *Glasser*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 168-69 [neither the respondent nor the court is required to deduct the basis for discipline from vague language in the charging document].)

(3) Failure to attach supporting documentary evidence to the petitions

The third grouping of allegations include that respondents "attach[ed] declarations containing hearsay to the petition without attaching supporting documentary evidence;" and "fail[ed] to attach [DM]'s medical records from St. Joseph Hospital to the petition[.]" In essence, OCTC is claiming that respondents failed to perform with competence because they attached to

[56] Because dismissal on the merits is appropriate, the court need not factor into the analysis, the privileged materials identified by respondents as a basis for dismissal on due process grounds. Nonetheless, the court agrees with respondents that these materials would be relevant—as Ringwald's communication, by implication, suggests that Dr. Phan declined to perform a capacity examination, leaving Ringwald to locate Dr. Tom. This would further bolster respondents' arguments against a culpability finding, in that they acted under good faith.

the petitions Ringwald, Dr. Tom, and Dr. Francisco's declarations containing hearsay statements without also attaching DM's medical records from St. Joseph Hospital.

But as correctly argued by respondents—and OCTC not raising contradictory authority—an attorney may attach hearsay documents to an initiating complaint and that it is within the province of the court to rule on admissibility of evidence during hearing or trial. (See generally, Code. Civ. Proc. § 128.7(b) [pleading having evidentiary support, or likely to have evidentiary support after a reasonable opportunity for further investigation or discovery].)

Further, respondents acted reasonably in making the medical records available to Judge Cissna for his review. First off, the respondents testified credibly that they were concerned about attaching DM's medical records to the petitions because of medical privacy issues under HIPAA. Further, attaching those records would have required an application and a sealing order, which was problematic given the exigencies of DM's matter as presented. So, in this context, respondents choosing the alternative route of having Ringwald bring DM's medical records with her when she went to court with Angus on March 13, does not rise to a violation of the rules of professional conduct. In sum, these allegations, grouped under category 3, fail both as a matter of law and on the merits.

(4) Failure to advise the court of salient information and the law

The fourth category includes allegations that respondents failed to advise the court: "that only [DM's] primary physician can determine competency under Health Care Decision Law;" "that Dr. Phan was the primary physician under Health Care Law; "about Dr. Phan's opinion;" "that Dr. Francisco was not [DM]'s primary physician for purposes of Health Care Decision[s] Law;" "that Dr. Francisco last saw [DM] in December 2014;" and "that [Dr.] Tom had never treated [DM]." In short, these allegations take issue with the substance of the petitions, which implied that Dr. Francisco was DM's primary physician at the time of treatment; failed to

mention Dr. Phan's opinion which would have undermined APS's request for antibiotic treatment; and proffered Dr. Tom's capacity assessment of DM even though the Health Care Decisions Law designated the primary physician to make such an assessment, and Dr. Tom was not DM's primary physician.

To begin, as to Dr. Tom's role, OCTC has not shown a violation because Dr. Tom disclosed in her declaration that DM "is NOT a patient under [Dr. Tom's] continuing treatment." (Exh. 1-29.)

Regarding Drs. Phan and Francisco, because respondents were not aware of Dr. Phan,[57] or the date of Dr. Francisco's last visit with DM, there was no intentional withholding of this information; and as discussed above, respondents did not have an independent duty to learn of their existence. (See e.g., *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 179 [prosecutor not found culpable of former rule 3-110(A) in preparing search warrant where he was unaware of affiant's failure to supply important facts].)

Finally, as to the known facts, though respondents were aware that Dr. Francisco was not DM's treater at St. Joseph at the time of filing the APS petition and that he would not be the designated primary physician under the Health Care Decisions Law (Duke had researched the Probate Code and the law on AHCD before filing)—the failure to apprise the superior court does not rise to reckless acts or intentional misconduct under former rule 3-110(A).

First, this court accepts Duke's credible testimony that she had not intended on confusing the superior court. Duke pointed to the VA letterhead of Dr. Francisco's declaration, and stated

[57] Setting aside the vagueness concerns, that the FANDCs fail to identify what particular opinion of Dr. Phan that forms the charge, the court credits both respondents' respective testimony to be credible; there is but a single reference to "Dr. Fan" in Ringwald's March 13 email. And because Jackson's March 25 phone call was made to Angus, after the fact, reciting her perceived deficiencies to the petitions, this does not affect this court's determination of Angus and Duke's respective credibility.

that in Humboldt County, the community is aware that St. Joseph Hospital is the only hospital in that area—and one would naturally know that the hospital facility is separate from the VA. Because of this common knowledge, Duke did not see the need to specifically point out that Dr. Francisco was not DM's treater at St. Joseph. With OCTC failing to rebut this testimony, this court concludes there was no intentional misconduct.

And, in consideration of the context here, this court cannot conclude that respondents acted recklessly. As represented by Ringwald, exigent circumstances supported bringing the petition in raising what this court finds to be valid, legal questions of DM's capacity and a conflict of interest between DM and JM. Ringwald informed respondents in her March 13 email that DM's "competency is questionable" and that "VA psychologist Tonya Tom agreed to do a competency exam on client in hospital on 3/13/15." (Exh. 23-13.) Ringwald's email further notified respondents that St. Joseph's "DR Fan" stated that DM "has 'moments of clarity' and didn't wish for treatment, so [St. Joseph] is going forth with no treatment for client's treatable and severe infection, as they state its [sic] client and wife's wish, although client's wife may not have client's best interest in mind and client's competency is questionable and he continues to change his mind frequently about treatment[.]" (Exh. 23-13.)

From this information, respondents knew DM was yet to be evaluated for having capacity, and a reasonable attorney would have legitimate questions whether JM, who was being alleged of elder abuse, had DM's best interest in mind, and whether the doctors in St. Joseph had mistakenly decided to halt DM's treatment of a "treatable and severe infection" based on JM's sole wishes. The issues of capacity and conflict existed *regardless* of whom was the primary physician under the Probate Code. Notably, the Probate Code does *not* provide that the "primary physician" has the *exclusive* responsibility for determining capacity, nor does it provide for the scenario where the treater declines to make that determination; and moreover, the language does

not provide guidance when there is ambiguity or a dispute among treating hospitalists. This is not to say that respondents were correct in leaving vague or unclear, Drs. Francisco and Tom's respective roles or highlight the definition of "primary physician" under the Health Care Decisions Law, the failure to do so amounts to no more than negligence.[58]

In finding no intentional or reckless act in withholding this information, this court separately rejects the argument that respondents should have somehow "corrected" the petitions once Jackson raised her concerns. Nothing about the sequence of events—from March 26 in learning about Dr. Phan to the April 2 withdrawal[59]—establish that respondents intentionally,

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[58] On this point, the confidential and privileged materials between APS and County Counsel would potentially further bolster respondents' argument of lack of culpability, demonstrating the full context of *what* was told to respondents and *when* that was communicated. To illustrate, during Dr. Phan's April 10, 2015 fees hearing testimony, it became clear that she had neither read DM's AHCD nor engaged in an examination of DM's capacity because she deemed that question irrelevant from a medical perspective. Dr. Phan had also advised Ringwald during Ringwald's investigation that she regarded JM as the decision-maker, regardless of whether DM was competent, which runs contrary to the requirement under section 4658 of the Probate Code that the primary physician "shall determine" the patient's capacity. As argued by respondents throughout trial, not only was it valid to question JM but Dr. Phan's decision-making was also in dispute.

Despite the limited record, capacity was nonetheless in question and exigent circumstances presented, hence, the record allows for this court's determination on the merits in finding no culpability.

[59] There is one internal County Counsel email dated March 25, 2015 and another email between APS and County Counsel dated March 26, 2015, that are subject to attorney-client privilege. Regardless, the court finds that there are sufficient facts to make a ruling on the merits.

As summarized in the findings of fact, on March 25, Jackson spoke with Angus over the phone about her perceived deficiencies in the petitions, after which Angus promptly reviewed DM's medical records to verify Jackson's concerns. Jackson then filed objections to the petitions on March 26 (at which point respondents became aware of Dr. Phan) and filed Dr. Phan's declaration on March 30 (at which point respondents became aware of her medical opinion regarding DM). Two days later, on April 1, 2015, APS filed a notice of intent to withdraw its Petition to Enforce Duties of Attorney-In-Fact for Health Care. At the petition hearing on April 2, 2015, the aforementioned petition was dismissed pursuant to Angus's request that the petition be withdrawn.

recklessly, or repeatedly failed to perform legal services with competence. Notwithstanding Jackson's objection, the issues of capacity and conflict remained.

In sum, the allegations criticizing the substance of the petitions do not support a violation under Count One.

(5) Service of the petition

The final allegation that "the APS petition" was not timely served, is dismissed on the failure of proof. Service was accomplished on Monday, March 16, and the proof of service was administratively handled by staff. The delegation of that one task to another individual who failed to timely serve under these circumstances, does not rise to incompetence of counsel for repeated, reckless or intentional act. (Contra, *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 634 [attorney who abdicated responsibility to properly supervise her trust account and non-attorney staff was found culpable of violating former rule 3-110(A)].)

In sum, the allegations underlying Count One as to the preparation and form, content, and manner of service, of "the petition," are unsupported here—as alleged against each respondent.

Dismissal on failure of proof—performance on appeal, as to Angus

The final theory of incompetent performance relates only to Angus, that she cited to inadmissible hearsay on appeal,[60] of which this court rejects as a basis for discipline. Here, this court credits Angus's testimony that she committed a simple mistake in citing to documents in reliance of the appendix provided by Jackson (see Amended Exh. 2-253), citing to them in Humboldt County's Response Brief (Amended Exh. 2-814).

[60] Angus's defense complains that the charge, as written is vague, because if OCTC had meant the reference to rule 8.204 of the California Rules of Court [content and format of briefs] mentioned in the Court of Appeal decision, then no violation is shown in support of the rule 3-110(A) violation. (Joint Closing Brief at 23:14-24:3.) This court acknowledges the imprecise language of the allegation. Nonetheless, the court will examine the sufficiency in light of Angus's citation to evidence not in the trial record. (See FANDC ¶ 61, filed against Angus.)

One, as the moving party, Jackson prepared the appendix of materials. (Cal. Rules of Court, rule 8.124.) Angus, as the respondent, did not (and was not required to) prepare a separate appendix on behalf of Humboldt. (Cal. Rules of Court, rule 8.124(b)(5).) Further, in Jackson's opening brief, she summarized what she believed to be relevant portions of DM's medical history. (Amended Exh. 2-737 through 749.) Though Angus should have exercised more care to distinguish which items of Jackson's appendix represented records not admitted into evidence (Cal. Rules of Court, rule 8.124(b)(3)(C) [appendix includes exhibits refused admission]), this act of simple negligence does not rise to a violation under former rule 3-110(A).

In sum, none of the underlying allegations support culpability. Count One is ordered dismissed, in its entirety, with prejudice against both Angus and Duke, on the mixed grounds described above.

Count Two—Business and Professions Code section 6068, subdivision (a) [Failure to Uphold the Law, Probate Code § 4771]

Count Two alleges a violation of the State Bar Act, section 6068(a) of the Business and Professions Code,[61] which provides that an attorney has a duty to support the Constitution and laws of the United States and California. It is a conduit whereby attorneys may be disciplined for violating laws which are not otherwise disciplinable under the State Bar Act. (*In the Matter of Respondent P.* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 631.) Here, OCTC argues culpability based on respondents' filing of the APS petitions without reasonable cause, as determined by the Court of Appeal under Probate Code section 4771.

On consideration of the arguments, the court dismisses Count Two as a matter of law. Probate Code section 4771 is a fee-shifting statute that allows the court to award reasonable attorney's fees based on, in relevant part, whether the proceeding was commenced without any

[61] Unless otherwise specified, further statutory references are to the Business and Professions Code.

reasonable cause. On its own terms, it does not command an attorney to act, nor does it prohibit any particular conduct. Rather, the legislation was proposed in year 1999, to create a "new civil liability," where a health care provider or institution that intentionally violates the Uniform Health Care Decisions Act would be subject to liability to an aggrieved person for damages; and subject anyone who intentionally falsifies or alters an individual's health care directive to damages and the award of reasonable attorney's fees. (California Bill Analysis, A.B. 891 Sen., 7/13/1999.)

As follows, where the Court of Appeal determined that *APS* was *civilly liable* for acting without reasonable cause in the fee-shifting statute of Probate Code section 4771, does *not* speak to Angus and Duke's *individual* and *professional* liability under section 6068, subdivision (a), in failing to uphold the law. Under this analysis, Count Two is dismissed with prejudice.

Count Three—section 6068, subdivision (d) [Seeking to Mislead a Judge]

Section 6068, subdivision (d) provides that an attorney has a duty to employ, for the purpose of maintaining the causes confided to the attorney, those means only as are consistent with truth, and never seek to mislead the judge or judicial officer by an artifice or false statement of law or fact. Here, OCTC alleged that in filing the APS petitions, respondents *knowingly* and *intentionally* failed to advise the court that only DM's primary care physician can determine competency under the Health Care Decisions law; that Dr. Phan was the primary physician under the Health Care Decisions Law; about Dr. Phan's opinion; that Dr. Francisco was not DM's primary physician for purposes of the Health Care Decisions Law; that Francisco last saw DM in December 2014; and that Dr. Tom had never treated DM. It is further alleged that that respondents knowingly and intentionally failed to attach DM's medical records from St. Joseph Hospital to "the petition."

Regarding Angus, an additional alleged act includes knowingly and intentionally citing to inadmissible evidence in the opposition brief on appeal.

Dismissal on failure of law and proof—APS Petitions, both respondents

Analogous with the reasoning supporting dismissal of Count One, the allegation in Count Three that respondents knowingly and intentionally failed to attach DM's medical records from St. Joseph to "the petition" is dismissed for failure to state a disciplinable offense. The allegation that respondents knowingly and intentionally failed to advise the court that Dr. Tom had never treated DM also fails because Dr. Tom's declaration disclosed that DM "is NOT a patient under [Dr. Tom's] continuing treatment." (Exh. 1-29.)

As for the remaining allegations in Count Three, the court dismisses them as to both respondents on failure to show the requisite intent. Though a violation can be found in the concealment of a material fact, an expression of a half-truth, or a false statement made to the court (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315), there was no *knowing* and *intentional* conduct here.

Both Angus and Duke testified credibly and consistently, and much of their respective testimony was corroborated by subsequent action or through a document. The record fully supports that Ringwald was the primary source of information who supplied her own declaration, Dr. Francisco's declaration and Dr. Tom's capacity declaration. Neither attorney possessed nor read DM's medical records prior to filing the APS petitions.[62] Neither respondent was aware of Dr. Phan. Hence, the record fails to establish clear and convincing evidence of a knowing and intentional act of holding back material information relating to Dr. Phan.[63]

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[62] Again, this court rejected OCTC's theory that respondents were required to independently investigate as a basis for culpability under Count One.

[63] Because culpability is not shown on this record, the court need not engage in an assessment of the appropriateness of dismissal on due process grounds; as with some of the other

Finally, as to the failure to identify Dr. Francisco's role, as discussed in Count One, Duke's testimony was credible in refuting an intentional act in holding back this information; and at most, was committed negligently.

Dismissal on failure of proof— filing of the appeal, as to Angus

As to Angus's individual act, citing to inadmissible hearsay on appeal, as discussed in Count One, it was a negligent error. There was no design to mislead the Court of Appeal. (See Evid. Code, § 780; *In the Matter of DeMassa*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 749 [court accepts as plausible attorney's innocent state of mind].)

In sum, on failure of proof, Count Three is dismissed in its entirety, with prejudice as alleged against each respondent.

Count Four—section 6106 [Moral Turpitude]

Count Four is based on the same allegations as those made in Count Three (misleading a court), but charges respondents with violating section 6106, which provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. An act of moral turpitude may be committed by an intentional act, or an act of gross negligence. The distinction between simple negligence and gross negligence is that of degree, the latter reflecting "the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others[,]" and can be committed proactively or by the failure to act. (See CACI No. 425 ["Gross Negligence" Explained].)

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allegations, the confidential materials would be relevant as further evidence in support of dismissal on the merits.

Dismissal on failure of law and proof—APS Petitions, both Angus and Duke

As with Counts One, Three and Four, many of the alleged acts do not rise to misconduct. That respondents knowingly and intentionally failed to attach DM's medical records from St. Joseph to "the petition," fails to state a disciplinable offense; and the allegation that respondents failed to advise the court that Dr. Tom never treated DM, fails on the merits.

Regarding the failure to advise the court that Dr. Francisco was not DM's primary physician for purposes of the Health Care Decision Law, respondents were, at most, negligent—as discussed above in the orders of dismissal for Counts One and Three. An attorney's negligent conduct cannot be the basis for a finding of moral turpitude.

Lastly, OCTC did not prove by clear and convincing evidence that respondents' failure to advise the court about material information relating to Dr. Phan amounted to gross negligence or an intentional act of misconduct. Again, respondents were not aware of Dr. Phan until March 26, 2015, which is after the APS petitions were filed on March 13, 2015. Respondents did not possess or read DM's medical records prior to filing the petitions, and they reasonably relied on the representations made by Ringwald, who was their primary source of information. Respondents also were required to act in a 24-hour window to prepare and file the petitions under the exigent circumstances presented by Ringwald that DM may die over the weekend if he did not promptly receive treatment. Hence, these allegations fail as a matter of proof.

Indeed, the record here fully supports respondents' good faith belief of the valid legal questions of a conflict between DM and JM's interests, and DM's lack of capacity.[64] So, OCTC has failed to show respondents acted dishonestly or corruptly in bringing the APS petitions.

[64] As with many of the other allegations, the confidential materials would otherwise be relevant to this court's determination of scienter. Nonetheless, the court has an adequate record to conclude lack of culpability based on the evidence produced at trial.

Dismissal on failure of proof—filing of the appeal, as to Angus

As laid out in Counts One and Three, the court does not find that Angus's citation to hearsay on appeal was anything more than negligent conduct. Because negligence does not constitute an act of moral turpitude under section 6106, this individual act does not support culpability in Count Four.

In sum, Count Four fails in its entirety, and is ordered dismissed with prejudice as alleged against both Duke and Angus.

The Conservatorship Petition—respondent Duke only

The remaining counts involve the conservatorship petition prepared by Duke; Angus is not charged with Counts Five through Eight. For the reasons articulated below, all counts are dismissed with prejudice on the failure of proof.

Count Five—former rule 3-110(A) [Failure to Perform with Competence]

OCTC alleges that Duke violated former rule 3-110(A), by intentionally, recklessly, or repeatedly failing to perform legal services with competence, by failing to contact Reed before filing the conservatorship petition; filing the petition based on misleading hearsay statements and without providing supporting documents; pursuing a conservatorship for DM without providing medical records from St. Joseph Hospital to the court and without advising the court about "Dr. Phan's recommendation;" failing to serve the notice of the petition and the petition on JM's counsel; failing to serve the *ex parte* application, and the order and the amended petition on DM at the proper address; and failing to serve JM's counsel with those documents.[65]

[65] The court granted OCTC's motion to dismiss the allegations of pursuing the conservatorship without advising the court that Dr. Phan was DM's primary care physician under the Health Care Decisions Law; pursuing a conservatorship for DM without advising the court that Dr. Tom had never treated DM; failing to serve the notice of the petition and petition on JM; and failing to serve the *ex parte* application, order, and the amended petition on JM.

Notwithstanding OCTC's dismissal motion and this court's denial of OCTC's mid-trial motion to amend, OCTC summarizes its factual support for allegations not appearing in the

OCTC has failed to carry its burden of proof as to deficiencies in service rising to misconduct. DM, JM, and Reed were indeed served, and their service is documented by the filed proofs of service. Further, the County Counsel's office was not under the duty to serve Jackson until she entered her appearance as the attorney for the objector, JM—she was *not* DM's counsel. (See Prob. Code, § 2250(e) [parties to be served], § 1821(b) [service by mail].)

With regards to contacting Reed before filing the petition, Reed was not named as an alternative conservator under the AHCD—so OCTC has not demonstrated Duke's obligation to consider her candidacy before filing for the public conservatorship.[66] Moreover, based on an assertion of attorney-client privilege, Duke could not explain the steps taken to notify Reed, though it appears, some effort was made. Dawson testified during trial in the conservatorship proceeding that Duke had asked him to contact Reed.

Regarding the substance of the petition, OCTC has failed to demonstrate by clear and convincing evidence, that Duke performed incompetent services by relying on misleading statements supplied by Ringwald, failing to include DM's medical records, and excluding Dr. Phan's recommendation from the conservatorship petition. This is so—regardless of Duke's awareness of the Probate Code section 4771 testimony.

One, the issues regarding the conservatorship involved whether DM lacked capacity—thus requiring the appointment of a conservator; and if so, whether the Public Conservator should be appointed rather than JM based on the APS investigation. (Prob. Code, § 2250.) And,

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Amended NDC, including purported deficiencies in the supplemental filings (closing brief at pp.14-21)—of which OCTC's expert had no quarrel during his deposition. Though OCTC does not raise these facts as the basis for discipline in Counts Five through Eight (closing brief at pp.23-26), the court notes that they cannot be considered by the court without violating due process. (See *Glasser*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 171.)

[66] And as previously noted in the court's discussion of a similar allegation in Count One (i.e., that respondents failed to contact Reed before filing the APS petitions), this allegation, as charged, does not state a disciplinable offense.

the Judicial Council form approved for mandatory use was completed, designed to address the petitioner's showing of good cause under the Probate Code. (See Exh. 3-47 through 57 [petition prepared on GC-111].) Neither the statute nor the mandatory-use form defines the manner or presentation of "good cause." Finally, there was merit to the cause of action. The matter proceeded to bench trial where Jackson's successive motions for nonsuit were denied.

Hence, Count Five is dismissed with prejudice.

Count Six—section 6068, subdivision (c) [Maintaining an Unjust Action]

Section 6068, subdivision (c) provides that an attorney has a duty to counsel or maintain those proceedings, actions, or defenses only as they appear to the attorney legal or just, except the defense of a person charged with a public offense. The same allegations underpinning Count Five are alleged in Count Six, with the inclusion that Duke failed to advise the court that Dr. Francisco last saw DM in December 2014.

As with Count Five, OCTC has failed to meet its burden of proof. There was a basis to question the capacity of DM. Dr. Soper's observations were consistent with Dr. Tom's, that DM lacked capacity. Indeed, Jackson likewise questioned DM's capacity by also attaching Dr. Tom's declaration and moving for appointment of JM. Hence, Count Six is dismissed with prejudice on the failure of proof.

Count Seven—section 6068, subdivision (d) [Seeking to Mislead a Judge]
Count Eight—section 6106 [Moral Turpitude]

The same underlying factual allegations are raised for Counts Seven (seeking to mislead a judge) and Eight (an act of moral turpitude). Specifically, they allege that Duke knowingly and intentionally filed and pursued the conservatorship case based on hearsay statements; and that Duke pursued the conservatorship case without providing medical records from St. Joseph

Hospital to the court, without advising the court about Dr. Phan's recommendation, and without advising the court that Dr. Francisco last saw DM in December 2014.[67]

Under the reasons articulated in dismissing Counts One, Three, Five and Six, the court likewise rejects the allegations under Counts Seven and Eight. First, Duke was not under an obligation to attach DM's medical records nor did she violate section 128.7 of the Code of Civil Procedure. There is also nothing wrong with attaching documents containing hearsay to an initiating complaint. Second, DM's medical records were subpoenaed to the court by the Public Guardian for trial—OCTC has not shown an intent to conceal this evidence. Finally, the issues involved capacity and the appointment of the appropriate conservator—not the appropriateness of Dr. Phan's medical decision-making, so there lacks clear and convincing evidence to mislead or to act with moral turpitude. Counts Seven and Eight are dismissed with prejudice on the merits.[68]

Orders of Dismissal

Though this court recognizes the harm suffered by JM and DM by APS's actions, this court is called upon to determine whether Angus and Duke's respective acts rose to professional misconduct—not APS's civil liability.

After careful consideration, the court finds that Mary Blair Angus, State Bar Number 210160, and Natalie A. Duke, State Bar Number 269315, not culpable of the charged misconduct

[67] The court granted OCTC's motion to dismiss the following allegations in the FANDC: knowingly and intentionally pursuing the Conservatorship case without advising the court that Dr. Phan was DM's primary physician under the Health Care Decisions Law; Dr. Francisco was not DM's primary physician for the purposes of the Health Care Decision Law; and Dr. Tom had never treated DM.

[68] As with some of the allegations surrounding the filing of the APS petitions, the privileged materials may be relevant to the mental state of Duke, and thereby, potentially relevant to the defense. Nonetheless, the record allows this court to reach the merits on OCTC's failure of proof.

on the varied and mixed grounds explained. These matters are **dismissed with prejudice**. Any reference to these matters on each attorney's profile page will be removed pursuant to the clerk's entry of dismissal. However, public cases nonetheless remain available on the court's public docket.

Because Angus and Duke are exonerated of all charges following a trial on the merits, each respondent may, upon the finality of this decision and orders, file a motion seeking reimbursement for costs under Business and Professions Code section 6086.10, subdivision (d). (See Rules Proc. of State Bar, rule 5.131.)

It is so ordered.

Dated: December 16, 2021

PHONG WANG
Judge of the State Bar Court

CERTIFICATE OF ELECTRONIC SERVICE

(Rules Proc. of State Bar, rule 5.27.1.)

I, the undersigned, certify that I am a Court Specialist of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, on December 16, 2021, I transmitted a true copy of the following document(s):

DECISION AND ORDERS OF DISMISSAL WITH PREJUDICE

by electronic service to WHITNEY LAUREN GEITZ at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

whitney.geitz@calbar.ca.gov

by electronic service to JAMES JOSEPH BANKS at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

jbanks@bw-firm.com

by electronic service to DANIEL V. KOHLS at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

dkohls@hansenkohls.com

The above document was served electronically. My electronic service address is ctroom2@statebarcourt.ca.gov and my business address is 180 Howard St, 6th Floor, San Francisco, CA 94105.

I declare, under penalty of perjury under the laws of the State of California, that the information above is true and correct.

Date: December 16, 2021

Anna Dungo
Court Specialist
State Bar Court