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JURISDICTIONAL STATEMENT

This is a disciplinary action under the jurisdiction of this Court, such jurisdiction established by Article V, Section 5 of the Missouri Constitution, Supreme Court Rule 5, and this Court's common law.

STATEMENT OF FACTS

This case arises from a fee dispute between two attorneys occurring now nearly six (6) years ago. Respondent-Attorney is fifty-five years old and has been a licensed attorney in this state since 1972. His bar number is 22663, and he is in good standing with the bar. He has had no prior disciplinary action taken against him in nearly thirty (30) years of practice. The dispute that gave rise to the bar complaint by a fellow attorney arose out of a civil case referred to him by that attorney, Alan Fleming. Fleming now resides in Florida but was practicing in Missouri at the time he filed the complaint.[1] (B.T. 21).

Fleming represented a truck driver in a worker's compensation case that arose out of an automobile accident. (B.T. 24-25). In that case, Fleming's client was the driver of a commercial vehicle, and as a result of the accident, the client's wife (who was a passenger) was killed. This left a potential wrongful death suit for the wife's dependents—a civil suit which could implicate as defendants at least the driver (Fleming's client), the owner, and the insurer of that vehicle. Because the dependent children could potentially recover from Fleming's client as well as from the owner and insurer, Fleming referred the case to Respondent to handle in order to avoid a conflict of interest. (B.T. 29). He, however, sought to share in the recovery, claiming 60% of the total fee recovered if the case were settled and 50% of the total fee recovered if the case were successfully tried.

[1]Because the rules do not apparently require service of the legal file upon Respondent, Respondent has cited to the Bankruptcy Transcript as "B.T." with the appropriate pages following.

(B.T. 31-32). Respondent was initially hesitant since Fleming had indicated that a conflict of interest was the basis of the referral. He voiced concerns to Fleming, but Fleming assured him there was no ethical issue implicated, and Respondent agreed to the sharing of fees. (B.T. 34-35).

Because the accident occurred in California, and the case involved conflict of laws issues, Respondent brought in a third, more experienced trial attorney, Gregory Grounds.[2] Grounds and Respondent subsequently researched various issues and then filed suit in May of 1995. Both attorneys were listed of record as early as May of 1995. (B.T. 15). Fleming claims the third attorney's—Grounds--involvement was hidden from him, but there is no evidence of that and in fact, both Grounds and Respondent entered their appearances of behalf of the dependents they represented as a matter of public record in the court's file. (B.T. 15). Fleming and the Respondent disagree on whether Fleming remained involved in the case past the original referral and disagree on what level of contact, if any, there was between them during the pendency of the case. In the fall of 1995, for various unrelated reasons--including medical problems which Respondent faced and surgery in 1995--Respondent sought legal counsel regarding the filing of bankruptcy and preliminarily filed a Chapter 7 bankruptcy. (B.T. 73). Shortly after filing, he voluntarily dismissed that bankruptcy. The assertion cited by Informant in her brief to this

[2] Grounds was, and is, the Mayor of Blue Springs, Missouri, is a practicing attorney, and had substantial more experience at the time in personal injury cases than did Respondent.

Court that the voluntary dismissal of the bankruptcy was due to this contract with Fleming was an assertion made by Fleming's attorney, not a statement by the parties or something the parties would have even been privy to other than Respondent's counsel in that bankruptcy, an attorney who was not involved in this case. The wrongful death case which Fleming had referred to Respondent proceeded, and settled in June of 1996.

Fleming complains that a great amount of time passed between the settlement and his knowledge of the settlement, however, his testimony indicated that only approximately two months passed before Fleming spoke with Respondent regarding the settlement, in August of 1996. (B.T. 49). Fleming stated, "…the first time I was able to talk with him was in August down in Florida. This was all happening at the same time I was trying to move, you know, my possessions down there. (B.T. 49). The settlement was for approximately $75,000, with total attorney's fees amounting to $31,000. The fees were made payable to Grounds' firm, Grounds, Rose & Emke. (B.T. 120). Grounds kept $15,500 as his earned fees in the matter (since Grounds had requested to share in Respondent's portion of the fees), and also kept the additional $15,500 due Respondent for rent. (Grounds was the attorney from whom Respondent leased office space and to whom Respondent owed approximately $12,000 in back rent.) No one controverts this fact. No one disputes that Respondent in fact received no cash in hand from the portion attributed to attorney's fees. It was in fact apparent from the bankruptcy's discharge transcript that counsel for Fleming was unaware that Respondent had retained no actual cash following the settlement. At the time of the settlement, proceeds were issued to Grounds and then disbursed to the client.

Respondent, over a year and a half late with his rent and facing eviction, and also knowing the back-due rent was a valid debt owed for a substantial amount of time to Grounds, was not in a position to ask for his portion of his fees. (B.T. 92-93). When Fleming contacted Respondent for his share of the fees from the settlement, Respondent had nothing in hand with which to pay him. (B.T. 98). He did not know what to do. Respondent's fees from the case had been held by his landlord for delinquent rent, his medical problems were not resolved, he underwent a second surgery in 1996, he had no cash, and in light of his continuing financial problems, he again anticipated having to file bankruptcy. (B.T. 120). He told Fleming of these problems, and Fleming was unsympathetic. Fleming wanted to close his practice and move to Florida and was interested in seeing money from the case. The two disagreed about whether in fact fees had been earned by Fleming in the proportion to which they had originally agreed; they talked about the nature of the contract, with Fleming believing the contract should hold regardless of the amount of work done. It is crucial to note that though there was a disagreement as to fees, and Respondent felt uncertain how to deal with Fleming over the phone, the Respondent did not "refuse" to pay Fleming. Respondent did not borrow from any trust account to pay Fleming. Respondent did not "intend" or "plan" at the onset to not pay Fleming. Even on cross-examination by counsel at the later bankruptcy discharge hearing, Respondent repeatedly indicated he labored over what to do. He simply did not know how to approach Fleming and how to resolve what seemed an unresolvable problem. When counsel argumentatively addressed him at the discharge hearing, alleging he had decided to not honor the contract, Respondent

replied "I hadn't made a decision." (B.T. 79). At most, Respondent delayed in paying Fleming simply because of his lack of funds; the debt to which Respondent had no challenge (his back due rent) pre-empted the debt to which he felt there was a legitimate challenge.

Shortly after Fleming learned of the settlement, he filed suit in Circuit Court against Respondent and then filed a bar complaint against Respondent. In both his civil suit and his bar complaint he alleged he'd been defrauded by Respondent. He used the same argument in contesting the debt's discharge in bankruptcy. But Respondent had not defrauded him. Respondent had simply no resources with which to pay and was hoping to resolve the situation via some sort of compromise or discharge. Respondent had no hope of recovering financially and again sought counsel in regards to bankruptcy; he was advised to file and did file, represented by counsel, in June of 1997. In his Petition and accompanying documents, he listed Fleming as a creditor from whom, among others, he sought discharge. Fleming filed his opposition to the discharge, alleging again that Respondent had never intended to pay him. The discharge, now contested by Fleming, was docketed for hearing in January of 1998. The Circuit Court case was held pending the bankruptcy determination. The debt was not discharged, and subsequent to the ruling of the bankruptcy court, the Respondent satisfied the judgment to Fleming.

Respondent was forthright throughout the discharge hearing, and although represented by counsel, never plead the Fifth Amendment nor refused to answer questions regardless of their perceived relevance. At the time of the discharge hearing, Respondent

had already been informed of the bar complaint, and still he chose to cooperate to the fullest extent with the committee. As a result of his forthrightness, and to his own detriment, during the course of the discharge hearing Respondent admitted that as a result of the financial crisis he faced, he had been negligent in filing income taxes for 1993, 1995, and 1996. As he had indicated in regards to payment to Fleming, he simply had no money with which to pay and was at a loss as to what to do. Also, during the course of these proceedings, it became apparent to the committee that Respondent had forgotten to properly report CLE hours for three non-consecutive years. He had satisfied the hours in a timely manner but had failed to file the reporting of the hours with the bar. Respondent, at all times, was open with information, cooperated with these proceedings, and even entered into stipulations which would allow for the Committee to proceed without impediment and which he believed—and the Committee agreed--would result in a reprimand. He corrected his oversights—in taxes and in CLE reporting. He satisfied his debt pursuant to the bankruptcy ruling that the debt was a valid debt. He has, at all times, been remorseful and wishes he could have dealt more promptly with the matters he allowed to build, matters which like his financial hardship, merely multiplied with time. Respondent has not, however, committed such acts as would warrant by this Court a suspension of or impairment on his license to practice law. He has not injured the public, he has not injured a client, he has not stolen files from a partner, he has not mingled funds, he has not retained property of a client, he has not proffered false documents to a court. His actions have caused injury to himself (greater than he could have imagined), but he has

not violated a fiduciary duty nor has he intended any harm. He merely lost control of his finances, delayed payment to another attorney, and can show this Court an overwhelming number of mitigating factors to be taken into consideration on his behalf.

POINT RELIED ON

A PUBLIC REPRIMAND, AND NOT SUSPENSION, IS APPROPRIATE UNDER THESE CIRCUMSTANCES BECAUSE A) RESPONDENT DID NOT VIOLATE OR BREACH A DUTY TO A CLIENT, THE PUBLIC, OR THE LEGAL SYSTEM, B) DID NOT ENGAGE IN "INTENTIONAL" CONDUCT, C) DID NOT CAUSE SERIOUS INJURY, AND D) SATISFIES THE MAJORITY, IF NOT ALL, OF THE THIRTEEN (13) MITIGATING FACTORS TO BE TAKEN INTO CONSIDERATION BY THIS COURT.

In re Weier, 994 S.W.2d 554 (Mo. 1999)
Londoff v. Vuylsteke, 996 S.W.2d 553, (Mo. App. 1999)
In re McBride, 938 S.W.2d 905 (Mo. banc 1997)
In re Cupples, 952 S.W.2d 226 (Mo. banc 1997)

ABA Standards for Imposing Lawyer Sanctions

ARGUMENT

A PUBLIC REPRIMAND, AND NOT SUSPENSION, IS APPROPRIATE UNDER THESE CIRCUMSTANCES BECAUSE A) RESPONDENT DID NOT VIOLATE OR BREACH A DUTY TO A CLIENT, THE PUBLIC, OR THE LEGAL SYSTEM, B) DID NOT ENGAGE IN "INTENTIONAL" CONDUCT, C) DID NOT CAUSE SERIOUS INJURY, AND D) SATISFIES THE MAJORITY, IF NOT ALL, OF THE THIRTEEN (13) MITIGATING FACTORS TO BE TAKEN INTO CONSIDERATION BY THIS COURT.

A) Respondent Did Not Breach a Duty to a Client, the Public, the Legal System or Profession

In the ABA Standards for Imposing Sanctions, Rule 3.0, the ABA Committee outlined four factors a court should consider before imposing any sanction. They are:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

The first of these is the duty violated. The ABA Committee prioritized those duties, ranking them from most to least in importance, beginning with the lawyer's duty to his clients, to the general public, to the legal system, and last, to the legal profession.

Throughout the ABA Rules, and reflected in this Court's Rules of Professional Conduct, is the preeminent and sacred duty owed by an attorney to his client. The rules pertaining to the relationship between attorney and client are vast and encompass the most familiar ethical duties: duties of competent representation, of confidentiality, against conflicts of interest, of safekeeping of client's property. They arise out of a well-recognized fiduciary duty to the client. The lawyer's duty to the general public involves duties encompassed in the rules prohibiting the intentional interference with the administration of justice, perjury, extortion, crimes involving the distribution of controlled substances and murder. It is in one sense these two duties (to the client and to the public) that disciplinary actions seek primarily to address. It is well-established in this Court that the primary purpose of a disciplinary action "is to protect the public." In re Weier, 994 S.W.2d 554 (Mo. 1999); In re Harris, 890 S.W.2d 299 (Mo. 1994). Duties to clients and to the public are unquestionably the primary concern of the bar and of this Court. It is more often the case than not that actions which come before this Court arise out of misconduct by attorneys which breaches the duty owed clients. This is not such a case.

An attorney's duties to the legal system, which follow as third in the list of duties according to the ABA, are defined by prohibitions against submitting false documents to court, withholding material information in the course of litigation, violating a court order, tampering with a witness, or attempting ex

parte communications with a judge. And last is the attorney's duty to the profession, duties to not improperly solicit employment from a prospective client, to not assist in the unauthorized practice of law, or to not improperly withdraw from a case.

Respondent's duty in this case is more analogous—in a broad sense—to that of a duty owed to the legal profession, although in reality it is purely a duty to another attorney within the profession. An attorney's duty to another attorney outside his firm does not rise to the level of a fiduciary duty, nor has this state recognized the relationship between attorneys not involved in a partnership as a fiduciary one. Respondent's duty to Fleming therefore in this case is a lesser duty than others recognized by the ABA and by this Court, perhaps more appropriately a contractual duty to be determined by law. Regardless, it is clear that Respondent's duty to pay co-counsel's fee is less than that of an attorney's duty to his client. In considering potentially appropriate discipline for a negligent breach of the highest duty—that to a client--the ABA cites to The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981). In that case a lawyer failed to repay a loan made to him by a client for two years and failed to keep adequate records of his trust accounting procedures. The ABA cited the case as an example of negligent breach of a duty by the attorney to his client, and the discipline was a public reprimand.

In the present case, Respondent failed to pay fees in a prompt manner to

another “attorney”, and that attorney filed a bar complaint and civil suit within six months of the settlement date. The dispute was submitted to court for a determination in the interim, and upon the court’s ruling that the contract was valid, Respondent made payment. Certainly the duty here between attorneys does not rise to the level of that owed by the attorney to his client or to the legal system or to public as a whole, nor in this case does the duty rise to that which an attorney owes partners within his firm. In In re Cupples, 952 S.W.2d 226 (Mo. banc 1997) (the first of two appearances before this Court), Cupples, a partner in Deacy & Deacy, secreted twelve to fifteen files from his firm while setting up his own independent law office, attempting to take with him clients of the partnership without notice to the partners and without appropriate notice and consent to the clients. Cupples left no “paper trail,” no written acknowledgment that he had the files. When confronted on more than one occasion, he denied he knew of the files. While he turned over a few files later in the investigation, he retained others that the partnership learned of only through clients. His intent was to steal the cases without the partners’ discovery. Cupples was deemed to have violated a “fiduciary” duty to his partners (since he was a partner in the firm) as well as violating a duty to the clients he attempted to take with him. Cupples did not cooperate with the investigation or proceedings, he challenged procedural matters that this Court deemed “frivolous,” and he was indifferent to making restitution. Still, this Court ordered a public reprimand for his conduct.

Cupples' conduct, unlike Respondent's, clearly evidenced not only a breach of a heightened duty to his partners within the firm and to their clients, but also indicated clearly intentional conduct working towards a selfish and definite goal of taking clients from the partners' firm. Respondent's conduct does not rise to the level of Cupples, nor his duty squarely to the duty owed between partners of a firm. Certainly he, without any prior discipline, and having made restitution to the party involved rather than attempting to avoid it may be appropriately disciplined by a public reprimand.

B) Respondent Did Not Engage in "Intentional" Conduct

Three areas of conduct are raised in Informant's brief: 1) the fee dispute between 2 attorneys, 2) the late reporting of CLE hours, and 3) the non-filing of income taxes by Respondent. It is however the first area of conduct which birthed these proceedings. Respondent's conduct, which is the crux of this disciplinary matter, is that he did not pay Fleming promptly when the underlying civil case was settled. He has offered his reasons for failing to do so—in part, sheer difficulty in ability to pay since the only money he received from the case went to his landlord for overdue rent, and in part because he had come to question the validity of the fee contract when the complaining attorney did nothing beyond the date of the contract to assist in the litigation. This is supported by his clear response to counsel at the discharge hearing when counsel was questioning the validity of the fee agreement:

Q. …So the basis for the nonpayment is your belief that the contract was illegal, is that correct? And that's the sole basis?

A. No.

Q. Okay. What's the other basis?

A. I couldn't pay Mr. Fleming.

Q. Well, that one begs me to answer why was that? Because of this outstanding debt you had?

A. That's part of it.

. . .

Q. Then why is it you couldn't pay it? There were the funds? There were the funds. They were saying here's your share, Mr. Sagan. Here's your $15,500. There it is.

A. All right.

Q. Why couldn't you have said, I've got to take the percentage and go pay Alan Fleming?

A. Well, I could—I was between a rock and a hard place. I could either pay Fleming, or I could pay Mr. Grounds and Mr. Rose, and 922 Oak Properties.

(B.T. 86-87). Furthermore, both of Respondent's reasons are acknowledged by

the court in its Memorandum Opinion of March 18, 1998.[3] (Memorandum Opinion 8)

In the midst of the voluminous transcript of the contested proceeding regarding the dischargeability of a bankruptcy debt, there is endless argument and discussion and assertion regarding the ethical implications of a fee sharing agreement. But this Court need not re-address fee sharing arrangements to determine this case. This Court may merely consider whether at the time this civil case was resolved, the Respondent could have a reasonable question as to its validity. This question was not one which was addressed by the bankruptcy court. The bankruptcy court had a limited contest to determine according to a separate set of rules and standards. If reasonable minds however—in this case, two members of the bar--could differ on whether the fee contract entered into was valid, Respondent's delay in paying could certainly be justified. Fleming admitted Respondent raised an ethical question for him during the delay, stating that he "mentioned an ethical conflict. I brushed that aside when talking with him…" (B.T. 49). Fleming also admits Respondent told him of his financial troubles. (B.T. 50). And further, Fleming referred to Respondent's delay, stating, "He was just sort of stalling me and I accepted that to some extent in view of the fact that these cases bog down…and for sometimes no readily

[3]This is the only reference to the court's Memorandum Opinion and therefore not abbreviated.

apparent reason." (B.T. 46).

It is crucial to remember that no more than five or six months passed from the settlement to the date Fleming filed both his civil suit in Jackson County Court and a bar complaint with the State Bar. It is apparent that what in another case might be limited delay, seemed in this case—to the complaining attorney who was relocating across the country—unreasonable. Nevertheless, the circumstances do not indicate conduct intended to harm Fleming.

Respondent's delay in paying was also the result of a number of conditions at play at the time the fee—termed a "referral fee" by the complainant—became "due." Within a year's time, Respondent underwent two surgeries (B.T. 89-90) and filed bankruptcy. He owed his law office landlord over a year and a half in back rent. He was facing eviction. Rather than hiding the debt or the fee in this case, Respondent advised his counsel of the debt and submitted the debt to the bankruptcy court for a determination of discharge. He did this, listing Fleming as a potential creditor, knowing notice would be sent to Fleming as a creditor, and knowing Fleming would have the opportunity to contest the discharge. Had Respondent wanted to "hide" from a potential obligation to the contract, had he intended to deceive Fleming, he would not have disclosed the contract (or creditor) nor subjected himself to the lengthy proceeding, which proved for him to only complicate matters more.

There is every indication that Respondent at the time of entering into the

fee contract was expecting to honor that agreement. His intent was to pay when payment became due. He did not however foresee the future financial trouble he would incur nor the two surgeries that would beset him, nor the lack of Fleming's input in the case itself. The agreement which evidences Respondent's intent at the beginning of the contract was even reduced to writing and signed by the Respondent. When at the close of the case however Fleming's only involvement was less than expected, it was reasonable for Respondent to at least question the propriety of the fee. In his testimony on the discharge, Respondent indicated that after the initial agreement between them, Fleming did not commit to do any specific work on the case, took no further responsibility for the case, had no documentation of any work he did, no correspondence with clients, and did not participate in the case after the initial referral. Apart from Fleming's testimony alone at the discharge hearing, he produced no evidence to the contrary. Even according to Fleming's own testimony, he had done approximately 15-20 hours of work in case and yet was expecting nearly $18,600 in fees. (B.T. 29). Beyond the date of the contract regarding the fee, no evidence has been offered by Fleming that he did anything to assist in the litigation. His testimony goes only to work he completed prior to referring the case to Respondent. According to Londoff v. Vuylsteke, 996 S.W.2d 553, (Mo. App. 1999), when the referring attorney merely refers the case and then takes no further responsibility in it, the contract is unenforceable as against public policy.

Londoff specifically interpreted the rule to require—in cases of joint responsibility rather than proportionate work—that a written agreement with the client(s) and each lawyer be in place. There was no such agreement in this case. Neither party produced such an agreement. There was the contract between attorneys, which alluded to a conflict discussion with clients. There was a retainer agreement between the Respondent and his clients. But there was no contract or written agreement between attorneys with signatures of clients evidencing their awareness of the arrangement. In Londoff the court stated that the fact that the referring attorney "did a few hours of work on the case before he referred it" to the other attorneys was insufficient to satisfy "joint responsibility." Londoff, 996 S.W.2d 553, (Mo. App. 1999), referring to McFarland v. .George, 316 S.W.2d 662, 669 (Mo. App. 1958). Absent such joint responsibility, the referring attorney was entitled only to fees proportionate to his work on the case.

In this case, Fleming never asserts that beyond the date of the referral he did anything further on the case, and the referral came prior to suit being filed. The only thing Fleming says he does past the date of referral is to attempt to call and push a settlement along. (B.T. 46). The only remaining "interest" the facts indicate he had was in the monetary outcome and specifically, his fee. Both Respondent's testimony and Grounds' testimony agree Fleming was not involved once they took the case. Grounds testified at the discharge hearing that once he

and Respondent received the case "Mike [Respondent] did at least half, and quite honestly, he may have done a little more." (B.T. 15). And further, "Paperwork-wise, he did a little more than half. In terms of meeting with the clients and talking, he was almost always present, so he probably did more than his share, the way it turned out." (B.T. 15). Grounds went on to explain various tasks he gave Respondent to do--researching California law on one issue, sending Respondent to "scurry" around with various questions, conflicts of law questions, statutes of limitation questions; when asked about Fleming's involvement however, Grounds responded as follows:

> Q. …Did Mr. Fleming, to the best of your knowledge, do any work on this case whatsoever in getting it settled?
>
> A. From what I know, from time it came to me, …I didn't know of anything.

(B.T. 17). Furthermore, to be safe in the determination of whether payment was due, Respondent disclosed the potential debt in his bankruptcy petition in the fall of 1996, leaving the dispute to the court to decide. Of course he hoped for a discharge, but he did not receive one, and he subsequently paid the debt to Fleming. This certainly does not evidence intent on the part of the Respondent to defraud Fleming. Unfortunately, the bankruptcy court was faced with only one way to deem the debt non-dischargeable—to have it meet the exceptions provided in 11 U.S.C. §523(a)(2)(A). In its Memorandum Opinion, the court

deemed the contract valid and enforceable and concluded – as a legal conclusion, and not a finding of fact--that Respondent's actions demonstrated an intent to not pay Fleming. This, as a legal conclusion of that court and not a finding of fact, is not binding on this Court. Furthermore, the court declared because Fleming only gave the court one argument to hinge the dischargeability upon, that it was bound to that evidence only. The court based its conclusion in large part upon the Respondent's failure to pay promptly at the time of the settlement, not his conduct at the inception of the contract. The court, frankly, did not like that an agreement was breached—that Respondent paid one creditor before another (a transaction which under the right time frame could be an "avoided preference" in bankruptcy), that Respondent indicated to Fleming that he was planning on filing bankruptcy, or that Respondent was unhappy with the lack of work Fleming contributed in exchange for the promise of a 60% recovery. The court wanted to uphold the agreement and had only one way to avoid discharging the debt. This Court is not limited to the evidence at the discharge hearing however. In re Oberhellmann, 873 S.W.2d 851, 852-853 (Mo. banc 1994). In matters involving discipline, other factors are considered.

Informant asserts in briefing this Court that Respondent "misled and lied" to Mr. Fleming about the status of the case. (Informant's Brief 20).[4] The record

[4]Hereinafter referenced "I.B." with the appropriate page following.

shows Fleming's primary complaint however to be that Respondent did not "communicate" with him during that two-month period between settlement and the August conversation between them, not that Respondent lied to him. The record shows the third attorney was of record in the case, something readily accessible to Fleming, not that the fact was hidden from him. If Fleming were as "interested" in the matter, he surely could have and would have, in a year's progression, obtained and reviewed the Petition. Further, there was an "offer on the table" when Respondent told Fleming of the offer, but the offer does not equate to an agreement, nor does the oral agreement equate to the settlement's approval by the court.

Respondent did not have the benefit of ideal circumstances under which to make a determination. Had he had funds in hand at the time of the settlement, he would have been able to pay. Had he had funds in hand at the time of the settlement, he would have been able to negotiate his disagreement with counsel's contribution, or lack thereof, and have proffered some, if not all, as a compromise settlement between the attorneys. He did not have funds. He did not feel the contract was entirely "above board" in light of how the year of litigation had evolved. He allowed his lawyer-landlord, to whom the settlement moneys were made, to retain money for a valid, long-overdue debt. He suffered under his own poor financial management and poor financial decisions as well as unexpected medical problems that hospitalized him not once but twice during

that year. But in all that transpired, he protected his clients. He did not act inappropriately with client funds. He did not perpetrate fraud on the court. He did not offer false documents. He did not perjure himself. He did not omit creditors in his bankruptcy petition. He was truthful and direct in his dealings with the legal system. His negligence in failing to promptly advise Fleming of the settlement and to promptly pay him was plainly that—negligence—born of circumstances that simply overwhelmed him.

In the same light, Respondent's failure to file income taxes and failure to do the proper paperwork required in reporting his CLE hours to the Missouri Bar were failures—omissions of acts he should have completed. His failure to file taxes became an issue in these proceedings only when he volunteered that information during his other proceedings, arguably information that trial counsel could have properly advised him against disclosing since it implicated potential liability for his client. Nonetheless, Respondent volunteered the information; he was candid about his great financial loss preceding these events, and he was frank about his embarrassment and loss at what to do. He did not act wisely, he did not act as diligently as another individual might, but he did not act with intent. Respondent's conduct, however unwise, does not equate to intentional or willful violations rising to a level that requires the loss of a lawyer's right to practice. Indeed, in the midst of one's loss of income and mounting problems, and in Respondent's case—in light of subsequent restitution which he has already

made—the loss of one's livelihood, no matter how brief, can become insurmountable. Furthermore, it should be noted that although Respondent failed to file tax returns, he has since filed all returns. No investigation by any federal entity has occurred, and no charges brought against Respondent. This is starkly different than a case where an attorney appears on formal charges and enters a plea of guilty to conduct. A plea of guilty in a court of law regarding tax matters often involves a mental state of "willfully," a mental standard that requires "more than a showing of careless disregard for the truth." United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976). Even an unreasonable or irrational misunderstanding or belief negates willfulness in most tax cases. Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991).

Informant acknowledges in her brief to this Court that all of the disciplinary cases reviewed by Chief Disciplinary Counsel in which tax returns are the basis for discipline stem from misdemeanor or felony pleas or convictions. (I.B. 21). The "public stigma is lacking" here, but also lacking is even a preliminary charge, much less a probable cause determination and the full due process afforded an individual who has been charged. Informant further agrees that Respondent's misconduct is somewhat mitigated by his ready admission and his subsequent filing in 1998. (I.B. 21). Moreover, whenever this Court approaches this issue in Respondent's case, it seems of utmost importance to recognize that the Respondent himself, and not an investigation or a charge or

another entity, made his negligence known in these proceedings. While the tax filings were not the basis for Respondent's appearance here, neither need the tax issue end with Respondent's admission. Respondent's mitigating factors must be taken into consideration to their fullest extent.

It should be noted as well that this Court has refused to be bound to a specific course of discipline, even in situations where an attorney is found guilty of a "serious crime." In re McBride, 938 S.W.2d 905 (Mo. banc 1997) is one such case. McBride was charged with six felonies: four counts of assault and two of armed criminal action. The assaults included McBride's firing of a .380 caliber automatic pistol, and resulted in the wounding of two men. A jury acquitted McBride of five of the counts and found him guilty on one count of assault in the second degree. The court suspended imposition of sentence and placed McBride on a five-year probation. When considering disciplinary action, this Court noted that though the authority existed to suspend McBride, but also noted that while McBride could not "relitigate" his guilt in this felony, this Court "may consider the circumstances behind his conduct and other mitigating or aggravating factors." This Court re-emphasized the familiar objective of these proceedings, "the ultimate objective is not to punish the attorney but to protect the public and maintain the integrity of the profession and the courts." This Court then went on to note McBride's cooperation with the investigation and state,

> He did not betray the trust or confidence of any client, nor did he jeopardize the representation of his clients before any court. He has not demonstrated a flagrant or cavalier disregard for the law...The record also shows that Mr. McBride has practiced for twenty years in positions of public trust, has never before been the subject of a disciplinary proceeding, and enjoys a good reputation among his clients, colleagues, the courts before whom he practices, and the general public.
>
> McBride, 938 S.W.2d 905, 907 (Mo. banc 1997).

This Court went on to note McBride's remorse, his lack of pride over his actions, his sleepless nights, and despite the Chief Disciplinary Counsel's request for indefinite suspension or disbarment, this Court found in light of all the circumstances, public reprimand to be appropriate.

Finally, in the definitional section to the ABA Standards for Imposing Lawyer Sanctions, the ABA defines "intent" as "the conscious objective or purpose to accomplish a particular result." Intent is not merely "intent" in the common usage of the word but actual intent to accomplish a specific object. The lesser mental state of "knowingly" is defined as awareness but without the "conscious objective or purpose to accomplish a particular result." And finally, the ABA defines lawyer "negligence" as the failure of a lawyer to heed a substantial risk that a result will follow…which failure is a deviation from the standard of care a reasonable lawyer would exercise." ABA Standards for

Imposing Lawyer Sanctions, Definitional Section. Respondent's omissions parallel those identified by negligence—he strayed from a standard of conduct that a "reasonable attorney" would follow. His conduct certainly does not rise to that of a plan or a conscious objective to an end.

C) Respondent Did Not Cause Injury, Other than Temporary Delay of Fees to Another Attorney

Injury may be categorized as serious injury, injury, or little or no injury. ABA Standards for Imposing Lawyer Sanctions, Definitional Section. The fee dispute in this proceeding does involve injury, though temporary in nature, injury which has since been repaired. Respondent satisfied the judgment in favor of Fleming now almost two years ago. No injury resulted in the Respondent's failure to file income taxes, and the Respondent has since filed for each year. The injury involved in failing to timely report CLE hours to the bar would be best categorized as little to no injury since Respondent had satisfied the mandatory CLE hours but had merely failed in reporting the same to the bar. That failure has also been remedied by Respondent. Accordingly, this factor does not require a heightened sanction.

D) Respondent's Mitigating Factors must Be Taken into Consideration in Assessing Discipline

There is perhaps no one who has gone to such lengths and so willingly in remedying his situation as Respondent. Thirteen (13) mitigating factors are

listed to be taken into account by this Court, and Respondent meets the large majority, if not all, of those factors. He has taken every step possible since the onset of this complaint in 1996 to correct his errors and comply with the bar. For brevity, they will be addressed in numbered fashion below:

1—Absence of a prior disciplinary record. Respondent has had no prior complaints or disciplinary actions. In nearly thirty (30) years of practice he has not received a bar complaint from a client or fellow attorney, has never been even admonished by this body, has never been brought before a tribunal. His record has been exemplary. He obtained and provided to this Court letters to serve as character references from fellow attorneys. He has no criminal record. He has maintained integrity before the bar and before the courts of this State. The fee dispute that gave rise to this proceeding is an isolated incident. Isolated incidents merit lesser sanctions. In re Harris, 890 S.W.2d 299 (Mo. 1994) and In Re McBride, 938 S.W.2d 905 (Mo. banc 1997).

2—Absence of a dishonest or selfish motive. Respondent's motive was not to be dishonest or selfish. He retained in pocket no money from the fee dispute that gave rise to this action. In addition to having nothing from which to pay the complaining attorney, he put forth what he believed was a valid contractual defense, a defense which was defeated but which the court did not dismiss as frivolous. He admittedly was not quick to speak with Fleming. He did not make an effort to contact him and work out their differences, but he failed to do so

because he did not know what to say.

3—Personal or emotional problems. This is uncontroverted. During the course of each of the fee dispute, the failure to file taxes, and the failure to timely report CLE hours, Respondent underwent two surgeries, was diagnosed with a sleeping disorder which rendered him unable to function in a full health, filed bankruptcy, had extraordinarily heavy financial obligations stemming from prior years which became burdensome, and though continuing to cooperate fully with the committee and panel's investigation, has certainly suffered physical and emotional trauma as a result of the length of these proceedings, which now are over five years from the date of the original bar complaint. Respondent has been involved in this process and the repercussions of his actions since the fall of 1996. His physical stamina has waned. He admittedly did not "present well" during his bankruptcy, was on medication for dental problems, and frankly has suffered in physical health as a result of the extended nature of this conflict. He has been understandably depressed, from the beginning of the incidents which led to these problems until today.

4—Timely good faith effort to make restitution or to rectify consequences of misconduct. This has certainly been (as is the factor which immediately follows) Respondent's strong point. He has suffered financial hardship and yet in the midst of it has made restitution (now almost two years ago) to the complaining attorney who retired to Florida. He satisfied and filed all of his

CLE reporting requirements, and he has filed his income taxes. As opposed to some who have come before this Court, challenging procedural technicalities and digging their heels in the ground begrudgingly along the way, Respondent has been more than candid with the individuals who have addressed him, has respected the court's and panel's positions, and has complied with every act required of him.

5—Full and free disclosure to disciplinary board or cooperative attitude towards proceedings. Again, this has been a strength for Respondent. Not only has he volunteered information to the board that may have served to compound his problems in one sense, but in the absence of the out-of-state witness who prompted these proceedings, Respondent entered into stipulations that alleviated his need to appear.

6—Inexperience in the practice of law. Respondent is not inexperienced in the general practice of law, but as he testified, his primary experience prior to assuming the case which ended in attorney disagreement, was as corporate counsel. He had limited Chapter 7 experience and limited criminal experience. In personal injury, he called himself a "rookie"; it was for that reason, in order to serve his clients' interest, he associated a more experienced litigator. (B.T. 119).

7—Character or reputation. No one has maligned Respondent's character or reputation. He has practiced in this community for years without dispute. He

had no prior complaints in thirty years of practice—not from clients, from corporate entities he represented, or from employers or colleagues. This incident was an isolated one.

8—Physical or mental disability or impairment. During the events that gave rise to this proceeding, Respondent underwent two surgeries, suffered from a sleep disorder and back pain preceding and subsequent to his surgery. His financial situation most certainly attributed to an element of depression.

9—Delay in disciplinary proceedings. Respondent has been dealing with this fee dispute for now over five (5) years. The bar complaint was filed by Fleming in December of 1996, but the information against Respondent was not filed until April 30, 2001, four and a half years after the original complaint. The stress of ethical inquiries over that extended amount of time has been extraordinary and burdensome, and it has been in no way due to any action of Respondent that this case has been prolonged.

10—Interim rehabilitation. Respondent has complied with the CLE reporting and tax filings required of him. He has made restitution to the complaining attorney. He has continued to practice these past five years without incident.

11—Imposition of other penalties or sanctions. Respondent has satisfied his debt to the complaining attorney. He retained counsel to represent him in bankruptcy proceedings; he has of course received penalties and interest as a result of his late filings. No other penalties or sanctions have been imposed.

12—Remorse. Anyone familiar with Respondent during the course of these hearings has witnessed his tears, his seeming despair at times, his definitive acceptance of responsibility and his frank characterization of his actions as simply "stupid." He is not proud of his mistakes; they have been an embarrassment for him. He certainly regrets, for lack of a better characterization, his "sloppiness" in taking care of his affairs promptly. His remorse is sincere.

13—Remoteness or prior offenses. This offense was isolated. Respondent has had no prior offenses nor any subsequent offenses. The occurrences are all now five years behind him, and he has successfully maintained his practice of law in the years since the onset of this trouble.

CONCLUSION

Finally, the “victim” in this case was not a "vulnerable" victim whom the bar must vehemently protect. He was a practicing attorney who acknowledged a conflict in his representation of a client’s family members and on the basis of that conflict referred the case to Respondent. At the same time, he sought to retain a significant fee interest in the outcome of that litigation. He was an experienced personal injury lawyer, assuring a personal injury novice that the agreement was valid since he had informed his clients of the conflict. Subsequently, another court has found that agreement valid as well. Nonetheless, this “victim” was not a naïve member of the public or an unknowing client; he was a fellow bar member with a dispute. Respondent has, to the contrary of appearing “deceitful”, actually been so candid and forthright as to voluntarily submit information in a court of law that he failed to do an act legally required of him. His admission to his failure to file taxes has in turn been added to the fee dispute as another basis for discipline.

Respondent acknowledges he was negligent in his actions, does not disagree that his conduct was less than desirable. He has made no attempt to deceive this body, has been fully cooperative from the onset, and has made restitution (almost two years ago) and has filed his taxes (now over three years ago). In this time period, he has been amenable to agreements with the regional committee and disciplinary panel. In turn, the regional committee, the disciplinary panel, and even representations from Chief

Disciplinary Counsel were that they agreed that the disciplinary action that was warranted was a public reprimand. This was evidenced by Informant's counsel at the disciplinary hearing, that in light of their review of his filed taxes and his restitution to the satisfaction of the alleged victim, "the recommendation is appropriate and we ask that a public reprimand be issued in this case." (Disciplinary Hearing Transcript 7).[5] Public reprimand is not to be downplayed; it is not merely an admonition, it is not in informal slap on the hand, it is not concerned with the attorney's "privacy." It is a published, formal finding of misconduct, forever on Respondent's record, and readily available for fellow members and colleagues to read and discuss. The public reprimand recognizes the purposes of this Court but without denying the Respondent his only source of livelihood and without potentially egregious requirements to confront subsequently. Now, as significant time has passed, and Respondent has remained compliant, and has continued to practice without complaint or incident, it seems inconsistent with the purposes of this Court to do otherwise.

Respectfully submitted,

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[5]Referring to the Transcript of the Disciplinary Hearing held August 20, 2001.

IN THE SUPREME COURT
STATE OF MISSOURI

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

CERTIFICATE OF SERVICE OF RESPONDENT'S BRIEF

Comes now Respondent, by and through the undersigned counsel, pursuant to Supreme Court Rule 84.05(a) and hereby certifies to the Court that two (2) copies of Respondent's brief were served by U.S. mail postage prepaid this March 12, 2002.

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IN THE SUPREME COURT
STATE OF MISSOURI

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

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Comes now Respondent, by and through the undersigned counsel, pursuant to Supreme Court Rule 84.06 and hereby certifies to the Court that:

(1) this brief includes the information required by Rule 55.03;
(2) this brief complies with the limitations contained in Special Rule No. 1 (b)
(3) this brief is formatted in Word Perfect 9.0
(4) the approximate number lines of type in the body of the brief is 791
(5) the enclosed disk has been scanned for viruses by McAfee and is virus free

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