

IN THE SUPREME COURT OF THE STATE OF MISSOURI

IN RE:)
)
 DANIEL L. FRANCO,)
 Mo. Bar No. 42232)
)
 Respondent.) Case No. SC83356
)

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Jurisdiction over this matter arises under Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, the Court's common law, and Section 484.040, R. S. Mo. (2000).

STATEMENT OF FACTS

Daniel Franco is a licensed attorney in good standing, who was admitted to practice on 27 September 1991, and whose Missouri Bar Number is 42232.

Daniel Franco's date of birth is 09 December 1955 and he resides at 13128 Larsen St., Overland Park, Kansas. T. at 107, lines 2 - 10; 11 - 15.

Mr. Franco practices law in Kansas City, Missouri, at 1621 Baltimore Avenue, Kansas City, Missouri 64108. He has only had one prior substantiated complaint of professional misconduct. T. at 148 - 149.

Pauline Mercer filed a complaint against Daniel Franco and the Region IV Disciplinary Committee requested that Daniel Franco cooperate with its investigation. Other complaints were made by Doris Bates and the Kansas Disciplinary authorities. Although Mr. Franco did not timely respond to the Committee's request for information, he did provide complete information and did provide a statement and a deposition with respect to these complaints. Informant's Exhibits A-5, A-17, A-24.

The respondent did not agree to undertake any service for Doris Davis Bates, did not take any money from her, and did not receive any original documents from her, in July of 1999 or thereafter, regarding a real estate matter. Mr. Franco did meet with Ms. Bates and advised her that he did not handle real estate matters and that he would refer her to a real estate lawyer. He did not provide the name of the

lawyer to whom he normally referred real estate cases because he did not think she could afford that lawyer. Doris Bates was offended by the suggestion that she could not afford a particular lawyer.

In the summer and fall of 1999, Doris Bates, or a person with a voice similar to hers, made repeated annoyance calls to Daniel Franco's law office, such that the telephone answerers were upset by her demeanor. Mr. Franco got one or two messages of this nature and advised the receptionist that Ms. Bates was not a client of his firm and he did not wish to speak with her because of her offensive conduct. T. at 173 - 176.

The respondent did receive a certified letter from Doris Bates, of which the respondent was actually unaware until after Ms. Bates filed a complaint against him, because the letter had been misfiled by the respondent's daughter, a high school student who was performing file clerk services for him in the summer of 1999. T. at 177 - 178.

Brett Michael Reid retained the respondent to represent him in a criminal matter in Riley County, Kansas, in December of 1999. At the time that Mr. Reid retained the respondent, the respondent advised Mr. Reid that the respondent was not licensed to practice law in Kansas and would have to secure local counsel. T. at 120 - 121.

From December of 1999 through February of 2000, the respondent was very ill from an undiagnosed and untreated, severe case of diabetes which caused fatigue and hallucinations. The respondent's wife observed numerous very unusual and frightening actions by the respondent during December and January of 1999/2000, and was extremely fearful for her husband. She would waken and find him stumbling in the dark bedroom talking and muttering to himself, appearing to see or hear things that were not there. T. at 212 - 213.

Additionally, in December of 1999, the respondent's mother was very ill and the respondent traveled to California to see her and attend to her affairs. Moreover, in December of 1999 through February of 2000, the respondent had a very heavy trial docket, including jury trials, and was working on at least one death penalty case. In association with this caseload, the respondent worked many long hours including working through the night on numerous days and resuming work the next day without sleep. 192 - 194.

At the time of the events underlying Informant's case against Mr. Franco, Mr. Franco had in his employ a woman named Monica Navarro. Ms. Navarro was a new secretary with little experience. She had never done any criminal law pleadings before coming to work for Mr. Franco in early December of 1999. Ms. Navarro had been hired to attempt to get Mr. Franco organized, because Mr. Franco and his wife had both come to the decision that organization was very

important to Mr. Franco's practice, and so when Mr. Franco got a significant fee, instead of buying a second car for their family, they put aside the money to use to pay a secretary to get Mr. Franco organized. T. at 214.

In late December of 1999, the respondent contacted his then-secretary, Ms. Navarro, and directed her to prepare an Entry of Appearance and Motion for Continuance in Mr. Reid's Riley County case, and advised her to attempt to reach Martin Wells, a Kansas Attorney whom the respondent had previously used on several Kansas cases. Supplemental Transcript at 9, 10.

The respondent dictated the entry of appearance, and also gave Ms. Navarro a Kansas Bar Number that he believed to be Martin Wells' Bar Number. He told Ms. Navarro to write the number down so she would have it available. Ms. Navarro was at her computer at the time that Mr. Franco gave her the Kansas Bar Number that he believed to be Martin Wells' KBA, and did not have a pen or paper in front of her. She placed her cursor on the screen and typed; and did not notice that she had typed the KBA next to Daniel Franco's Missouri Bar Number. Supplemental Transcript at 12, 13.

The Bar Number typed by Ms. Navarro did not indicate that it was a Missouri Bar Number or a Kansas Bar Number; it just appeared next to Daniel Franco's Bar Number. Informant's Exhibit A-7. Ms. Navarro was told by Mr.

Franco that he was not a Kansas lawyer and needed a Kansas Bar Number "on the pleadings" with Mr. Franco. Supplemental Transcript at 9.

Neither Mr. Franco nor Ms. Navarro was able to reach Martin Wells to determine whether or not he could serve as Kansas counsel in the Reid case.

When Mr. Franco returned from California, he contacted an attorney who had an office in the basement of Mr. Franco's suite, Michael Bredehoft. Mr. Bredehoft and Mr. Franco had already discussed the potential of Mr. Bredehoft's appearance as Kansas Counsel on cases for Mr. Franco, and had agreed on an hourly rate of \$50.00. T. at 128; 180.

Mr. Franco contacted Mr. Bredehoft at home about the Riley County case, and Mr. Bredehoft agreed to serve as Kansas counsel, gave Mr. Franco his Kansas Bar Number, and authorized Mr. Franco to sign Mr. Bredehoft's name. Mr. Franco dictated Mr. Bredehoft's information to Monica Navarro, and the pleading was signed by Mr. Franco, who signed his own name and signed Mr. Bredehoft's name with Mr. Franco's initials next to it indicating the actual signer. The Entry of Appearance and Motion for Continuance was filed, and the continuance was granted to 13 January 2000. T. at 185 - 186.

On 12 January 2000, Mr. Franco had a trial in Cass County, Missouri. He spent all night working on the trial, and made several calls to Mr. Bredehoft and to Monica Navarro about Mr. Bredehoft's appearance on 13 January 2000.

Mr. Franco believed that Ms. Navarro was making numerous efforts to find Mr. Bredehoft and that Mr. Bredehoft would be, or had been, told that Mr. Reid's preliminary examination was scheduled for 13 January 2000 and that Mr. Bredehoft was to be present. T. at 129 - 131; 176.

Mr. Franco did not sleep before traveling to Riley County, Kansas for the Reid trial and was driven to Riley County by his client's parents, because Mr. Franco's wife was worried that his lack of sleep would pose a danger to him.

Mr. Franco expected to see Mr. Bredehoft at the preliminary examination on 13 January 2000 and did not call to the Court's attention that Mr. Bredehoft was not present. T. 132 - 134.

Court start early on 13 January 2000, very quickly. Mr. Franco launched immediately into defense of his client and did an excellent job, so much so that the prosecuting attorney was very impressed and undertook an investigation into Mr. Franco because he seemed to be a formidable opponent. The prosecutor discovered the apparent KBA number next to Mr. Franco's Missouri Bar Number, learned it was not an active KBA, and contacted Mr. Franco. T. at 135 - 136.

During the call with the Riley County prosecutor, Mr. Franco learned for the first time of Ms. Navarro's mistake in typing the KBA number next to Mr. Franco's Bar Number. Michael Bredehoft had, in the meantime, commenced a job with UAW as in-house legal counsel. Michael Bredehoft and Daniel Franco had one

conversation after January 13th, which was not about the Reid case. Mr. Bredehoft asked about a case on which Mr. Franco was going to use him as Kansas counsel, and Mr. Franco said it had fallen through. At the time, Mr. Franco was on his way to court and he did not have time to talk. T. at 137 - 139.

At the time of the brief conversation with Mr. Bredehoft, Mr. Franco was upset about Mr. Bredehoft's failure to appear in Riley County but had been taught by one of his mentors not to talk about important things when one is in a hurry, so he did not mention it. He intended to raise it a later time, but Mr. Bredehoft did not appear at the office after that so Mr. Franco had no opportunity to do so.

Daniel Franco is held in high regard by at least one Circuit Judge, The Honorable Thomas C. Clark. Judge Clark has a sufficiently high regard for Daniel Franco that he finds him honest almost to a fault, and is aware that Daniel Franco has a reputation for honesty and fair dealings. *See testimony commencing at 218.*

Daniel Franco made no representations to the Riley County, Kansas case regarding his licensure. The Riley County Court examined the transcript of the proceedings and determined that, although the hearing had not been effective as a preliminary examination because of the absence of Kansas counsel, the defendant had been properly represented and a waiver was entered on his behalf. Daniel Franco was allowed to appear *pro hac vice* by the very judge before whom the

original preliminary examination was conduct. Daniel Franco has never knowingly held himself out as being licensed to practice law in Kansas.

On one prior disciplinary complaint, Daniel Franco was strongly advised to be sure he had local counsel when appearing in Kansas, but the basis of the complaint did not relate to whether or not Mr. Franco had Kansas counsel. The complaint in question was found to be groundless. In that case, Mr. Franco never appeared before the Kansas court without his attorney and in fact told a Johnson County, Kansas judge that he could not come before the Bar because his Kansas counsel could not be present. T. at 150 - 151.

Mr. Franco never intended to misrepresent any fact to the Kansas courts. Mr. Franco acknowledged that it was an error in judgment to fail to call to the Riley County, Court's attention that Mr. Bredehoft had not arrived.

Mr. Franco acknowledged that it was an error in judgment to fail to timely respond to the Committee requests regarding Pauline Mercer and Doris Bates. Mr. Franco acknowledged that he was so chagrined at Ms. Mercer's complaint after the many hours of uncompensated work that Mr. Franco undertook for Ms. Mercer that he was emotionally unable to deal with her complaint. Mr. Franco acknowledged that it was embarrassment at the second complaint that caused him to "put his head into the sand" and not provide any response.

Mr. Franco acknowledges that he has a duty to cooperate with investigations of apparent attorney misconduct, and that he did not cooperate in those two instances because of his own emotional reaction to them. At the time of the events giving rise to this action, Daniel Franco and his family were also going through extreme difficulties with Mr. Franco's son, who had, at the time, many difficulties with the law.¹

Daniel Franco has instigated numerous practice management techniques in his law office in order to track the cases that he handles, including issues relating to incoming and outgoing items, selection and designation of Kansas Counsel, and other matters in order to avoid future problems. Mr. Franco began medical treatment for his diabetes in early spring of 2000, and has not suffered the severe symptoms that he experienced in December 1999 and January 2000. He has also consciously cut back on his practice in order to insure that he will not place himself or his clients' interests in jeopardy. This was done with his wife's encouragement and support. T. at 193, 198.

¹ The numerous references in the record to this evidence will be hereinbelow specifically cited and quoted.

POINTS RELIED ON

I. THE SUPREME COURT SHOULD PUBLICLY REPRIMAND THE RESPONDENT, OR, IN THE ALTERNATIVE, SHOULD FOLLOW THE HEARING PANEL'S RECOMMENDATION FO SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER NINETY DAYS, BECAUSE, ALTHOUGH RESPONDENT DID REPERSENT A CLIENT IN KANSAS COURT WITHOUT A KANSAS LICENSE, HE REASONABLY BELIEVED THAT THE KANSAS COURT WAS AWARE THAT HE WAS NOT LICENSED TO PRACTICE LAW IN KANSAS; REASONABLY BELIEVED THAT HIS LOCAL COUNSEL WOULD ARRIVE IN TIME TO PARTICIPATE IN THE PROCEEDINGS, AND BECAUSE MITIGATING CIRCUMSTANCES THE RESPONDENT'S GOOD CHARACTER AND REPUTATION JUSTIFY A LESSER SANCTION.

ABA Standards for Imposing Lawyer Sanctions, 4.33.....17

In re Weir, 994 S.W.2d 554 (Mo. 1999).....17

In re Kopf, 767 S.W.2d 30, 22 (Mo. banc 1989).....19

In re Storman, 873 S.W.2d 227 (Mo. banc 1994).....19

In re Sticker, 808 S.W.2d 356 (Mo. 1991).....21

II. THE SUPREME COURT SHOULD PUBLICLY REPRIMAND THE RESPONDENT OR, IN THE ALTERNATIVE, SHOULD FOLLOW THE RECOMMENDATION OF THE HEARING PANEL FOR SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER NINETY DAYS, BECAUSE, ALTHOUGH THE RESPONDENT VIOLATED RULE 4-8.1(B) BY FAILING TO MAKE TIMELY RESPONSE TO REQUESTS FOR INFORMATION FROM THE DISCIPLINARY COMMITTEE, AND FAILED TO APPEAR FOR A SCHEDULED STATEMENT UNDER OATH, AND FAILED TO PRODUCE REQUESTED DOCUMENTS, THE RESPONDENT ACKNOWLEDGES HIS ERROR IN JUDGMENT, ESTABLISHED MITIGATING CIRCUMSTANCES, AND IS OTHERWISE FIT TO PRACTICE LAW.

ABA Standards, Rule 9.32(d), 9.32(l).....22
In re Coe, 903 S.W.2d 916 (Mo. 1995).....22

III. THE SUPREME COURT SHOULD FIND THAT THE RESPONDENT DID NOT VIOLATE RULES 4-1.1, 4-1.3, AND 4-1.4 WITH RESPECT TO DORIS BATES, IN THAT THE RESPONDENT DID NOT AGREE TO PERFORM WORK FOR MS. BATES, DID NOT HAVE AN ATTORNEY/CLIENT RELATINSHIP WITH HER RELATIVE TO THE MATTER ALLEGED IN THE INFORMATION, DID NOT RETAIN ANY DOCUMENTS BELONGING TO HER, AND OTHERWISE DID NOT VIOLATE ANY DUTY WITH RESPECT TO HER.

In re Disney, 922 S.W.2d 12 (Mo. 1996).....25

Schwarze v. May Dept. Stores, 360 S.W.2d 336 (Mo. Ct. App. 1962).....26

State v. Johnson, 700 S.W.2d 815 (Mo. banc 1985).....27

In re Smith, 749 S.W.2d 408 (Mo. banc 1988).....29

ARGUMENT

I. THE SUPREME COURT SHOULD PUBLICLY REPRIMAND THE RESPONDENT, OR, IN THE ALTERNATIVE, SHOULD FOLLOW THE HEARING PANEL'S RECOMMENDATION FO SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER NINETY DAYS, BECAUSE, ALTHOUGH RESPONDENT DID REPRESENT A CLIENT IN KANSAS COURT WITHOUT A KANSAS LICENSE, HE REASONABLY BELIEVED THAT THE KANSAS COURT WAS AWARE THAT HE WAS NOT LICENSED TO PRACTICE LAW IN KANSAS; REASONABLY BELIEVED THAT HIS LOCAL COUNSEL WOULD ARRIVE IN TIME TO PARTICIPATE IN THE PROCEEDINGS, AND BECAUSE MITIGATING CIRCUMSTANCES AND THE RESPONDENT'S GOOD CHARACTER AND REPUTATION JUSTIFY A LESSER SANCTION.

The first and second points on which the Informant relies in its brief to this honorable Court relate to Count III of the Amended Complaint.² Although the better order would be to address the counts in numeric order, for the sake of ease in following the respective briefs, the respondent will instead follow the order of argument used by the Informant.

² Count I was dismissed by Informant on the record. T. at 171, lines 3 - 12.

Regarding Daniel Franco's appearance in Riley County, Kansas, the overwhelming evidence establishes that Daniel Franco made no intentional misrepresentations to the Court, whether by admission or omission. Because any misrepresentation was merely negligent and an admitted error in judgment, either reprimand or the 90-day suspension recommended by the lower tribunal is appropriate to redress the actions of Mr. Franco relative to Count III.

There is no dispute that Mr. Franco appeared in Riley County, Kansas without having a Kansas attorney beside him at the bar. There is also no dispute about Mr. Franco's intentions on that day -- which were neither to mislead the Kansas Court, nor to be less than honest with the Court in regards to his licensure. Even the district attorney who originally complained about Mr. Franco acknowledges that he has no idea what Mr. Franco's intentions were, T. at 52, lines 1 - 9. Mr. Irvine testified that he had "no evidence of what his intentions or his thoughts or what his belief were at the time".

Indeed, Mr. Franco confirmed that he had no intent to mislead the Kansas Court. T. at 199, lines 16 - 24. To do so, as he stated, would have been "the height of foolishness". T. at 199, line 24. Mr. Franco was "an experienced criminal defense lawyer." He knew "that [he] was going to have many appearances in a case that [he] anticipated would be contentious". T. at 199, lines 24; 200, lines 1 - 2. In fact, although Mr. Franco had the permission of his Kansas co-counsel to

sign his name, he "didn't want to trick anybody into thinking it was his signature", so he put his "D.L.F." next to the signature because he "felt it was required and incumbent on [him] to put somebody else had signed it besides Michael Bredehoft". T. at 186, lines 17 - 20.

Mr. Franco testified that he believed that Mr. Bredehoft would be showing up in court that day, "expecting and hoping". Deposition of Daniel Franco, Informant's Exhibit A-5, at 31 - 32. Mr. Franco further testified as to his efforts to contact Mr. Bredehoft, which were numerous. T. at 128 ("left several messages...directed [his] secretary...to get ahold of Mr. Bredehoft"; t. at 128; left messages with and inquired of common receptionist (T. at 128 - 129); and saw a note from Mr. Bredehoft to the receptionist indicating he would be gone on the day in question, leading him to believe Mr. Bredehoft would be in court in Riley County (T. at 129, lines 10 - 12.)

Mr. Franco also believed that the trial court "had notice . . . that a Missouri lawyer and a Kansas lawyer had signed [an application for continuance and entry of appearance] in th[e] case" of *State of Kansas v. Brett Michael Reid*, that was called before the court on January 13th. At the time, although Mr. Bredehoft did not show for court, Mr. Franco believed "the court knew from the pleadings that sitting in front of it was a Missouri attorney not licensed to practice law in Kansas". T. at 134. He did acknowledge that a second number appeared after his

Missouri Bar number, but the secretary in question testified that she herself placed that number there but was not instructed to do so and did so purely through human error. Supplemental Transcript at 12.

There is a clear distinction between negligent conduct and intentional conduct when considering the appropriateness of discipline. While the record reflects that Mr. Franco, as a result of human error, did file a document containing a second number next to his Missouri Bar number, the record fails to establish that this number misled the tribunal or was intended to do so. Indeed, the number in question, appearing as Informant's Exhibit A-7, does not denote that it is intended to be a Kansas Bar Number. The pleading also bears the name of a Kansas attorney who acknowledges authorizing the use of his name and bar number. T. at 79, lines 5 - 9; t. at 185 - 186 (similar account by Mr. Franco).

Mr. Franco, at the very worst, was not sufficiently careful in attending to the matters before the Riley County Court on the day in question. He secured permission from a Kansas attorney to have co-representation for the client, and to sign the attorney's name using the attorney's bar number. He attempted to reach the attorney and attempted to communicate to the attorney, the date to which the matter had been continued. Mr. Reid, his client, was not injured and the Court was apparently not overly concerned, since the Court, over vigorous objection, allowed Mr. Franco to be admitted *pro hac vice* in the case. T. at 202.

Where a case involves mere negligence and not intent, and a client is not injured, reprimand is an appropriate sanction. ABA Standards for Imposing Layer Sanctions §4.33, as quoted in *In re Weier*, 994 S.W.2d 554, 559 (Mo. 1999)(violation of Rules 4-1.7). Public reprimand is an appropriate sanction under these circumstances. There is simply no evidence of any intentional wrongdoing, and there is substantial evidence that Mr. Franco, rather than attempting to defraud a tribunal, was simply operating under more assumptions than he should have been in attempting to diligently represent his client.

Moreover, the record is clear that there were substantial burdens on Mr. Franco at the time of these proceedings. Tellingly, Mr. Franco was suffering from undiagnosed and severely debilitating symptoms of adult-onset diabetes. T. at 192, lines 23 - 25; 193, lines 1 - 9. He began to think he might have diabetes and finally got medication in May of 1999, but prior to that time was unmedicated. T. at 193, lines 1 - 24. His symptoms included severe pain, especially in his feet; numbness in his hands and feet; lack of sensation; insatiable thirst; perspiring and sweating; lightheadedness; dizziness; and trouble sleeping. T. at 194, lines 2 - 12.

Mr. Franco's symptoms were worse than he realized. In fact, his wife testified that he apparently experienced hallucinations in late December and early January. T. at 212. Her candid testimony explains Mr. Franco's behavior:

Q: Can you describe for the Committee, please your husband's physical condition in December of 1999...for the next couple of months?

A:....His physical condition went from bad to worse.....He has experiencing difficulties because of his full-blown diabetes, which we were not even aware of that he had.he was suffering from: sleep deprivation and a combination of diabetes.

He would forget things. He's always been a very clearheaded person, always remembers details, and now he was forgetting things.....

...I know on two occasions when he came into the bedroom in the early hours of the morning, I heard him talking to himself, having hallucinations as if he was having a conversation with someone else...

When we went to California [Christmas 1999], he got sick and his immune system was so low....the doctor was extremely concerned and said that if Dan hadn't come in when he did, that he probably would have died within the next 24 hours or 48 hours.....

T. at 211 - 212.

Mrs. Franco went on to testify that "after January [1999] his schedule was not quite as bad" and that they did see a difference, "but he did continue to have quite a few problems up until he was diagnosed in late May and started receiving medication in June". T. at 213, lines 13 - 17. Mrs. Franco discussed with him "taking measures to correct his schedule", and "he kept telling [her], "I have clients, I'm obligated to the clients' ". T. at 213, lines 24 - 25. He felt pressure from his family obligations, saying "I'm the main provider for our family". T. at 213, line 25; 214, line 1.

Mr. Franco's mitigating circumstances also extended to his "only and eldest son". T. at 161, lines 16 - 17. He testified that his son, "a beautiful young man who's been hell-bent on self-destruction -- a very bright, gifted kid", had been in trouble with the law during the fall proceeding the underlying events, and that Mr. Franco, who had raised this child and his daughter as a single parent, had to remove his son from the family home. T. at 161 - 162.

In determining the appropriate sanction, the respondent's mental state is clearly to be considered as a factor. Although the respondent's medical condition and suffering because of exhaustion and personal problems do not excuse his failure to make sure that his Kansas attorney was present or that the attorney's presence was excused, these things stand as strong mitigating factors. *In re Kopf*,

767 S.W.2d 20, 22 (Mo. banc 1989); *see also In re Storman*, 873 S.W.2d 227 (Mo. banc 1994)(negligence warrants reprimand).

Additionally, the evidence of Mr. Franco's honesty and integrity was uncontradicted. Only the witnesses involved in the Reid matter otherwise testified, and they had no direct evidence -- and no clear indirect evidence -- of fraudulent intent.

On direct point was the testimony of the Honorable Tom Clark, judge of the Sixteenth Judicial Circuit. His testimony, voluntarily given, placed Daniel Franco in the highest category of honorable members of the bar. He stated that Daniel Franco was a person of "honor and truthfulness". T. at 221, lines 11 - 14. He stated that Mr. Franco "met or exceeded" his expectations of forthrightness. T. at 220, lines 9 - 13. He also confirmed Mr. Franco's "reputation for truthfulness" as being "very good or excellent". T. at 219.

This reputation, and further mitigation, is upheld by Mr. Franco's candor with the Committee. He acknowledged that he made an error in judgment in not speaking when the Riley County Court convened. Franco Deposition, 35 at lines 17 - 18. (Informant's Exhibit A-5). Acknowledgment of his error is also a mitigating factor that should be taken into consideration in assessing punishment.

Based upon the record, the appropriate sanction for the respondent's conduct arising out of the Riley County, Kansas occurrence is reprimand. In the

alternative, the ninety-day suspension recommended by the Committee could be considered by the Court. In determining which of these disciplinary sanctions to levy, the Court should also consider the corrective measures taken by the respondent to insure that he does not have problems of this nature again. T. at 198 - 199. Correction of the problems that led to the events giving rise to the disciplinary proceedings should be considered as a mitigating factor. *See, e.g., In re Stricker*, 808 S.W.2d 356, 363 (dissenting opinion) Mo. 1991.

For the foregoing reasons, as to Count III, the Court should find that, although a violation occurred, it was not an intentional fraud or misrepresentation but an act of negligence, in part arising out of the respondent's physical and mental condition due to profound and undiagnosed illness and other personal problems. Because the respondent has corrected his illness, and taken action to address office procedures that might have contributed to the difficulties giving rise to his violation, reprimand or, at the most, a ninety-day suspension, are the appropriate sanction.³

³ Although Informant attempts to characterize this as a second alleged violation of local counsel rules in Kansas, the proceeding as to which Informant made reference did not involve an allegation of nonappearance with local counsel and also resulted in a finding that no sanctionable conduct had occurred. T. at 150. Therefore, this should not be considered as a second offense in determining what discipline to order.

II. THE SUPREME COURT SHOULD PUBLICLY REPRIMAND THE RESPONDENT OR, IN THE ALTERNATIVE, SHOULD FOLLOW THE RECOMMENDATION OF THE HEARING PANEL FOR SUSPENSION WITH LEAVE TO APPLY FOR REINSTATEMENT AFTER NINETY DAYS, BECAUSE, ALTHOUGH THE RESPONDENT VIOLATED RULE 4-8.1(B) BY FAILING TO MAKE TIMELY RESPONSE TO REQUESTS FOR INFORMATION FROM THE DISCIPLINARY COMMITTEE, AND FAILED TO APPEAR FOR A SCHEDULED STATEMENT UNDER OATH, AND FAILED TO PRODUCE REQUESTED DOCUMENTS, THE RESPONDENT ACKNOWLEDGES HIS ERROR IN JUDGMENT, ESTABLISHED MITIGATING CIRCUMSTANCES, AND IS OTHERWISE FIT TO PRACTICE LAW.

Daniel Franco admitted that he failed to timely and fully respond to the efforts of the counsel for the Chief Disciplinary Counsel, to investigate the allegations of wrong-doing. T. at 162; 141 - 146. Mr. Franco acknowledged that this was an error on his part resulting from his emotional responses to the complaints against him. T. at 160, lines 22 - 25; 161, lines 13 - 14. He also candidly admitted that "he was probably being overwhelmed in my practice with respect to my organization". T. at 162, lines 8 0 12. Mr. Franco did attempt to

cooperate by appearing for a deposition in this case, and was fully candid with the Committee in its proceedings. This can be seen as a timely, and good faith effort to rectify the consequences of his misconduct and remorse, both mitigating factors under the ABA Standards. Rule 9.32(d); 9.32(l).

The full record establishes that Mr. Franco is a man of honor otherwise qualified to practice law. In the absence of any compelling reason to suspend Mr. Franco, or to do so for six months as now requested by Informant, reprimand is a sufficient disciplinary action. *See generally In re Coe*, 903 S.W.2d 916 (Mo. 1995).

Under the circumstances of this case, failure to cooperate in the first stages of the investigation, having been admitted by the respondent, reprimand is sufficient to insure that the respondent understands, appreciates, and fully remedies his remission. In the alternative, the Committee's recommendation of suspension for 90 days would be ample punishment for the respondent's acknowledged and regretted failure to cooperate.

III. THE SUPREME COURT SHOULD FIND THAT THE RESPONDENT DID NOT VIOLATE RULES 4-1.1, 4-1.3, AND 4-1.4 WITH RESPECT TO DORIS BATES, IN THAT THE RESPONDENT DID NOT AGREE TO PERFORM WORK FOR MS. BATES, DID NOT HAVE AN ATTORNEY/CLIENT RELATINSHIP WITH HER RELATIVE TO THE MATTER ALLEGED IN THE INFORMATION, DID NOT RETAIN ANY DOCUMENTS BELONGING TO HER, AND OTHERWISE DID NOT VIOLATE ANY DUTY WITH RESPECT TO HER.

In Count II of the Amended Information, the Informant alleged that Mr. Franco violated his duty to Doris Bates by failing to represent her in a competent and diligent manner and failing to communicate with her. However, the record reflects that Mr. Franco did not have an attorney/client relationship with Ms. Bates and thus did not violate any duty to her.

Mr. Franco did handle one prior matter for Ms. Bates, in housing court. T. at 94. Ms. Bates met with Mr. Franco right after 04 July 1999 to discuss other legal matters. T. at 94, 172. However, Mr. Franco did not agree to represent her.

As he testified:

Q: [By Corinne Corley, attorney for respondent] And did you agree at any time then or thereafter to handle those real property matters for Mrs. Bates?

A: [By Daniel Franco] No.

Q: What did take place after that meeting?

A: Well, I have a pretty clear recollection of certainly certain aspects of the meeting because of the heat that day....*** What I recall about the meeting is that she came to me thinking that I practice in the area of real estate.

Q: Which you do not?

A: I do not.

A: I told her that I did not practice in that area, and I have always referred, although it's been very few referrals, I have always referred my real estate cases to Doug Patterson....

Q: All right, and did you in fact refer Miss Bates to Mr. Patterson.

A: No. What I told her was if she wanted to, I could.

Mrs. Bates is a very irrational woman and she got a little upset with me because perhaps indelicately I had indicates to her I wasn't sure if she could afford Mr. Patterson.

T. at 172 - 173.

Both Mr. Franco and Mrs. Bates testified that Mr. Franco did not receive any money from Mrs. Bates. T. at 176, lines 22 - 24; 98, lines 2 - 4. Mr. Franco testified that he never took possession of any documents from Mrs. Bates, although she tried to give him some. T. at 173, lines 14 - 22. The document that she had was "a list with some handwritten kind of cryptic notes...on the back of an envelope or something". T. at 173, lines 16 - 18; 104, lines 15 - 22 ("I really don't remember. I know I had a piece of paper with al the addresses and the business that needed to be transacted").

Mrs. Bates got offended when Mr. Franco attempted to caution her that the person to whom he referred real estate cases might cost more than she could afford, and attempted to get Mr. Franco to "just write a letter to these people and resolve it". T. at 174. Thereafter, Mrs. Bates called Mr. Franco's office and Mr. Franco advised her that he couldn't represent her, and wouldn't represent her. T. at 175, lines 20 - 25. Despite this advice, Mrs. Bates persisted in harassing Mr. Franco by calling his office repeatedly, up to four times during a twenty-four hour period and using profane language on one occasion. T. at 175 - 176.

There was no attorney-client relationship between Daniel Franco and Doris Bates relative to any real estate matter in July of 1999 or thereafter. *See, e.g., In re Disney*, 922 S.W.2d 12 (Mo. 1996).

In *Disney*, the Informant charged attorney Walter K. Disney with violation of "several rules of professional conduct....[including] failing to act with reasonable diligence in representing his client". 922 S.W.2d at 14. As noted by this Court, "all of these violations [were] predicated on the existence of an attorney-client relationship between [the alleged victim] and Disney". *Ibid.* If such a relationship was found not to have existed, the Court would be required to find in favor of the respondent attorney. *Ibid.*

In *Disney*, "the evidence establish[ed] Disney had been Stauffer's attorney in the past". 922 S.W.2d at 14. However, "the attorney-client relationship ended when Disney completed the last legal task". *Ibid.* As noted by the Court, because the purpose of the attorney/client relationship had been accomplished, the relationship ended. *Ibid, citing and quoting Schwarze v. May Dept. Stores*, 360 S.W.2d 336, 338 (Mo. Ct. App. 1962).

Disney and the case at bar differ only in the evidence offered to establish the attorney/client relationship. In *Disney*, it was clear that the alleged client did not believe that the respondent was representing him in the transaction pursuant to

which sanction was sought. 922 S.W.2d at 15. This Court did not hesitate to find that no attorney/client relationship existed. *Ibid.*

Here, however, the testimony from Doris Bates was that the respondent agreed to look into the matters about which she made her appointment with him. However, the uncontradicted testimony of Daniel Franco establishes that Doris Bates has an unequivocal motivation to lie. In short, as the cited and quoted transcript portions reveal, Doris Bates was an irrational woman affronted by Mr. Franco's "indelicately" phrased suggestions that she could not afford the lawyer to whom he normally referred cases. Thereafter, Ms. Bates conducted herself in a less than admirable fashion, calling Mr. Franco's office repeatedly over a 24-hour period and using profane language.

In *State v. Johnson*, 700 S.W.2d 815, 817 (Mo. banc 1985), cert. denied, 476 U.S. 1119, 106 S. Ct. 1980, 90 L. Ed. 2d 663 (1986), this Supreme Court discussed principles relevant to considering whether the informant met its burden relative to the allegations of wrongdoing regarding the Doris Bates situation. There, the Court, in considering parameters of impeachment, stated that "If a witness is hostile, biased, or prejudiced against a party, the substance of his testimony may be affected by his other than impartial state of mind". 700 S.W.2d

at 817. This Court went on to note the importance of considering that witness' bias:

In such an instance, that party should be afforded an opportunity to display before [the factfinder] the bias, hostility, or prejudices held by the witness against that party. Once informed, the jury can then, with greater accuracy, determine the appropriate weight to be given the whole of the witness' testimony.

Ibid.

Viewed in light of Mr. Franco's testimony, it is reasonable to discredit the testimony of Doris Bates. Bolstering the reasonableness of believing Mr. Franco's understanding of the events is the testimony from Judge Clark that Mr. Franco's reputation for truthfulness "in [his] courtroom and elsewhere" is "very good or excellent". T. at 219, lines 16 - 21. Judge Clark himself testified to his opinion of Mr. Franco as being "honorable and proficient and very forthright". *Id.* at lines 22 - 25; t. at 220, line 1. Mr. Franco has "met or exceeded [Judge Clark's] expectation" for forthrightness "no matter what the circumstances". T. at 220, lines 9 - 12. With contradictory testimony from Ms. Bates and Mr. Franco as to the issue of whether or not an attorney/client relationship existed, the Court can easily find that no such relationship existed given Ms. Bates' motivation to lie, and Mr. Franco's reputation for honesty and truthfulness. Moreover, the recollection of Mr.

Franco and Ms. Bates is sufficiently *similar* as to lend further credence to Mr. Franco's understanding that no relationship existed.

Both testified that Ms. Bates did not pay any money to Mr. Franco, and that he did not ask for any. Both testified to repeated calls to Mr. Franco's office that were not returned -- and Mr. Franco provided a reasonable explanation in the lack of an attorney/client relationship and the harassing nature of the calls. Additionally, the record is replete with examples of Mr. Franco working above and beyond the call of duty to assist a client, as in the case of Pauline Mercer, the alleged complainant who did not appear to prosecute her claims. *See, e.g.*, T. at 166 - 189. It would be more characteristic of Mr. Franco to exceed expectations on behalf of a client, rather than neglect any duty with respect thereto.

Discipline requires a preponderance of the evidence, indicating that misconduct has occurred. *In re Disney, supra*, 922 S.W.2d at 13. With respect to the allegation that Daniel Franco did not provide competent service to Doris Bates or act diligently with respect to her, and failed to communicate with her, the Informant has failed to meet its burden with respect to the allegations. Although the tribunal below otherwise found, this Court "considers and weighs the evidence de novo, and reaches its own conclusions of law". *Disney, supra, citing In re Smith*, 749 S.W.2d 408 (Mo. banc 1988).

A preponderance of the evidence has not been met with respect to the existence of an attorney/client relationship between Daniel Franco and Doris Bates as to the real estate matters regarding which she contacted him in July of 1999. Although Mr. Franco had previously represented Ms. Bates in housing court, the purpose of that representation had been completed. Mr. Franco clearly explained to Ms. Bates that he did not handle real estate matters, and frankly attempted to dissuade her from hiring the attorney to whom he customarily referred such work. She became upset and latter harassed him.

Mr. Franco had no obligation to perform any service for Ms. Bates and did not undertake to do so, nor agree to do so. She attempts to bolster her allegation to the contrary by testifying that she gave Mr. Franco "some documents", but the only document she can recall is one clearly identified by both of them as a paper on which she had scribbled some information. Mr. Franco refused the paper. Ms. Bates does not remember any other documents that she might have had or had given him.

The evidence is simply not consistent with the allegations, and the Informant's burden of proof has not been met. Therefore, the Court should find for the respondent on Count II of the Amended Complaint.

CONCLUSION

For the foregoing reasons, this Court should conclude that Daniel Franco did not intentionally misrepresent his status as a Kansas Attorney nor intentionally mislead a tribunal. Although this Court may also conclude, on this record, that Daniel Franco failed to cooperate with a disciplinary investigation, the mitigating factors established by the un rebutted, credible evidence is sufficient to enable this Court to find that the proper sanction is public reprimand.

Respectfully submitted:

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CERTIFICATE OF SERVICE

Two copies of the foregoing brief were served on the below-listed persons by placing said copies in the regular U. S. Mail, sufficient first-class postage pre-paid, this 12th day of April, 2001:

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CERTIFICATION PURSUANT TO SPECIAL RULE NO. 1(C)

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

1. Includes the information required by Rule 55.03;
 2. Complies with the limitations contained in Special Rule No. 1(b);
 3. Contains 7,035 words, according to Microsoft Word 97, the word processing system used to prepare this brief; and
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