IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
MICHAEL W. SAGAN,	)	**Supreme Court #SC84010**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

SHARON K. WEEDIN #30526
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF CONTENTS **1**

TABLE OF AUTHORITIES **2**

STATEMENT OF JURISDICTION **3**

STATEMENT OF FACTS **4**

PRELIMINARY BACKGROUND INFORMATION 4

ADMISSIONS OF FACT -- EX. B 5

INFORMANT'S STATEMENT OF FACTS 10

POINT RELIED ON **18**

ARGUMENT **19**

CONCLUSION **23**

CERTIFICATE OF SERVICE **24**

CERTIFICATION: SPECIAL RULE NO. 1(C) **24**

TABLE OF AUTHORITIES

CASES

In re Disney, 922 S.W.2d 12, 15 (Mo. banc 1996).....18, 22
In re Duncan, 844 S.W.2d 443 (Mo. banc 1992).....18, 22
In re Kueter, 501 S.W.2d 486 (Mo. banc 1973).....18, 22
McFarland v. George, 316 S.W.2d 662 (Mo. App. 1958).....18, 20

OTHER AUTHORITIES

A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.).....18, 19

RULES

4-8.4(d).....23
RULE 4-8.4(c).....18
Rule 4-1.5(e).....18, 20
Rule 4-5.5.....22
Rule 4-8.4(c).....9, 10, 16, 18, 19, 23
Rules 4-5.5.....23

STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 1994.

STATEMENT OF FACTS

Preliminary Background Information

Informant and Respondent submitted this case to the Disciplinary Hearing Panel on a record consisting of the information (**Ex.** A), admissions of fact (**Ex.** B), and some additional exhibits. Exhibit 1 is comprised of Judge Federman's Memorandum Opinion, the transcript of the trial hearing conducted before Judge Federman, the transcript of a hearing before the circuit bar committee, and a letter from the CLE Program Director regarding Respondent's compliance with the CLE reporting rule. Respondent's exhibits one, two, and three are letter exhibits. In addition, there is a short transcript of the hearing before the Disciplinary Hearing Panel.[1] Because the Court ordered the complete record filed and the matter briefed and argued pursuant to Rule 5.19(d)(2), a more

[1] There are three transcripts in the record: the one created from the January 27, 1998, hearing before bankruptcy judge Federman, the November 6, 1998, hearing before the circuit bar committee, and the short August 20, 2001, hearing before the Disciplinary Hearing Panel. The transcripts from the bankruptcy case and the circuit bar committee hearing are both part of **Ex.** 1. Transcript citations from the trial conducted as part of the bankruptcy case are designated "**Ex.** 1, **B.T.** __" in the brief. Citations from the transcript for the hearing before the circuit bar committee are designated "**Ex.** 1, **C.B.C. T.** __" in the brief. Citations to the transcript developed before the Disciplinary Hearing Panel are designated "**T.** __".

complete statement of facts derived from the entire record follows the stipulated facts set forth immediately below.

Admissions of Fact -- Ex. B

1. Informant is Division III of the Region IV Disciplinary Committee appointed by this Court pursuant to Rule 5.02.

2. Informant has determined, pursuant to Rule 5.11, that probable cause exists to believe that Respondent is guilty of professional misconduct.

3. Respondent was licensed as an attorney in Missouri on September 9, 1972. Respondent's license is currently in good standing. His bar number is 22663. His date of birth is March 4, 1947. His social security number is 493-50-3786.

4. Respondent was MCLE delinquent for the years 1996-1997, 1998-1999, and 1999-2000, but has now satisfied his MCLE requirements as of August 17, 2001.

5. Respondent failed to file Federal and State Income Tax Returns for the years 1993, 1995, 1996 and 1997 but has now filed the returns as of 7/02/98.

6. The address designated in his most recent registration with The Missouri Bar is 922 Oak Street, Kansas City, Missouri, 64102-2602.

7. Alan Fleming is an attorney licensed in the State of Missouri. Mr. Fleming represented Terence Anderson, a truck driver who was involved in a vehicular accident on February 24, 1995, in the State of California. As a result of that accident, Mr. Anderson was seriously and permanently injured, and his wife, a passenger in the vehicle operated by Mr. Anderson, was killed. Mr. Fleming represented Mr. Anderson in a

workers' compensation claim against the employer for the injuries he sustained in said vehicular accident.

8. During the time that Mr. Fleming so represented Mr. Anderson, and while Mr. Anderson's workers' compensation claim was still pending, Mr. Fleming was in contact with the Anderson children - a daughter who had reached her majority, and a minor son who was seventeen years of age at the time of the accident.

9. Mr. Fleming believed that he had a conflict of interest in representing the Anderson children in a wrongful death action against the driver and the owner of the vehicle which was involved in the accident inasmuch as the Anderson children could and should include their father, Terence Anderson, as a co-defendant in the action for wrongful death of Mrs. Anderson, the children's mother.

10. Mr. Fleming thus referred the wrongful death claim of the children to Respondent.

11. Mr. Fleming attempted to retain a monetary interest in the wrongful death claim by asking for 60% of whatever attorney fee was collected from the death claim if the case was settled and 50% of the fee if the case was tried. Respondent agreed to represent the Anderson children and agreed to the proposed fee arrangement with Mr. Fleming.

12. In March of 1995, Mr. Fleming arranged a meeting with Mr. Anderson, his two children and Respondent in Mr. Anderson's home. The purpose of that meeting was to introduce Respondent to the children, to explain that Mr. Fleming had a conflict and to suggest that they retain Respondent to handle the case.

13. On April 29, 1995, Respondent had the Anderson children sign separate contracts of employment which he had prepared. The contracts made no reference to Mr. Fleming because of Mr. Fleming's conflict of interest.

14. On May 19, 1995, Mr. Fleming memorialized the fee split negotiated by the attorneys in March of 1995, by writing out the terms of the arrangement on his letterhead. Both Mr. Fleming and Respondent signed the agreement letter.

15. That in early May, 1995, Respondent contacted Gregory Grounds, an experienced trial attorney in Kansas City, and asked Mr. Grounds to act as lead counsel in the wrongful death litigation. Mr. Grounds then took the lead in preparing the petition which both he and Respondent signed. The petition was filed in mid-May of 1995.

16. Mr. Grounds was a partner in a partnership which owned the building where Respondent maintains his law office.

17. After the lawsuit was filed, Mr. Fleming asked Respondent whether the lawsuit had been filed and thereafter periodically called Respondent to ask if the case had been settled.

18. On November 7, 1995, Respondent filed a petition for protection in the United States Bankruptcy Court under Chapter 7 which was later voluntarily dismissed by the Respondent. The Anderson case represented one of the few, if not the only, contingent fee case pending in Respondent's law office at that time.

19. At some point, Mr. Fleming became impatient with the lack of progress on the case. In April of 1996, Mr. Fleming spoke with Respondent, who was not able to tell him

what steps had been taken nor what conversations he had with the insurance company regarding settlement.

20. In approximately May of 1996, Mr. Grounds negotiated a settlement of the Anderson case with defense counsel for the sum of $75,000. Respondent's contract with the Anderson children entitled him to 40% of any recovery or a fee of $31,000. That fee was paid to Mr. Grounds, who was entitled, under his agreement with Respondent, to 50% or $15,500.

21. By that time, Respondent was approximately $12,000 in arrears in rent due and owing to Mr. Grounds' partnership, therefore Mr. Grounds and Respondent agreed that Mr. Grounds would keep Respondent's share of the fee as payment for rent due as well as for rent to come due in the future.

22. In the fall of 1996, Mr. Fleming attempted to contact Respondent, but Respondent refused to return the phone calls. Mr. Fleming then contacted defense counsel, who advised him that the case had been settled in May or June of 1996. Mr. Fleming then called Respondent, who admitted that the case had been settled and that he had been paid his fee. He did not believe he owed Mr. Fleming anything due to ethical conflicts.

23. Respondent filed his second Chapter 7 bankruptcy case in the United States District Court for the Western District of Missouri on June 18, 1997. In that case, he attempted to discharge the debt owed to Mr. Fleming. Mr. Fleming filed an adversary proceeding pursuant to 11 U.S.C. §523(a)(2)(A). The Bankruptcy Court Judge found the Anderson children were fully informed of the fee-splitting arrangement after it was

disclosed to them and thus the arrangement was enforceable. As a result, Respondent was found to be indebted to Mr. Fleming in the amount of $18,600. The debt was found to be non-dischargeable to the extent that it was obtained by false pretense, false representation or actual fraud. Finding that Respondent intended to deceive Mr. Fleming and did in fact deceive Mr. Fleming, the Court ruled that Mr. Fleming was entitled to a portion of the fee in the amount of $18,600. Respondent has satisfied the judgment to Mr. Fleming.

24. On January 27, 1998, a trial hearing was held on the adversary proceeding before the Honorable Arthur B. Federman, United States Bankruptcy Judge in the United States Bankruptcy Court for the Western District of Missouri, Western Division. During that proceeding, Respondent admitted under oath that he had failed to file income tax returns for the years 1993, 1995 and 1996, because he did not have enough money to pay his taxes.

25. Respondent is guilty of professional misconduct under Rule 4-8.4(a), by violating Rule 4-5.5 by engaging in the unauthorized practice of law in the State of Missouri because Respondent is subject to Rule 15 and because he failed to comply with MCLE requirements for the years 1996-1997, 1998-1999 and 1999-2000 and then continued to practice law.

26. Respondent is guilty of professional misconduct under Rule 4-8.4(c), by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in connection with the debt he owed to Mr. Fleming.

27. Respondent is guilty of professional misconduct under Rule 4-8.4(c), by engaging in conduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer and in other respects by failing to file income tax returns for the years 1993, 1995 and 1996.

Informant's Statement of Facts[2]

Respondent graduated from law school in 1972. **Ex.** 1, **B.T.** 66. Respondent worked for a title company for five years, then went to work for the corporation that owned the chain of daycare facilities known as LaPetite Academies. Respondent was general counsel for LaPetite, with real estate being his primary responsibility. In 1983 or 1984, he left LaPetite to become a stockbroker for Merrill Lynch and another company. **Ex.** 1, **B.T.** 66-67.

Respondent lost approximately half a million dollars in the October, 1987, stock market crash and incurred a large tax liability to the IRS. **Ex.** 1, **B.T.** 67-68, 88-89. He was unemployed for six or seven months, then went to work for the Kansas City, Missouri, Prosecutor's office. In 1990, Respondent opened a solo law practice at 922 Oak in Kansas City. Respondent's practice consists primarily of Chapter 7 bankruptcies, criminal forfeitures, traffic matters, and some personal injury. **Ex.** 1, **B.T.** 68-69.

[2] In order to provide a coherent and chronological statement of facts, there is some repetition of information between the Admissions of Fact and Informant's Statement of Facts.

Alan Fleming began practicing law in 1978. **Ex.** 1, **B.T.** 21. Mr. Fleming has considerable experience working on both the plaintiff and defendant sides of tort and professional liability litigation, as well as workers' compensation cases. **Ex.** 1, **B.T.** 21-23. In 1985, Mr. Fleming started a solo practice, doing primarily plaintiffs' personal injury work. **Ex.** 1, **B.T.** 22-23.

In 1995, Mr. Fleming represented Terence Anderson in Mr. Anderson's workers' compensation claim against his employer. The claim arose out of an accident that occurred in California when the semi-tractor trailer driven by Mr. Anderson rear-ended a semi-tractor trailer parked on the shoulder of an interstate highway. **Ex.** 1, **B.T.** 24-25, 44-45. As a result of the accident, Mr. Anderson is a quadriplegic. Mr. Anderson's wife, a passenger in the truck driven by Mr. Anderson, was killed in the accident. **Ex.** 1, **B.T.** 24. Mr. Fleming obtained a final order of permanent total disability for Mr. Anderson. **Ex.** 1, **B.T.** 26.

While Mr. Fleming was representing Mr. Anderson in the workers' compensation case, he advised Mr. Anderson that Mr. Anderson's two children would have a claim for the wrongful death of their mother against Mr. Anderson and his employer. **Ex.** 1, **B.T.** 26. Mr. Fleming did not believe his representation of Mr. Anderson in the workers' compensation case posed a real conflict of interest with his representation of the Anderson children in a wrongful death claim against Mr. Anderson and his employer. **Ex.** 1, **C.B.C. T.** 33. Mr. Fleming nonetheless told Mr. Anderson that he did not feel he could file the wrongful death case since he was representing Mr. Anderson, who would be a defendant in the wrongful death case. Mr. Fleming told Mr. Anderson that he knew

an attorney who could handle the wrongful death case. Mr. Fleming identified that attorney as Respondent. **Ex.** 1, **B.T.** 29. Mr. Anderson was agreeable to pursuing the matter. **Ex.** 1, **B.T.** 30.

Mr. Fleming thereafter contacted Respondent, who met with Fleming in Fleming's office to discuss the case. Mr. Fleming had obtained the police report of the accident and a video tape of the accident scene, which he gave to Respondent. **Ex.** 1, **B.T.** 27-28, 116. Mr. Fleming had spent 15 to 20 hours researching various issues incident to the wrongful death claim. **Ex.** 1, **B.T.** 29. Fleming outlined the issues to Respondent and expressed his belief that the wrongful death case was ready to be filed and that all that was left for Respondent to do was draft the petition and negotiate a settlement. **Ex.** 1, **B.T.** 31-32. Mr. Fleming offered the referral to Respondent on a 60/40 split fee basis, with 60% of the contingency fee to go to Mr. Fleming and 40% to Respondent. **Ex.** 1, **B.T.** 31-32. Respondent agreed to those terms. **Ex.** 1, **B.T.** 72.

Around March 1, 1995, Mr. Fleming and Respondent met with Mr. Anderson and Anderson's two children at the Anderson home. **Ex.** 1, **B.T.** 33. Both Anderson children had reached their majority by the time the wrongful death petition was filed. **Ex.** 1, **B.T.** 7. The conflict situation was discussed. **Ex.** 1, **B.T.** 35-36, 71. Mr. Fleming believes the Anderson children and Respondent signed an agreement at the meeting acknowledging the fee splitting arrangement between Fleming and Respondent. **Ex.** 1, **B.T.** 35-37. Respondent denies that a fee agreement was produced or signed at the meeting. **Ex.** 1, **B.T.** 138. The Anderson children did sign a written contingency fee contract on April 29, 1995, naming only Respondent as their attorney. **Ex.** 1, **B.T.** 72, 114-115. On May 19,

1995, Respondent signed an agreement handwritten by Fleming acknowledging that "Mike Sagan and Alan Fleming agree that as a fee for work performed in the case involving the wrongful death of Karen Anderson, wife of Terry Anderson, Alan Fleming will receive a fee equal to 60% of any monies recovered on account of said wrongful death. If a jury is sworn in, the fee to Fleming will be 50%. Any possible conflicts were discussed with Terry Anderson's approval, as well as his two children." **Ex.** 1, **B.T.** 39-41, 70. Respondent had questioned Fleming about whether the fee arrangement between Respondent and Fleming was ethical, and Fleming assured him that it was. **Ex.** 1, **B.T.** 121.

Shortly after taking the referral, Respondent contacted Richard Rose of Grounds, Rose & Emke about the firm associating with him on the case. Rose told his partner, Gregory Grounds, about the case. **Ex.** 1, **B.T.** 3-4. Respondent was a litigation rookie and wanted a litigator like Grounds with wrongful death experience to work with him on the case. **Ex.** 1, **B.T.** 119. Respondent rents office space in a building in which Grounds is a partner/owner. **Ex.** 1, **B.T.** 4, 80. Respondent did not tell Grounds about Respondent's fee arrangement in the case with Mr. Fleming. **Ex.** 1, **B.T.** 6, 19. Respondent did not tell Mr. Fleming that Respondent had associated with another attorney on the case. **Ex.** 1, **B.T.** 42-43, 47. According to Mr. Grounds, Respondent's fee arrangement with Grounds, Rose & Emke was that each would get roughly 50% of the attorney fee if they each did roughly half the work. **Ex.** 1, **B.T.** 9. According to Respondent, Mr. Grounds knew that the firm's fee would be only half of Respondent's 40%. Respondent did not know why the firm kept 50% of the fee. **Ex.** 1, **C.B.C. T.** 28-

29. The wrongful death petition was filed in mid-May 1995. **Ex.** 1, **B.T.** 5. Respondent and Mr. Grounds were listed as co-counsel for the plaintiffs on the wrongful death petition. **Ex.** 1, **B.T.** 15.

Respondent and Mr. Grounds thereafter each did roughly half the work necessary to settle the wrongful death case. **Ex.** 1, **B.T.** 15-16, 121. Mr. Grounds drafted the petition and negotiated with defense counsel. Respondent did some legal research and worked on a motion for summary judgment. **Ex.** 1, **B.T.** 10. The case settled in May or June of 1996 for $75,000. **Ex.** 1, **B.T.** 48-49, 88. The settlement draft was made payable to Grounds, Rose & Emke. **Ex.** 1, **B.T.** 120. Around the time of the settlement, Respondent agreed with Mr. Grounds that Respondent's share of the attorney fee could be credited toward back rent Respondent owed the firm for his office space. Out of the $15,500 attorney fee Respondent was owed pursuant to the agreement he had with Grounds, Rose & Emke, $12,000 went to pay back rent owed the firm, and the rest was credited toward future rent. **Ex.** 1, **B.T.** 80, 91-92, 98, 120. Mr. Fleming was given nothing from the settlement. **Ex.** 1, **B.T.** 53.

Respondent changed his mind in early 1996 about honoring the fee agreement he had entered into with Mr. Fleming. **Ex.** 1, **B.T.** 72, 78-79. Respondent decided that the agreement he had with Mr. Fleming was illegal and unethical because Fleming had done no work on the case. **Ex.** 1, **B.T.** 79, 81. Respondent never told Mr. Fleming that Respondent had decided not to honor the fee agreement. **Ex.** 1, **B.T.** 79-80. Aside from his belief that the fee agreement with Fleming was unethical, Respondent could not pay Mr. Fleming at the time of settlement because he had no money. Respondent could pay

Fleming or his rent, and Respondent elected to pay the rent. **Ex.** 1, **B.T.** 86-87. Respondent's total income in 1996 was $31,656; $15,500 of which derived from the Anderson settlement. **Ex.** 1, **B.T.** 91.

Respondent did not tell Mr. Fleming that Respondent had decided not to honor the fee agreement with Fleming because it would not have served his purposes to do so. **Ex.** 1, **B.T.** 112. Respondent did not want to get sued by Fleming. **Ex.** 1, **C.B.C. T.** 30.

Mr. Fleming contacted Respondent periodically about how the case was proceeding. **Ex.** 1, **B.T.** 42-43. In April of 1996, Fleming offered to reduce his percentage of any recovery if Respondent settled the case for $150,000, even though Fleming believed the case was worth $200,000. **Ex.** 1, **B.T.** 46-47. Based on what Respondent had told Fleming, Fleming believed the case had not settled but that there was an offer to settle on the table in July of 1996. **Ex.** 1, **B.T.** 48. Mr. Fleming contacted the wrongful death defendant's attorney directly in the late summer of 1996 because Respondent stopped returning his calls. **Ex.** 1, **B.T.** 48. The defense attorney told Fleming the case had settled some months before for $75,000 and that Greg Grounds was one of the plaintiffs' attorneys. **Ex.** 1, **B.T.** 48-49. Fleming thereafter called Grounds, who theretofore had not realized that Fleming had anything to do with the case. **Ex.** 1, **B.T.** 6.

Respondent filed for bankruptcy protection in November of 1995. **Ex.** 1, **B.T.** 126. Respondent did not list Mr. Fleming as a creditor in that case. Respondent did not think that personal service contracts were subject to bankruptcy. Respondent's bankruptcy attorney informed him otherwise and that the contingency fee contract in the

Anderson case would have to be disclosed. **Ex.** 1, **B.T.** 73-74. Respondent thereafter dismissed the bankruptcy case. **Ex.** 1, **B.T.** 76, 128.

Respondent filed a second case for bankruptcy protection in June of 1997. Respondent filed a second case for bankruptcy protection because he owed the IRS from $50,000 to $60,000, but Mr. Fleming was the catalyst for the second filing. **Ex.** 1, **B.T.** 88, 126. Respondent told Fleming he would never collect anything from the Anderson's settlement because Respondent was going to declare bankruptcy. **Ex.** 1, **B.T.** 50-60.

Respondent did not file income tax returns for 1993, 1995, or 1996 because he did not have the money to pay his taxes. **Ex.** 1, **B.T.** 141-142.

Bankruptcy judge Federman conducted a trial on January 27, 1998, pursuant to 11 U.S.C. §523(a)(2)(A), (4)(6), to determine whether Respondent had an obligation to Mr. Fleming and whether the obligation was dischargeable in bankruptcy. Judge Federman concluded Respondent was indebted to Mr. Fleming in the amount of $18,600, that Respondent deceived Mr. Fleming, that Fleming justifiably relied on the deception, and that the debt was not, therefore, dischargeable in bankruptcy. **Ex.** 1 (Memorandum Opinion).

An information was served on Respondent on April 30, 2001. Respondent was charged with violating Rule 4-5.5 (practiced law in years in which he was non-CLE compliant), 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation in connection with the debt he owed Fleming), 4-8.4(a) (assisting or inducing another attorney to violate the Rules of Professional Conduct), 4-8.4(c) (engaging in conduct reflecting adversely on his honesty, trustworthiness, or fitness by

not filing tax returns), and 4-8.4(d) (conduct prejudicial to the administration of justice). Respondent has admitted, and the Disciplinary Hearing Panel concluded, that Respondent did violate Rules 4-5.5, 4-8.4(c), and 4-8.4(d). Respondent and Informant stipulated that public reprimand would be the appropriate discipline. The Disciplinary Hearing Panel recommended public reprimand.

POINT RELIED ON

THE SUPREME COURT SHOULD SUSPEND RESPONDENT BECAUSE HE VIOLATED RULES 4-8.4(c) AND 4-5.5 IN THAT HE ENGAGED IN CONDUCT INVOLVING DISHONESTY, DECEIT, AND MISREPRESENTATION IN HIS DEALINGS WITH MR. FLEMING, BY NOT FILING INCOME TAX RETURNS, AND BY BEING NON-COMPLIANT WITH THE CLE REPORTING RULES.

In re Disney, 922 S.W.2d 12, 15 (Mo. banc 1996)

In re Duncan, 844 S.W.2d 443 (Mo. banc 1992)

In re Kueter, 501 S.W.2d 486 (Mo. banc 1973)

McFarland v. George, 316 S.W.2d 662 (Mo. App. 1958)

Rule 4-8.4(c)

Rule 4-5.5

A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

THE SUPREME COURT SHOULD SUSPEND RESPONDENT BECAUSE HE VIOLATED RULES 4-8.4(c) AND 4-5.5 IN THAT HE ENGAGED IN CONDUCT INVOLVING DISHONESTY, DECEIT, AND MISREPRESENTATION IN HIS DEALINGS WITH MR. FLEMING, BY NOT FILING INCOME TAX RETURNS, AND BY BEING NON-COMPLIANT WITH THE CLE REPORTING RULES.

Whatever credence Respondent's belief that the fee split agreement with Mr. Fleming was unethical may have had, by failing to level with Fleming about his intention not to honor it, and by covering up the settlement of the Anderson case, Respondent violated the Rule. Likewise, while lacking the money to pay one's taxes explains to some degree the failure to file returns, it does not excuse it. The prickly issue is what sanction should be leveled for the conduct.[3]

[3] The A.B.A.'s Standards for Imposing Lawyer Sanctions (1991 ed.) do not, in the first analysis, account for multiple charges of misconduct, although the multiplicity of offenses can be considered an aggravating factor. Instead, the Standards direct that the "ultimate sanction imposed" should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct." Id. at 6.

Informant stipulated with Respondent to a public reprimand, which is the sanction recommended by the Disciplinary Hearing Panel. Nothing in the stipulation binds Informant to that recommendation. After further review of the entire record and reconsideration by the Office of Chief Disciplinary Counsel, Informant recommends that the Court suspend Respondent with no leave to apply for reinstatement until after six months from the date of the disciplinary order.

The reason Informant recommends a suspension rather than a public reprimand is the degree of misrepresentation and deceit present in the record with respect to Respondent's dealings with Mr. Fleming. Respondent may have truly, if opportunistically, believed that he did not need to honor the agreement with Fleming because it was "illegal and unethical."[4] Assuming, arguendo, that Respondent had that good faith belief, Respondent misled and lied to Mr. Fleming about the status of the wrongful death case, the fact that he was associating with other lawyers on the case, and

[4] Based on the evidentiary record created on this issue at the hearing before Judge Federman, Informant does not disagree with Judge Federman's legal conclusion that the fee splitting agreement did not violate Rule 4-1.5(e). There was evidence that Fleming performed significant services by investigating and researching legal issues, that the clients were advised of the fee splitting arrangement and had no objection, and that the total fee was reasonable. See generally *McFarland v. George*, 316 S.W.2d 662 (Mo. App. 1958) (historical background of attorney referral fees and ethical constraints thereon.)

what his intentions were with respect to honoring the agreement. Respondent's conduct in this regard was knowing and duplicitous.

The case settled and was finally disposed by May or June of 1996; yet Respondent falsely told Fleming in July that there was an offer on the table. And, while Respondent told the circuit bar committee at its hearing that he told Fleming of his association with Grounds on the case from the beginning, Respondent did not refute Mr. Fleming's adamant testimony to the contrary at the earlier hearing before Judge Federman. Both Grounds and Fleming unequivocally testified at the bankruptcy hearing that neither knew of the other's involvement in the case or of any fee splitting agreement between Respondent and the other. Although Respondent testified before the circuit bar committee that Grounds knew well that his firm's attorney fee in the case would be half of Respondent's 40% of the whole fee, with 60% to Fleming, Respondent did not so testify in the bankruptcy case, and Grounds' testimony at the bankruptcy hearing was clearly to the contrary.

There is nothing in the record to indicate that Respondent was ever criminally prosecuted for his failure to file income tax returns for the years in question. All of the disciplinary cases reviewed by Informant in which tax return issues are the basis for discipline stem from misdemeanor or felony pleas or convictions. Obviously, the underlying misconduct is present whether the attorney/taxpayer is criminally prosecuted or not, although the public stigma of criminal prosecution is lacking in this case. Respondent's misconduct in this regard is somewhat mitigated by his ready admission that he failed to file the returns. Suspension typically follows a plea or conviction for the

misdemeanor of willful failure to pay tax or to make a federal income tax return. See *In re Duncan*, 844 S.W.2d 443 (Mo. banc 1992); *In re Kueter*, 501 S.W.2d 486 (Mo. banc 1973).

An additional aggravating factor in this case is the fact that Respondent practiced law in violation of Rule 4-5.5 for three CLE reporting years, including one of the years (1996) when the Anderson case was being settled. Multiplicity of offenses is a factor to be considered in aggravation of the appropriate disciplinary sanction. Rule 9.2, A.B.A. Standards for Imposing Lawyer Sanctions (1991 ed.).

Suspension is the sanction appropriate to Respondent's conduct because Respondent violated his duty to the public and the profession to be honest and maintain his personal integrity. Cf. *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996). Respondent's flaunting of the tax laws and his obligation to comply with continuing legal education rules are also serious instances of misconduct. While Respondent misled Mr. Fleming over a several month period, the record is not indicative of separate acts of intentional fraud such as would demonstrate an unfitness to practice law. Further, Respondent has no record of past discipline and cooperated with disciplinary authorities. Under the circumstances, Informant urges the Court to suspend Respondent's license to practice law.

CONCLUSION

Respondent has admitted and the Disciplinary Hearing Panel has concluded that Respondent violated Rules 4-5.5, 4-8.4(c) and 4-8.4(d). Respondent knowingly violated duties to the public and the profession by misleading and lying to a fellow member of the bar for economic gain. For this breach in his personal integrity, as well as his failure to file tax returns and his non-compliance with the Court's CLE reporting rules, Respondent should be suspended with no leave to apply for reinstatement until after six months from the date of the order of discipline.

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____

Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2002, two copies of Informant's Brief have been sent via First Class mail to:

Michael W. Sagan
922 Oak Street
Kansas City, MO 64106-2602

_____
Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(c)

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

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 5,057 words, according to Microsoft Word 97, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin