IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of the State of Delaware:	§	
RONALD G. POLIQUIN,	§	No. 336, 2012
Respondent.	§	Board Case Nos. 2011-0084-B; 2012-0058-B; 2012-0060-B

Submitted: August 8, 2012
Decided: August 9, 2012

Before **HOLLAND, BERGER,** and **JACOBS,** Justices.

ORDER

This 9th day of August 2012, it appears to the Court that the Board on Professional Responsibility has filed a Report on this matter pursuant to Rule 9(d) of The Delaware Lawyers' Rules of Disciplinary Procedure. The Office of Disciplinary Counsel approved the June 19, 2012 Report of the Board. Respondent, through counsel, filed objections to the Board's Report, and the Office of Disciplinary Counsel has responded to those objections. The Court has reviewed the matter pursuant to Rule 9(e) of The Delaware Lawyers' Rules of Disciplinary Procedure and concludes the Board's Report should be approved.

NOW, THEREFORE, IT IS ORDERED that the Report filed by the Board on Professional Responsibility on June 19, 2012 (copy attached) is hereby **APPROVED;**

1. Respondent hereby is immediately suspended from the practice of law in this State for a period of six months and one day;

2. During the period of suspension, Respondent must fully cooperate with the ODC in its efforts to monitor his compliance with the suspension order and shall not: (a) have any contact directly or indirectly constituting the practice of law, including the sharing or receipt of legal fees, except that Respondent is entitled to any legal fees earned prior to the date of this order; (b) share in any legal fees earned for services by others during such period of suspension. Respondent also shall be prohibited from having any contact with clients or prospective clients or witnesses or prospective witnesses when acting as a paralegal, legal assistant, or law clerk under the supervision of a member of the Delaware Bar;

3. The Office of Disciplinary Counsel (ODC) shall file a petition in the Court of Chancery for the appointment of a Receiver for the Respondent's law practice pursuant to Procedural Rule 24; the Receiver shall provide notice to clients, adverse parties, and others as required by Procedural Rule 23; and the Receiver shall make such arrangements as may

be necessary to protect the interests of any of Respondent's clients and the public;

4 Respondent shall cooperate in all respects with the Receiver, including providing him/her with all law office books and records;

5. Respondent shall promptly pay the costs of the disciplinary proceedings in accordance with the Delaware Lawyer's Rules of Disciplinary Procedure when presented with a statement of costs by the ODC;

6. As reinstatement is not automatic, should Respondent apply for reinstatement, any such application must be made pursuant to Rule 22 of the Delaware Lawyer's Rules of Disciplinary Procedure following the suspension period; and

7. This Order shall be disseminated by the ODC as provided in Rule 14 of the Delaware Lawyers' Rules of Disciplinary Procedure.

The matter is hereby **CLOSED.**

BY THE COURT:

/s/ Carolyn Berger
Justice

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June 19, 2012

VIA E-MAIL and U.S. Mail:

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Re: In the Matter of a Member of the Bar of the Supreme Court of Delaware:
Ronald G. Poliquin, Esquire, Respondent
Board on Professional Responsibility of the Supreme Court of Delaware
Board Case Nos. 2011-0084-B; 2012-0058-B; 2012-0060-B

Dear Ms. Schwartz and Mr. Boyer:

I enclose a copy of the Panel's Report and Recommendation in the above-captioned matter. I am directing this letter to Ms. Schwartz as I am aware that Mr. Iobst, who handled the matter, is no longer at the Office of Disciplinary Counsel.

Very truly yours,

Karen L. Valihura, Esquire

cc: **VIA E-Mail**
Yvonne Anders Gordon, Ed.D. (YGordon@nccde.org)
Lisa A. Schmidt, Esquire (Schmidt@rlf.com)

Via E-Mail and Hand Delivery (of original)
Mr. Steven D. Taylor (by e-mail: steve.taylor@state.de.us)

BOARD ON PROFESSIONAL RESPONSIBILITY

OF THE SUPREME COURT OF DELAWARE

In the Matter of a Member of the Bar of The Supreme Court of Delaware: RONALD G. POLIQUIN, Respondent.	**CONFIDENTIAL** Board Case No. 2011-0084-B Board Case No. 2012-0058-B Board Case No. 2012-0060-B

BOARD REPORT AND RECOMMENDATION OF SANCTION

I. Procedural Background

Pending before a panel of the Board of Professional Responsibility (the "Board") is a Petition for Discipline filed on March 7, 2012 in Case Nos. 2011-0084-B; 2012-0058-B; and 2012-0060-B (the "Petition") involving Ronald G. Poliquin, Esquire ("Respondent"), a member of the bar of the Supreme Court of the State of Delaware.

Respondent filed an Answer to the Petition for Discipline on March 28, 2012 (the "Response" or "Resp.") in which Respondent admitted the allegations in large measure contained in Counts I-VIII. Respondent denies the allegations in Counts IX-XI.[1]

The Panel Chair conducted a telephonic pre-hearing conference on April 4, 2012 at 3:00 p.m. which was attended by Mr. Slanina, counsel for Respondent, and Mr. Iobst, on behalf of the Office of Disciplinary Counsel ("ODC"). The parties agreed to proceed with the hearing on April 12, 2012 which would be limited to issues relating to liability with respect to Counts IX – XI. A subsequent hearing was set for May 7, 2012 to address sanctions (relating to the admitted Counts I-VIII) and with respect to any other Counts on which the Panel might recommend a finding of liability.

[1] Nevertheless, it is the Board's responsibility to satisfy itself that the record, in fact, supports the admitted facts. *In re Bailey*, 821 A.2d 851, 863 (Del. 2003).

The parties accordingly narrowed the issues so that their presentations on April 12, 2012 focused on liability issues relating to Counts IX-XI.

A panel of the Board convened on April 12, 2012.[2] The ODC introduced a binder of 37 exhibits into evidence without objection. (Tr. at 5-6) The Board heard testimony from the Respondent. No other witnesses were presented as to the liability phase of these proceedings.

On April 13, 2012, the Panel Chair advised counsel for the ODC and counsel for the Respondent that, "the Panel has determined that it plans to recommend to the Delaware Supreme Court that the Respondent violated Delaware Lawyers' Rules of Professional Conduct 3.3(a)(1), 8.4(c) and 8.4(d), as alleged in Counts Nine, Ten and Eleven of the Petition for Discipline filed on March 7, 2012."

On April 18, 2012, Mr. Matthew Boyer advised the Panel Chair that he had been retained by the Respondent to represent the Respondent in the sanctions phase of the proceeding. A Notice of Substitution of Counsel was filed on April 30, 2013 wherein Mr. Boyer entered his appearance and Mr. Slanina withdrew his appearance for the Respondent.

Pursuant to Rule 9(d) of the Delaware Lawyers' Rules of Disciplinary Procedure, this is the Board's report with its findings and recommendations.

II. Factual Findings of the Board

A. Facts Admitted by the Respondent

1. The Respondent is a member of the Bar of the Supreme Court of Delaware. He was admitted to practice in 2003. (Resp. ¶1, Tr. at 8, 23)

2. At all relevant times, Respondent was engaged in the private practice of law. During this time Respondent was affiliated with various firms, including Young, Malmberg &

[2] The transcript of the April 12, 2012 hearing is cited herein as "Tr. at __." The transcript of the May 7, 2012 sanctions hearing is cited herein as "S.Tr. at ___."

Howard P.A. and Chasanov & Schaeffer. (Resp. ¶2) Respondent presently has a solo practice. (Tr. at 8) He practices primarily in the areas of employment and civil rights law. (Tr. at 8)

Board Case No. 2012-0058-B (Barbara Conley)

3. Respondent represented Barbara Conley ("Conley") in a lawsuit captioned *Barbara Conley v. State of Delaware Department of Public Safety*, C.A. No. 08C-09-026 (RBY) in the Superior Court of the State of Delaware in and for Kent County. The Complaint was filed on September 16, 2008. (Resp. ¶3)

4. Respondent filed a Second and Third Amended Complaint adding additional parties. Defendants' Motion to Dismiss the Third Amended Complaint was denied on July 16, 2009. (Resp. ¶4)

5. The Superior Court issued a Scheduling Order on September 8, 2009. (Resp. ¶5)

6. Pursuant to the Scheduling Order, discovery was scheduled to be completed by January 14, 2010. Respondent, on behalf of Conley, served on Defendants Interrogatories and Requests for Production on November 20, 2009. No other discovery was propounded by Respondent on behalf of Conley. (Resp. ¶6)

7. On January 19, 2010, five days after the discovery period was closed, Respondent, on behalf of Conley, moved for a revised Scheduling Order. On April 6, 2010, in a teleconference with the Superior Court, Respondent requested a further extension of the discovery period despite having propounded no discovery during the five months after November 20, 2009. The Court issued a new Scheduling Order on April 8, 2010 extending the discovery period until October 1, 2010. While Respondent maintains that he requested the extension due to his adversary's failure to respond to Respondent's requests, he admits to missing deadlines in that case. (Tr. at 10, 23).

8. The ODC alleged that the Respondent, on behalf of Conley, propounded no discovery to Defendants during the period from April 8, 2010 until October 1, 2010. (Resp. ¶8)

The Respondent stated in his Response that he did not have sufficient information or belief to respond to that allegation. (*Id.*) However, he admitted at the hearing that he had failed to conduct discovery. (Tr. at 23-24)

9. Defendants filed a motion and brief for summary judgment on November 4, 2010. Respondent filed an answering brief on November 29, 2010. (Resp. ¶9)

10. The pretrial stipulation deadline was scheduled for December 14, 2010. On December 20, 2010, six days after the deadline, Respondent wrote to the Court advising that he would bring the pretrial stipulation to the pretrial conference on December 21, 2010. (Resp. ¶10)

11. The Court granted the Defendants' Motion for Summary Judgment in an Amended Opinion and Order dated January 11, 2011. The Court in its Opinion repeatedly stated that Conley had failed to produce sufficient evidence to prove her claims. (Resp. ¶11) Respondent averred that the Court provides numerous legal and factual reasons for its decision, not all of which are attributed to Respondent's conduct.

Board Case No. 2012-0060-B (Sandra D. Jackson)

12. Respondent entered his appearance on July 31, 2009 on behalf of plaintiff Sandra D. Jackson ("Jackson") in the matter of *Sandra D. Jackson v. Dover Downs Inc.*, C.A. No. 08C-12-014 (RBY) in the Superior Court of the State of Delaware in and for Kent County. (Resp. ¶18)

13. Jackson's deposition was taken by Dover Downs, Inc.'s ("Dover Downs") attorney on September 10, 2009. On September 14, 2009 Dover Downs' attorney requested additional discovery (photos of accident scene, contact information regarding Jackson's treating physicians and documentation if Jackson was claiming lost income). The same information was requested by letters to Respondent dated October 26, 2009, November 23, 2009, December 29, 2009 and February 8, 2010. Respondent admits that he did not provide some of the requested information that he had promised to provide. (Resp. ¶19; Tr. 24-25)

14. An Order granting a Motion to Compel production of this information was entered on June 24, 2010. On August 11, 2010 a Motion for Sanctions was filed by Dover Downs' attorney based upon Respondent's failure to comply with the Order. A Stipulated Order was entered on September 2, 2010 purportedly resolving the issues. (Resp. ¶20)

15. On January 20, 2011, Dover Downs filed a further Motion to Compel Discovery and Motion for Sanctions based upon further failures of Respondent to respond to discovery requests. (Resp. ¶21)

16. On February 8, 2011 a Stipulated Order was entered purportedly resolving the pending discovery issues. (Resp. ¶22)

17. On March 7, 2011, Respondent was notified for the third time by the prothonotary that the $150.00 trial fee was overdue. (Resp. ¶23)

18. On March 10, 2011, Dover Downs filed a third Motion for Sanctions for Respondent's violations of the Stipulated Order dated February 8, 2011. (Resp. ¶24)

19. The Court ruled at the Pretrial Conference that Jackson's evidence and testimony of witnesses would be limited because of a failure to respond to previous discovery requests. (Resp. ¶25)

20. Respondent filed a Motion for Continuance of the May 23, 2011 trial on May 18, 2011. The Motion was granted by Orders dated May 19, 2011 and May 20, 2011. (Resp. ¶26)

21. Another attorney entered his appearance on behalf of Jackson and a Substitution of Counsel Form was filed on June 22, 2011. (Resp. ¶27)

22. An Order was entered on July 19, 2011 by the trial Judge upon application of Jackson's new attorney revising prior Orders and permitting additional witnesses to testify because of Respondent's performance deficiencies, including Respondent's failure to prepare the plaintiffs' lay and expert witnesses for trial. (Resp. ¶28)

23. The Respondent represented the Town of Cheswold, the Defendant Below-Appellant ("Cheswold") in an appeal before the Supreme Court of Delaware Captioned *Town of Cheswold v. Robbin Vann*, No. 103, 2010. (Resp. ¶39)

24. The opening brief and appendix of Cheswold in this appeal were due to be filed on July 6, 2010. (Resp. ¶40, Tr. at 26)

25. On July 6, 2010, Respondent on behalf of his Client, Cheswold, filed a Motion for Extension of Time under Rule 15(b)(iv). The motion was granted on July 6, 2010. The opening brief and appendix were scheduled to be filed on August 6, 2010. Respondent did not file the brief and appendix on August 6, 2010. (Resp. ¶41)

26. On August 9, 2010, a Clerk of the Delaware Supreme Court sent a letter to Respondent advising, among other things, that his brief was overdue. Respondent did not contact or respond to the Clerk. (Resp. ¶42)

27. On August 10, 2010, four days after his brief was due, Respondent, on behalf of Cheswold, filed a second Motion for Extension of Time under Rule 15(b)(iv). The motion was granted on August 10, 2010. The opening brief and appendix were scheduled to be filed on August 11, 2010. Respondent did not file the brief and appendix on August 11, 2010. (Resp. ¶43)

28. On August 12, 2010, a Clerk of the Delaware Supreme Court sent a letter to Respondent advising, among other things, that his brief was overdue. Respondent did not contact or respond to the Clerk. (Resp. ¶44)

29. On August 12, 2010, attorneys for Robbin Vann, the opposing party, filed a Motion to Dismiss the appeal based upon Cheswold's failure to file a timely brief on appeal. Respondent, on behalf of Cheswold, filed an Answer to the Motion to Dismiss on August 16, 2010. (Resp. ¶45)

30. On August 16, 2010, Respondent, on behalf of Cheswold, filed a Motion for Leave under Rule 15(b)(v)(vi)(vii) requesting a third extension of time to file the overdue brief

until August 19, 2010. This Motion was denied by the Court on August 17, 2010. (Resp. ¶46)

31. On August 19, 2010, Respondent, on behalf of Cheswold, filed a Motion for Leave to File Out of Time Pursuant to Rule 15(vi) requesting an extension for the fourth time. On August 20, 2010 the Motion was granted and the brief was due to be filed no later than 4:30 p.m. on August 20, 2010. Respondent filed a "draft" brief and appendix on August 20, 2010. (Resp. ¶47)

32. On August 20, 2010, the Court issued a Rule to Show Cause to Respondent to appear on August 25, 2010 to show cause why he should not be sanctioned pursuant to Supreme Court Rule 33 for performance deficiencies. (Resp. ¶48; Ex. 31)

33. Respondent filed an Answer to Rule to Show Cause on August 24, 2010 admitting performance deficiencies. (Resp. ¶49)

34. Respondent appeared in Court on August 25, 2010. Respondent admitted performance deficiencies. (Ex. 36 at 2, *see also* Tr. at 26) Respondent denied that he was impaired or that there was an "underlying cause" for his performance deficiencies. (Resp. ¶50)

35. In the hearing on August 25, 2010 (the "August 25 Hearing"), the Court stated Respondent's conduct exhibited a lack of candor to the Court in addition to the untimeliness issues and performance deficiencies. (Ex. 33 at 14-16) Respondent denied any lack of candor to the Court. (*Id.* at 19)

36. At the conclusion of the Rule to Show Cause Hearing on August 25, 2010, the Court imposed a private admonition among other sanctions. (Resp. ¶52, Ex. 34)

37. On August 26, 2010, the day after the Hearing, Respondent through counsel sent a letter to the Clerk of the Supreme Court disclosing to the Court for the first time a 2007 Private Admonition. (Resp. ¶53, Ex. 36)

38. The Private Admonition consented to by Respondent on July 27, 2007, included violations of Rules 1.1, 3.4(c) and 8.4(d) for misconduct involving lateness or failure to appear at

scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and a wasting of judicial resources in three Delaware Courts. (Resp. ¶54, Ex. 36)

B. The April 12, 2012 Board Hearing

In light of the admitted violations, the April 12, 2012 Board hearing focused on Counts IX – XI.

Board Case No. 2012-0058-B (Barbara Conley)

Respondent confirmed many of the admissions he had made in his Response. Respondent testified that he had developed a dependency on prescription drugs over a course of time which had adversely impacted his practice. (Tr. at 11) This was the first time the Panel learned of this information. In his March 27, 2012 Response to the Petition, Respondent states that at the August 25 Hearing, "Respondent denied through counsel that he was impaired or that there was an 'underlying cause' for his performance deficiencies." (Resp. ¶ 50) No mention was made of his drug dependency issues in his Response. At the April 12 Hearing, he initially testified that he first realized he had a drug dependency issue in July 2011. (Tr. at 13) At the May 7, 2012 Sanctions Hearing, he corrected this to say it was in May 2011 – prior to his entering a rehabilitation facility in Texas for 30 days. (Tr. at 15, S.Tr. at 65-66))

Respondent admitted that he had violated Rules 1.1, 1.3 and 8.4(d) in the *Conley* case by failing to conduct discovery and meet deadlines. (Tr. at 23)

Board Case No. 2012-0060-B (Sandra D. Jackson)

Respondent confirmed many of the admissions he had made in his Response. He testified that this case came at "the apex" of his dependency issues. (Tr. at 14) He testified that he was transitioning from one firm to another and believes he did not have enough support. (*Id.*) He entered a drug treatment program for 30 days during the *Jackson* case and had the matter transferred to another law firm. (Tr. at 15). He admitted to missing deadlines in that case. (Tr.

at 24-25)

Respondent admitted that with respect to the *Jackson* case, he violated Rules 1.1, 1.3, 3.4(c), 3.4(d) and 8.4(d). (Tr. at 24-25)

Board Case No. 2011—0084-B (Delaware Supreme Court)

Respondent admitted the allegations contained in the Court's Order to Show Cause. (Tr. at 49-50) Much of the testimony and evidence concerned the question of Respondent's state of mind in failing to disclose his prior Private Admonition at the August 25 Hearing. Respondent maintained throughout his testimony that he did not appreciate that a disciplinary sanction, such as a private admonition, could be imposed as a result of his performance deficiencies. He also testified that he was not trying to conceal the Private Admonition and that "it just never came into [his] mind at that point in time." (Tr. at 18) Further to this point he was asked:

> Q. At any time before or during the rule to show cause hearing, did you engage in any mental calculus or thought process as to whether you would or would not tell the Court about the prior private admonition?
>
> A. No. Just to explain, the rule to show cause comes pretty quickly as far as they issue it, they tell you to appear here. There's not a whole lot of time to calculate things before you go in and meet with them. It's a pretty – it's somewhat of a traumatic experience. It's not something that you really – to me, that you can really calculate.

(Tr. at 19-20).

He testified further that:

> At no point in time did it trigger in my mind that I needed – did I think I needed to disclose this private admonition. That never was

triggered in my mind of the prior disciplinary order. I understand that the Supreme Court has an ability to do anything they want. It did not trigger in my mind, no.

(Tr. at 36-37)

Respondent expressly denied that there was a plan to avoid disclosure during the hearing to avoid a harsher sanction and then wait until the following day to disclose it:

Q. With reference to this part of your answer to No. 56, was the reason that you waited until the next day your concern that, if you disclosed the private admonition, you would receive a more severe sanction?

. . . .

THE WITNESS: No. And I certainly – if that was the plan, I mean, I certainly know that, if I disclosed it, I wouldn't have disclosed it the next day. Otherwise, I know the Supreme Court can do whatever they want, essentially. I wanted to make sure I was absolutely candid to the Court about the issue. That's why I disclosed it the next day. If I wanted to hide it, I wouldn't have disclosed it the next day. That wouldn't make sense to me.

(Tr. at 40-41)

When initially asked by his counsel when it was that he first realized the relevance of his 2007 Private Admonition, he testified that it "was at the point in time – well, I'll say they issued the private admonition at the end of the hearing and then after discussing it with yourself [Mr. Slanina], at that point in time, since they had already given me a private admonition as a sanction, I disclosed it to you [Mr. Slanina] and authorized you to make sure that they knew that I had a previous private admonition." (Tr. at 18-19) He stated that this conversation took place outside

the courthouse *after* the Court had issued the private admonition at the August 25 Show Cause Hearing. (Tr. at 19) Respondent's Response also states that, "[i]mmediately *after* the hearing Respondent and counsel discussed the fact that a disciplinary sanction had been imposed and the possibility that the Court might not have imposed a private admonition for similar conduct." (Resp. ¶ 56; Tr. at 39) (Emphasis added)

After being questioned by the Panel as to whether he had discussed the 2007 Private Admonition before the August 25 Hearing, Respondent testified that he had discussed the 2007 Private Admonition with Mr. Slanina in the days just *before* the August 25 Show Cause Hearing. (Tr. at 54)

After giving that testimony, and upon re-cross-examination by the ODC, Respondent testified that the conversation with Mr. Slanina outside the court house after the August 25 Show Cause Hearing was actually the *second* time he had discussed the 2007 Private Admonition with Mr. Slanina:

> I did discuss with him after – that would be the second time I discussed with him as far as kind of – the first time was far as I had the notice of disclosure to the Court. The first time would be Mr. Slanina had some questions as far as discussing – initial questions that he probably asked as far as your background is and where you're at. And I think that was up – those were the only two times I discussed it with Chip.

(Tr. at 58-59)

Respondent's counsel advised the Panel that they had anticipated that they would be asked whether he and his counsel had discussed the Private Admonition prior to the August 25 Hearing, and that the Respondent was prepared to waive the attorney-client privilege on a limited basis in order to address this point. (Tr. at 54) It was in response to the question posed by the

Panel that Respondent then acknowledged that he had spoken to Mr. Slanina about the Private Admonition *before* the August 25 Hearing. (Tr. at 54).

Respondent also testified that he had discussed Supreme Court Rule 33 with Mr. Slanina prior to the Show Cause Hearing. The text of the Rule itself states that a private reprimand is a possible sanction for a performance deficiency. Rule 33 states that "[d]isciplinary action for performance deficiency may include one or more of the following sanctions against the offending attorney: . . .(iv) Reprimand. A private or public reprimand . . .."

Further, the following colloquy occurred at the August 25 Hearing:

CHIEF JUSTICE STEELE: You've talked to Mr. Slanina, I take it, about Rule 33 and the range of potential sanctions that we could impose under that Rule?

MR. POLIQUIN: I understand that, Your Honor.

CHIEF JUSTICE STEELE: Is he -- I take it at some point, he will address what, if any, of those sanctions would be appropriate?

MR. POLIQUIN: We have spoken about that, Your Honor.

(Ex. 33 at 25)

At the April 12 Hearing, Respondent testified that he believes he reviewed Rule 33 prior to the August 25 Hearing. (Tr. at 28) He also testified that, "if I read the rule, I would understand it, yes, they were options to have a public or private reprimand." (Tr. at 38) However, Respondent steadfastly maintained that what he was expecting was a fine or contempt finding. (Tr. at 38-39)

Thus, the Board was presented with Respondent's outright denials of any specific intent to conceal the 2007 Private Admonition at the August 25 Hearing as part of a pre-conceived plan to obtain a lighter sanction. Balanced against this testimony is Respondent's testimony that he had discussed the 2007 Private Admonition with Mr. Slanina in the days just *prior* to the August 25 Hearing, and that he had read and discussed Rule 33 prior to that hearing.

Based upon these facts, the Board might have been prepared to give the Respondent the benefit of the doubt and to recommend that the ODC had not established by "clear and convincing evidence" that Respondent had not specifically intended to deceive the Supreme Court by not disclosing during the August 25 Hearing his 2007 Private Admonition during that hearing. While the Petition could be read to allege such a specific intent by alleging, for example, that Respondent "withheld until the next day a report of his prior private admonition for similar rules violations..., (Petition ¶¶ 56, 58, 60), the ODC argued at the May 7 Hearing that Respondent's conduct was "knowing" as opposed to "intentional." (S.Tr. at 78) In fact, the Board does not believe the ODC has met its burden to establish, by clear and convincing evidence, a pre-planned intent on the part of Respondent to deceive the Supreme Court as part of a strategy to obtain a lighter sanction -- although the question is a close one.[3]

However, two factors persuade us that Respondent has *knowingly* violated his duty of candor to the Supreme Court. First, the questioning by the Court should have prompted the disclosure of his prior Private Admonition as the Court clearly appeared to be asking whether Respondent's performance deficiencies were an isolated event. Second, Respondent's counsel's affirmative representation that the Respondent "has performed within the expectations of the judicial system since his admission in 2003" should have prompted an immediate correction of the record and disclosure of his 2007 Private Admonition at the August 25 Hearing.[4]

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[3] According to the definitions contained in the ABA Standards for Imposing Lawyer Sanctions, "intent" is "the conscious objective or purpose to accomplish a particular result." "Knowledge" is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards, "Definitions."

[4] In this regard, Respondent's counsel stated during the August 25 Hearing that Respondent "has performed within the expectations of the judicial system since his admission in 2003." (Ex. 33 at 10) The Panel believes that this statement simply is untrue and is puzzled as to why it was made. Respondent expressly waived the attorney-client privilege so that he could tell the Panel that the 2007 Private Admonition was disclosed to his counsel prior to the August 25 Hearing. Giving that Mr. Slanina did not correct this testimony, and seemed to have anticipated Respondent giving it, we assume that there is no dispute between Mr. Slanina and Respondent on the point that the two of them discussed the 2007 Private Admonition prior to the August 25 Hearing. We do note that Mr. Slanina withdrew from the representation following the April 12 Hearing, but the Panel was not provided with any reason.

As to the first point, a number of questions posed by the Court should have prompted immediate disclosure of any prior disciplinary sanction. For example, the Respondent was asked a number of questions in which it was apparent that the Court was attempting to ascertain whether the deficiencies associated with the Town of Cheswold matter were aberrational or "one-shot" events. The following questions illustrate the point:

> JUSTICE JACOBS: . . . One of the concerns I have is that there needs to be some mechanism in place that, you know, will give this Court some assurance that somebody will be looking over Mr. Poliquin's shoulder until we can be satisfied that this is indeed, as he claims, a once – you know, basically, a one-shot problem, which is the product of being overly extended as distinguished from a deeper psychological problem that in other cases has manifested itself in many different ways. (Ex. 33 at 16)
>
> . . . .
>
> CHIEF JUSTICE STEELE: What are you going to do to convince us that this is an aberration and not the tip of the iceberg and that you will have a sense of prioritizing your practice and complying with the rules of every court because of the risk of jeopardizing your client's interest if you do not? (Ex. 33 at 23)

Respondent testified that during this questioning, he was not thinking about the 2007 Private Admonition. Rather, he was thinking about how he could assure the Court this conduct would not occur in the future. (Tr. at 43-44, 46; *see also* Tr. at 56)

Indeed a mere Notice of Substitution of Counsel was filed. The Panel notes that Superior Court Civil Rule 5(aa)(1) provides, in relevant part that, "An attorney may withdraw the attorney's appearance without obtaining the court's permission when the attorney is attorney for the plaintiff on a judgment entered on a warrant of attorney, or where such withdrawal will leave a member of the Delaware Bar appearing as attorney of record for the party. Otherwise, no appearance shall be withdrawn except on order of the Court." Delaware Rule of Disciplinary Procedure 15 provides that, "Except as otherwise provided in these Rules, the Rules of Civil Procedure for the Superior Court of the State of Delaware shall apply to the extent practicable in disciplinary and disability matters...." It is probably the better practice that substitutions of counsel in disciplinary proceedings be made upon motion to the Panel Chair, as opposed to through the filing of a Notice of Substitution. This would be consistent with Superior Court Civil Rule 5(aa)(1).

As to the second factor, *i.e.*, that counsel's statement should have prompted disclosure, there can be no doubt that it simply was not correct that Respondent had "performed within the expectations of the judicial system since his admission in 2003." (Ex. 33 at 10) For example, the 2007 Private Admonition (Ex. 36) reveals that the Preliminary Review Committee ("PRC") had determined that there was probable cause to support a Petition for Discipline against the Respondent for violations of Rules 1.1, 1.3, 3.1, 3.2, 3.4(c) and 8.4(d) However, the PRC authorized the ODC to offer a sanction of a private admonition for violations of Rules 1.1, 3.4(c) and 8.4(d). (Tr. at 31; Ex. 36) Respondent had been referred to the ODC by both the Family Court and by the Court of Chancery. In this regard, the Private Admonition states that the "referral [by Family Court] reflected a general sense of dissatisfaction by the judicial officers in Family Court with the Respondent's professional conduct and attitude" . . . and that "the Respondent was frequently late, did not show up for scheduled court appearances and/or filed tardy requests for postponements sometimes without notifying opposing counsel." (Ex. 36)

The 2007 Private Admonition also states that on "December 11, 2006, U.S. Magistrate Judge Thynge's Memorandum Opinion in *Brandewie v. State of Delaware Dept. of Correction* included references to Respondent's 'sloppy work and complete disregard to the court's rules and procedures.'" (Ex. 36)

Further, on December 21, 2006, Vice Chancellor Lamb denied Respondent's request for injunctive relief on the ground that the application filed by the Respondent did not conform to Court of Chancery Rule 65 and did not exhaust administrative remedies." (Ex. 36)

Finally, the 2007 Private Admonition states that "[t]he Respondent's professional conduct wasted judicial resources in Family Court (Kent County), the United States District Court for the District of Delaware, and the Court of Chancery (New Castle County), in violation of Rule 8.4(d)." (Ex. 36)

Thus, given that the basis for the 2007 Private Admonition consisted of complaints from three different courts, Respondent's Counsel's statement that Respondent had been performing within judicial expectations since 2003 could not possibly be true. Accordingly, the Panel believes that Respondent should have corrected any misimpression given to the Court at that point.

These facts prompted the Panel to inquire of Mr. Slanina at the April 12 hearing:

[MS. VALIHURA]: regardless of whether or not there was an obligation to disclosure the prior Private Admonition, once you stated that Respondent "has performed within the expectations of the judicial system since his admission in 2003," wasn't there an obligation to correct the record?

Mr. Slanina argued that his statement did not trigger any duty on the part of Respondent to correct it:

> I think it's going to be a question of judgment of fact for the panel as to whether or not that relatively amorphous statement of he's been practicing since 2003 I think it was and he's been able to comport himself is -- rises to the level of a statement that he's never had any issues, he's never had any problems, he's never been sanctioned, and on paper and this is subjective issue as to what Mr. Poliquin's reaction to hearing that at the rule to show cause, assuming he did hear it, assuming he was paying attention, was or should have been.

(Tr. at 76-77) The Panel does not agree that Mr. Slanina's statement was "relatively amorphous." In addition, there is no evidence that Respondent was not paying attention. In fact, he addressed the Court. He described the hearing as a "traumatic experience." (Tr. at 19-20) It would be incredible to believe Respondent was not paying attention. Moreover, there was no suggestion that Respondent's ability to meaningfully participate in that hearing was compromised in any way by any medications or otherwise.

At the Sanctions Hearing, the Panel also questioned Respondent about his counsel's statement at the August 25 Hearing – whether he was troubled by it and whether it had triggered the disclosure the next day. He testified as follows:

> I don't – I guess I don't really – it's been two years since that hearing, so it's hard for me to recall exact – you know, recall that statement even being said, quite frankly.
>
> I – I think what triggered the idea of me having a prior private was probably the fact they gave me a private that day. I don't recall if I mentioned to Chip or if he mentioned to me afterwards, but I think it happened – you know, I know it happened after the hearing.
>
> Certainly my state of mind during that hearing was a little – it's a little intense, a little jarring, as far as what you're going through. And so, to answer your question, that statement did not automatically – did not trigger that recollection.

(S. Tr. at 72-73)

Respondent agreed that the Rule to Show Cause (Ex. 31) included specific conduct that was similar to the conduct that was the subject of the 2007 Private Admonition. (Tr. at 32, 33)

Respondent and his counsel did advise the Court the next day of the 2007 Private Admonition. (Ex. 36)[5] However, this disclosure came after the Court had issued a Private Admonition at the conclusion of the August 25 Hearing. While the prompt corrective disclosure may serve as a mitigating factor, as discussed below, the Panel does conclude that given the

[5] Respondent states in his response to the Petition that, "Immediately after the hearing, Respondent and counsel discussed the fact that a disciplinary sanction had been imposed and the possibility that the Court might not have imposed a Private Admonition if it were aware that Respondent had received a prior Private Admonition for similar conduct. In order to meet his duty of candor to the tribunal, Respondent immediately authorized counsel to advise the Court of the prior Private Admonition and counsel did so." (Resp. ¶¶ 56, 58, 60)

circumstances, Respondent should have disclosed the 2007 Private Admonition during the August 25 Hearing and violated his duty of candor to the Court.

The Supreme Court's subsequent modification of Rule 33 to expressly include an obligation to attach a complete record of all prior disciplinary matters does not change the Panel's conclusion on liability on this point. (Tr. at 67)[6] At a minimum, the questioning by the Court and respondent's own counsel's statement about the absence of any prior problems, required disclosure which should have been made at the August 25 Hearing.

Nor does the Panel find persuasive Respondent's argument that if the August 25 Hearing had been a disciplinary proceeding, then Board Rule of Disciplinary Procedure 9(f) would have precluded the revelation of a prior disciplinary record until after there was a finding of misconduct. (Tr. at 71) Respondent acknowledged that those rules did not govern the August 25 proceeding. (*Id.*) However, he argued that the rules at the time of that hearing did not give him fair notice of a possible reprimand:

> The Court is not bound by these rules. The Court can do some other procedure as it has subsequently done by changing Rule 33. But at the time of Mr. Poliquin's rule to show cause in August 2010, we didn't have the benefit of the Court directing and specifying that it had a different role in the disciplinary process and the disciplinary procedural rules found at, in particular, 9(f)(4) didn't apply to them.

(Tr. at 71) The Panel is simply not persuaded by this argument. The argument might even suggest that the non-disclosure was part of a litigation strategy based upon this interpretation of D.R.D.P. 9(f)(4). However, no testimony suggests that there was such a pre-conceived strategy.

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[6] For example, Supreme Court Rule 33(c) was amended to add: "The Lawyer/Respondent's response shall attach a current and complete record of all the Lawyer/Respondent's prior disciplinary matters in Delaware or any other jurisdiction." The Amendments also added an express statement that a sanction could include a referral to the Office of Disciplinary Counsel. (Rule 33(c)(v). (Tr. at 60, 67)

Respondent waived the attorney-client privilege in this area and Respondent did not testify that he had relied on such an interpretation of the rules.

The May 7, 2012 Sanctions Hearing

As in the April 12 hearing, Respondent was the only witness presented by the ODC.

For the Respondent, Clay Jester, Carol Waldhauser and Respondent testified.

First, Mr. Jester, a partner with Parkowski, Guerke & Swayze, and a member of the Professional Guidance Committee, testified that Respondent asked to meet with him in his capacity as a member of that committee. (S.Tr. at 10) Respondent's first meeting was after the August 25 Hearing. (*Id.*) They met weekly for awhile and then either every other week or monthly. (S.Tr. at 11) At first, Respondent described his issues as case management issues. (S.Tr. at 12) Early on, they discussed Respondent's issues with "ADD or ADHD." (S.Tr. at 13) Respondent told Mr. Jester that he had been prescribed Adderall and at some point, that had become a "bigger problem." (*Id.*) Mr. Jester described Respondent as "totally sincere, and highly motivated throughout the whole process." (S.Tr. at 15)

Mr. Jester assisted Respondent in arranging for coverage of his cases while Respondent entered a treatment program. (S.Tr. at 16-17) He testified that "Respondent did everything you could ask a person to do in that circumstance." (S.Tr. at 18) Respondent entered a rehabilitation program in late May 2011 and got out around June 27, 2011 and continues to meet with Mr. Jester. Mr. Jester testified that Respondent has been "open and honest" as well as remorseful with respect to any effect his issues have had on his clients and the courts. (S.Tr. at 19)

Ms. Waldhauser, Executive Director of the Delaware Lawyers Assistance Program, testified that Respondent contacted her in March of 2011. (S.Tr. at 25) She stated that he had made full disclosure to her of his issues and was "very, very adamant about getting help." (S.Tr. at 26) He told her that the "solution became the problem." (*Id.*)

She stated that Respondent had been taking Adderall and "Benz—a downer, anxiety pill." (S.Tr. at 26) He had a problem with "disorganization, clarity and focus." (*Id.* at 27) Eventually, he went to an addiction counselor. (*Id.* at 28) He was able to find a room in the Caron Foundation -- a rehabilitation facility in Texas -- and had to leave his wife and two small children for 30 days to enter this facility. (*Id.* at 31) He was not able to get into the Caron's Pennsylvania campus because of the lack of beds and his lack of insurance. (*Id.* at 30)

Respondent signed releases to enable the ODC to see information relating to his stay there. (*Id.* at 32-33) Ms. Waldhauser testified that "he did want to make full disclosure to the Disciplinary Counsel with reference to what had happened, what he did to hopefully treat this situation, and what he would do in the future." (S.Tr. at 33) In her experience, no one had ever signed such releases to have this type of information turned over to Disciplinary Counsel. Because of that, she had him sign an additional release to make sure that this was his intent. (*Id.*)

He agreed to work with her "indefinitely," to undergo supervised random urinalysis testing, to go to 12-step support group meetings, obtain a sponsor, go to counseling and to meet with her bi-monthly in person. (S.Tr. at 34) Respondent has followed through as he agreed. (*Id.*) He also committed to working with the Professional Guidance Committee regarding his practice management and the Lawyer Assistance Committee. (*Id.*)

Initially, Respondent went to Narcotics Anonymous ("NA") meetings twice a day, everyday. (S.Tr. at 35) Now, he goes to meetings once a day. (*Id.*) He testified that he has been drug-free for almost one year. (*Id.*) All of his random drug tests have been negative. (*Id.* at 42)

Respondent testified that after the August 25 Hearing, he called Mr. Jester and asked for his help in getting "his professional life back in order." (S.Tr. at 39) He concluded that the firm he was with, Chasanov & Schaeffer, was not giving him the support he needed "as far as organization, calendar, attending to clients, not having an assistant." (*Id.*) He thought it would

be better to enter a solo practice since he was not receiving support and had no control over decision making. (*Id.*) He started going to a 12-step program, and started taking on fewer clients.

In his solo practice, he hired an assistant and invested in the legal software, Abacus, which he felt had a good calendaring system. (*Id.* at 56) He was audited immediately upon his return from rehabilitation and the audit "went fine." (*Id.* at 52)

He testified that he "signed releases for all of my medical records from Caron Texas to the Office of Disciplinary Counsel, so they could view it and know exactly what the nature of my treatment was, the nature of my problems were." (*Id.* at 53) He also signed a release so that ODC could review his medical records from Dr. Obeidy -- the doctor who was assisting him with his addiction. (*Id.*) He also discussed with ODC's counsel the nature of the help he was receiving, and his practice to give him some assurance that his practice "was running the way it should be." (*Id.* at 54). He also signed a release so that ODC could have information regarding his participation in the Lawyers Assistance Program. (*Id.*)

Respondent testified that he has been a frequent volunteer for Delaware Volunteer Legal Services. (*Id.* at 55) He also serves on the Board of Habitat for Humanity. (*Id.*)

Respondent testified that he attends an NA meeting every day and calls his sponsor daily. (*Id.* at 56) He is attempting to be more conservative in the cases he takes, has a full-time assistant and practice management software. (*Id.* at 59) His wife assists with bookkeeping, and he has an accountant. (*Id.*)

Respondent expressed remorse that he did not handle the *Connelly* case the way he should have. (S.Tr. at 60-61) As to the *Jackson* case, he expressed remorse for putting the client in the position of having to get substitute counsel to "clean up the case." (*Id.* at 61) He expressed remorse for putting the court and his clients "in a bad position." (*Id.*) He denied any plan to deceive the Delaware Supreme Court during the August 25 Hearing. (*Id.* at 62)

III. Standard of Proof

Allegations of professional misconduct set forth in the ODC's Petition must be established by clear and convincing evidence. (Rule 15, Disc. Proc. Rules) As to Counts I-VIII, the Board accepts Respondent's admissions to specific violations as clear and convincing evidence of the alleged professional misconduct.

IV. Violations of the Rules

As set forth in the Petition, and as admitted both in the Response and again at the Hearing, Respondent has violated several of the Rules.

The Board concludes that Respondent has violated and has admitted to (in Counts I-VIII) two violations of Rule 1.1; two violations of Rule 1.3; one violation of Rule 3.4(c); one violation of Rule 3.4(d) and two violations of Rule 8.4(d). In addition, the Board concludes that Respondent has violated Rule 3.3(a)(1), Rule 8.4(c) and Rule 8.4(d) in the Counts which he contested. (Counts IX-XI).

A. Board Case No. 2012-0058-B (Barbara Conley)

In Board Case No. 2012-0058-B , the Panel recommends a finding that Respondent violated Rules 1.1, 1.3 and 8.4(d).

B. Board Case No. 2012-0060-B (Sandra Jackson)

In Board Case No. 2012-0060-B, the Panel recommends a finding that Respondent violated Rules 1.1, 1.3, 3.4(c), 3.4(d) and 8.4(d).

C. Board Case No. 2011-0084-B (Delaware Supreme Court)

In Board Case No. 2011-0084-B, the Panel recommends a finding that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d).

V. Recommended Sanctions

The ODC recommends that Respondent be suspended for at least one year. (S.Tr. at 76)

Respondent's counsel argued that the appropriate sanction should be a public reprimand followed by a period of probation, and that no suspension should be imposed. Respondent's

counsel agreed that there are multiple instances of misconduct, that there are two prior private admonitions, that a progressive approach to discipline must be taken, and that, "[t]here must be public discipline." (S.Tr. at 98) At one point he argued that "one could make an argument either for a suspension or a reprimand." (S.Tr. at 105) However, he argued that there should be "a dual sanction of a public reprimand and a probation – and as to the period of probation, Mr. Poloquin is amenable to whatever the Board would believe is appropriate...." (S. Tr. at 95) He contended that the mitigating factors outweighed the aggravating factors. Respondent's counsel also offered as additional suggestions, Respondent's entering a formal contract with Ms. Waldhauser, an immediate report to the ODC should he get a positive drug test and a practice monitor. (S.Tr. at 98-99) He also suggested that it would send the wrong message to the Bar to find three violations and a suspension for the failure to disclose the 2007 Private Admonition at the August 25 Hearing when it was disclosed within 24 hours of that hearing. (S.Tr. at 96-97)

This Panel recommends that Respondent be suspended for six months and one day.

VI. Analysis

In reaching its recommendation of an appropriate sanction, the Board carefully considered the ABA Standards for Imposing Lawyer Sanctions (the "ABA Standards") and the four factor analysis considered under those standards: the ethical duties violated by the lawyer; the lawyer's mental state; the extent of the actual or potential injury caused by the lawyer's misconduct; and the existence of aggravating and mitigating factors.[7] "The objectives of the lawyer disciplinary system [in Delaware] are to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar

[7] *ABA Standards for Imposing Lawyer Sanctions 8* (1992), *available at* http://www.abanet.org/cpr/regulation/standards_sanctions.pdf; *see also In re Bailey*, 821 A.2d 851, 866 (Del. 2003).

misconduct."[8] The focus of the lawyer disciplinary system in Delaware is not on the lawyer but, rather, on the damage to the public that is ascertainable from the lawyer's record of professional misconduct.[9]

A. The Ethical Duties Violated by Respondent

The Board concludes that the ethical violations include duties to clients, the legal system and the profession.

Board Case No. 2012-0058-B (Barbara Conley)

Rule 1.1 provides an attorney "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." By failing to conduct discovery and to meet discovery deadlines, and by failing to meet other deadlines established by the Scheduling Order, Respondent admitted that he violated Rule 1.1. (Resp. ¶13, Tr. at 23)

Rule 1.3 states an attorney "shall act with reasonable diligence and promptness in representing a client." By failing to conduct discovery and to meet discovery deadlines, and by failing to meet other deadlines established by the Scheduling Order, Respondent admitted that he violated Rule 1.3. (Resp. ¶15, Tr. at 24)

Rule 8.4(d) provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." By failing to meet deadlines established by the Scheduling Orders, Respondent admitted that he violated Rule 8.4(d). (Resp. ¶16, Tr. at 24)

Board Case No. 2012-0060-B (Sandra D. Jackson)

Rule 1.1 provides an attorney "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation

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[8] *In re Francine R. Solomon*, No. 361 (Del. 2005) quoting *In re Bailey*, 821 A.2d at 866.

[9] *In re Hull*, 767 A.2d 197, 201 (Del. 2001).

reasonably necessary for the representation." By failing to respond to discovery requests and Orders entered by the Court resulting in a limitation of witnesses and evidence to be presented at trial, Respondent admitted that he violated Rule 1.1. (Resp. ¶30, Tr. at 24)

Rule 1.3 states an attorney "shall act with reasonable diligence and promptness in representing a client." By failing to respond to discovery requests and Orders entered by the Court resulting in a limitation of witnesses and evidence to be presented at trial, Respondent admitted that he violated Rule 1.3. (Resp. ¶32, Tr. at 25)

Rule 3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal." By his failure to obey Court Orders on June 24, 2010 and February 8, 2011, Respondent admitted that he violated Rule 3.4(c). (Resp. ¶34, Tr. at 25)

Rule 3.4(d) provides in pretrial procedure a lawyer shall not "fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party." Respondent admitted that his failure to respond to (a) letters of opposing counsel; (b) motions to compel and for sanctions for discovery violations; and (c) Orders of the Court and Stipulated Orders regarding discovery violated Rule 3.4(d). (Resp. ¶36, Tr. at 25)

Rule 8.4(d) provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Respondent admitted that his failure to respond to (a) letters of opposing counsel; (b) motions to compel and for sanctions for discovery violations; and (c) Orders of the Court and Stipulated Orders regarding discovery violated Rule 8.4(d). (Resp. ¶38, Tr. at 25)

Board Case No. 2011-0084-B (Delaware Supreme Court)

Rule 3.3(a)(1) requires that a "lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." By failing to disclose to the Delaware Supreme Court at the Rule to Show Cause hearing his prior private admonition for similar rules violations, and failing

to correct at that hearing his Counsel's statement that he has performed within judicial expectations since 2003, Respondent violated Rule 3.3(a)(1).

Rule 8.4(c) provides it is professional misconduct for a lawyer to "engage in conduct involving dishonesty . . . deceit or misrepresentation." By failing to disclose to the Delaware Supreme Court at the Rule to Show Cause hearing his prior Private Admonition for similar rules violations, and failing to correct at that hearing his Counsel's statement that he has performed within judicial expectations since 2003, Respondent violated Rule 8.4(c).

Rule 8.4(d) provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." By failing to disclose to the Delaware Supreme Court at the Rule to Show Cause hearing his prior Private Admonition for similar rules violations, and failing to correct at that hearing his Counsel's statement that he has performed within judicial expectations since 2003, and by failing repeatedly to meet deadlines for filing briefs and motions for extensions, by filing a brief out of time without prior authorization and prior consent of opposing counsel, and for other performance deficiencies, Respondent violated Rule 8.4(d).

B. Respondent's Mental State

The Board must determine the Respondent's mental state in order to determine the level of culpability. The ABA Standards define the most culpable mental state as that of intent when the lawyer acts with purpose to accomplish a particular result. A less culpable mental state is that of knowledge where the lawyer is consciously aware of the attendant circumstances of his or her conduct but is not trying to accomplish a particular result. The least culpable mental state is negligence where the lawyer deviates from the standard of care that a reasonable lawyer would exercise in a given situation.[10]

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[10] ABA Standards at 6.

The Board concludes that the Respondent's mental state was knowing.[11] In this case, Respondent was aware of the nature and circumstances of his conduct in connection with client matters and in connection with his appearance before the Delaware Supreme Court.

C. Injury Caused by Respondent's Misconduct

The ABA Guidelines direct the Board to determine the extent of the injury and whether there is actual or potential harm. Each client in this matter suffered some injury or potential injury that was directly caused by Respondent's misconduct.

Barbara Conley's case was resolved against her on summary judgment. Respondent's failure to produce certain evidence appears to be at least a factor in that adverse ruling.

The evidence and testimony of witnesses in Sandra Jackson's case was limited due to Respondent's failure to respond to discovery requests.

In the *Town of Cheswold* case, Respondent's failure to comply with the Supreme Court's rules could have resulted in a dismissal of the appeal.

D. The Existence of any Aggravating and Mitigating Circumstances

Once misconduct is established, the Board must consider whether there are aggravating or mitigating circumstances which would warrant an increase or a decrease in the sanction.

ABA Standard 9.22 sets forth the following non-exhaustive list of aggravating factors:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;

[11] The ODC also argued that "Mr. Poloquin's mental state was knowing in each of the client matters contained in the petition for discipline." (S.Tr. at 78)

(i) substantial experience in the practice of law;
(j) indifference to making restitution; and
(k) illegal conduct, including that involving the use of controlled substances.

(ABA Standard § 9.22)

Based upon the Respondent's admissions and the evidence presented at the Hearing, the Board finds the following aggravating factors:

(1) Respondent has a prior disciplinary record. (ABA Standard § 9.22(a)) The record consists of two prior private admonitions.

(2) Respondent has engaged in a pattern of misconduct. (ABA Standard § 9.22(c))

(3) Respondent's misconduct consists of multiple offenses. (ABA Standard § 9.22(d))

Respondent does not dispute that these are aggravating factors. (S.Tr. at 106-108)

ABA Standard 9.32 sets forth the following non-exhaustive list of factors to be considered in mitigation:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical disability;
(i) mental disability or chemical dependency including alcoholism or drug abuse when:
  (1) there is medical evidence that Respondent is affected by a chemical dependency or mental disability;
  (2) the chemical dependency or mental disability caused the misconduct;
  (3) Respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
  (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
(j) delay in disciplinary proceedings;
(k) interim rehabilitation;

(l) imposition of other penalties or sanctions;
(m) remorse; and
(n) remoteness of prior offenses.

(ABA Standard § 9.32)

Based upon the Respondents' admissions and the evidence presented at the Hearing, the Board finds that the following mitigating factors exist:

(1) Respondent suffers from personal or emotional problems. (ABA Standard § 9.32(c))

(2) Respondent cooperated with the ODC in connection with the Hearing. (ABA Standard § 9.32(e)).

(3) Respondent is generally of good character as evidenced by his willingness to represent those who might not otherwise have representation. (ABA Standard § 9.32(g))

(4) Respondent has exhibited remorse and has recognized the wrongfulness of his conduct, as evidenced by (a) his admission to the allegations made and violations charged in the Petition and (b) his testimony. (ABA Standard § 9.32(m))

(5) Notwithstanding his failure to disclose his prior Private Admonition during the August 25 Hearing, Respondent disclosed his prior Private Admonition the day after the August 25 Hearing.

The Board rejects the following mitigating factors:

1. The Board does not find that Respondent's chemical dependency rises to the level of a mitigating factor. (ABA Standard § 9.32(i)) Chemical dependency can be considered as a mitigating factor when: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental

disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.[12] (*Id.*)

Here, there is evidence that Respondent has had a chemical dependency. It is undisputed that he entered a 30-day treatment program at the Caron Treatment Center in Princeton, Texas. (Tr. at 15; S. Tr. at 48) However, Respondent testified that his difficulties in managing his practice were caused by his attention deficit disorder which was first diagnosed in 2004 or 2005. (S.Tr. at 46) He described his dependency on medication used to treat his attention deficit disorder as "progressive." (S.Tr. at 47) Eventually, as he testified, the solution became the problem. (*Id.*) He became addicted to Adderall as well as another prescription narcotic that was a depressant namely, Benz. (S. Tr. at 26) Thus, Respondent's performance issues were initially caused by his attention deficit disorder, according to his own testimony. Those issues were then compounded by what became an addiction to the medication that had been prescribed to address that condition.

While Respondent testified that he is approaching his one-year anniversary of being drug-free, (S.Tr. at 58), the Panel remains concerned that while his addiction to these narcotics no doubt exacerbated his problems, the underlying cause – the attention deficit disorder – remains.

Respondent offered no medical evidence, other than his own testimony, to attempt to establish that his addiction to prescription drugs caused his performance issues.[13] The Panel cannot conclude that the second element has been satisfied.

Nor can the Panel conclude that the third and fourth elements are satisfied. The Panel commends the Respondent for the efforts he has made thus far and encourages his further

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[12] *In re Feuerhake*, No. 160, 2010 (Del. Supr. July 13, 2010).

[13] Respondent did sign releases to enable the ODC to have access to all of his medical records. (S.Tr. at 33-34; 53-54). ODC stated that it was not able to obtain records from Respondent's treating doctors at the Caron Treatment Center notwithstanding Respondent's efforts to cooperate. (S.Tr. at 93-94) The ODC agrees that Respondent made full disclosure to, and cooperated with the ODC. (S.Tr. at 84, 86)

progress. Again, the Panel remains concerned that while the drug dependency issues appear to be under control, an underlying cause of his problems, according to Respondent's testimony, is the attention deficit disorder. (S.Tr. at 69-70) Now, Respondent appears to be taking no medication in aid of that condition. Instead, Respondent is attempting to address his attention deficit disorder that condition through better managing his case load, obtaining additional staff assistance, and through the use of better office management systems.[14] It is simply too early to tell whether these steps will effectively address the performance issues. He testified that he does not believe he has missed any deadlines since he has returned from rehabilitation. (S.Tr. at 69)

2. While Respondent argued that delay in proceedings ought to be a mitigating factor, ABA Stnd. § 9.23(j), the Panel finds that this is a close call. Respondent's counsel argued that because much of the case turns on Respondent's state of mind 19 or 20 months ago, "the delay in the proceedings of 19 months has inevitably made it harder for him to sit here today and give a blow by blow account of when exactly he and Chip – whether they were standing on the courthouse steps when they discussed this, why it took until the next day to get the copy of the private admonition and the letter off." (S.Tr. at 115) There was no explanation by the ODC as to the delay. Clearly, all are best served by avoiding significant delays. Here, though, there can be little question that Respondent's conduct was "knowing."

While there may be more mitigating factors than aggravating factors, the Panel feels that the balance of the two is relatively neutral.

E. Recommended Sanctions

Although not necessarily an exhaustive list, a number of ABA Standards discussed below are relevant. On balance, the Panel believes that they point to suspension as the appropriate

[14] At any given time, Respondent is handling 30 to 35 cases as a solo practitioner. (S.Tr. at 63) These are almost exclusively employment and civil rights cases. (*Id.*) He stated that a year ago, his caseload was "probably double that." (S.Tr. at 71)

sanction:

1. ABA Standard 4.42(a) provides that suspension is generally appropriate when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client."

2. ABA Standard 6.12 provides that, "[s]uspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. Here, Respondent did take remedial action by disclosing his prior Private Admonition to the Supreme Court the day after the August 25 Hearing.

3. ABA standard 6.22 provides that, "[s]uspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding."

4. ABA Standard 8.2 provides that suspension is generally appropriate when "a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession." In this case, Respondent argues that this standard is not applicable since Respondent has not received a reprimand, but rather, has received only two private admonitions. Instead, Respondent relies on ABA Standard 8.3 for the proposition that a public reprimand should be the next step here. ABA Standard 8.3(b) provides that a reprimand is generally appropriate when a lawyer "has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."

The Panel does not agree that Respondent's reliance on ABA Standard 8.3 is appropriate. Here, there have been two prior private admonitions involving similar misconduct. Had the second one been disclosed to the Supreme Court during the August 25 Hearing, the Court may well have issued a sanction more severe than a private admonition. While the Panel is not in a position to speculate as to what the Court might have done, Respondent implicitly acknowledges that the Court may have issued a more severe sanction when he agreed that discipline is "progressive."[15] Therefore, it is inappropriate for the Respondent to rely on the fact that his prior sanctions were in the form of private admonitions -- when he is being charged, and the Panel finds, that he should have disclosed his 2007 admonition prior to receiving the second private admonition and that if he had done so, the 2010 sanction may well have been more severe than another private admonition.

Respondent also relies on ABA Standard 6.13 which provides that, "[r]eprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." However, the Panel believes that Respondent's conduct was "knowing" as opposed to "negligent."

Further, Delaware Supreme Court's precedent likewise points to a suspension under these circumstances.

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[15] Respondent's Response also concedes this point by stating that, "[i]mmediately after the hearing, Respondent and counsel discussed the fact that a disciplinary sanction had been imposed and the possibility that the Court might not have imposed a Private Admonition if it were aware that Respondent had received a prior Private Admonition for similar conduct." (Resp. ¶¶ 56, 58; *see also* S. Tr. at 98)) The Order issuing the Private Admonition shows that it was filed on August 30, 2010 at 2:42 p.m. (Ex. 35) Paragraph 3 of the Order directs that "all filings leading up to this order shall be forwarded to the Office of Disciplinary Counsel...." (Ex. 35 at 2) Respondent's letter to the Supreme Court disclosing his prior Private Admonition was Efiled on August 26, 2010 at 2:10 p.m. (Ex. 36) Thus, the belated disclosure to the Court would have been among the items forwarded to the ODC for review. It is fair to conclude that this was intended since a virtually identical order was Efiled on August 26, 2010 at 2:10 p.m. – the same time as Respondent's letter. (Ex. 34; S.Tr. at 109) The earlier August 26 version of the Order does not contain the language quoted above (in paragraph 3 in the August 30 order) regarding forwarding the file to the ODC.

The Court has treated as a serious disciplinary matter the substantial neglect of client affairs in the context of a pattern of misconduct or multiple offenses. *See In re Hull.*[16] In *Hull*, Respondent admitted to repeated acts of misconduct, including failing to file documents in several bankruptcy proceedings for different clients, causing a couple to lose an $8,000.00 personal exemption and another client to have his house foreclosed. Respondent also told a client that the client had a viable claim for medical malpractice and that she would recommend an attorney to the client. Respondent never did, and the client was barred by the statute of limitations from pursuing the claim. The Supreme Court held that circumstances of the case, along with the additional aggravating factors,[17] warranted a longer suspension than the Board had recommended. Thus, the Court suspended the attorney for two years, rejecting the Board's recommendation of a one-year suspension (with the possibility of being reinstated in six months).[18]

In *Matter of McCann*, the Delaware Supreme Court suspended attorney Richard S. McCann for one year after affirming the Board's findings regarding his three violations of the Rules of Professional Conduct. 669 A.2d 49, 51-52 (Del. 1995). Considering McCann's prior history of misconduct, his "substantial experience" in the practice of law and the multiple violations at issue in the case, the Court rejected the Board's recommendation of a public reprimand and two-year probation period as "inadequate and inappropriate," noting that the

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[16] 767 A.2d 197 (Del. 2001).

[17] The aggravating factors that the Supreme Court mentioned were: (1) the attorney's substantial experience in the practice of law, (2) the attorney's prior disciplinary history, (3) the attorney's pattern of misconduct, and (4) the presence of multiple offenses. *In re Hull*, 767 A.2d at 200.

[18] *See also, see also In re Benge*, 754 A.2d 871, 880 (Del. 2000) (imposing a one-year suspension in view of a "persistent pattern of client neglect that has continued unabated despite the imposition of a private admonition with a private probation and the subsequent imposition of a public reprimand with a public probation").

Court "has exclusive authority and wide latitude in determining disciplinary sanctions over lawyers." *Id.* at 52, 58 (*citing In re Figliola*, 562 A.2d 1071, 1076 (Del. 1995)).

At issue in *Matter of McCann* were three separate infractions, each involving violations of multiple Rules. In the first case, McCann violated Rules 1.3, 1.4(a) and 3.2. *Id.* at 54. During an appeal to the Delaware Supreme Court, McCann failed to adhere to a Court-issued briefing schedule, ignored two delinquency notices requiring that an appellate brief be filed, failed to respond to a Notice to Show Cause regarding sanctions, and failed to timely notify his client that her appeal had been dismissed for failure to file a required brief. *Id.* at 52-53. Although McCann argued that his debilitating allergies should excuse his conduct, the Board (and, subsequently, the Court) held that they were, at best, a mitigating factor and that his asserted defense "borders on the frivolous." *Id.* at 54-55.

In the second case, McCann violated Rules 1.8(c), 3.3(a)(1), 3.4(b), 8.4(c) and 8.4(d). *Id.* at 55-56. At his client's request, McCann altered a will to refer to himself as the client's "nephew," despite there being no relation between the two. *Id.* at 53. After the client's death, McCann (who was to receive 10% of the estate) executed a Petition for Administration in which he stated (under oath) that he was the client's nephew. *Id.* In defense of his behavior, McCann argued that, though he knew that his statement was false, he did not realize the importance or implications of the falsity and thus did not make a "knowing misrepresentation." *Id.* at 55. Finding his argument unpersuasive, the Court held that "[McCann] has been practicing law since 1964. He cannot be heard to claim that he did not understand the importance of this clear misrepresentation." *Id.* at 56.

In the third case, McCann violated Rules 1.3 and 1.4(a). *Id.* at 57. Although a client requested that McCann file several cases, McCann delayed doing so and failed to inform the client that he had not complied with its request. *Id.* at 53. Four months later, McCann falsely told the client that the cases had, in fact, been filed. *Id.* These actions constituted failures to

offer prompt and diligent legal service and to adequately inform the client. *Id.* at 57. Considering the three violations at issue in the case, the *Matter of McCann* court found that, although "[t]he lawyer discipline system was not designed to be either punitive or penal in nature," the circumstances of the case and comparison with previously-imposed attorney discipline dictated the sanction of a one-year suspension. *Id.* at 58.

In *Matter of Chasanov*, the Delaware Supreme Court imposed a six-month suspension on attorney William M. Chasanov for two cases of misconduct. 869 A.2d 327, 2005 WL 528862, at *2 (Del. 2005). After disciplinary hearings, the Board initially recommended a six-month suspension but later filed a Report advocating a two-year suspension based on the Court's precedent. *Id.* at *1-*2. Considering mitigating facts relating to the first of the two cases at issue, the Court imposed a six-month suspension and rejected the Board's later report. *Id.* at *2.

The first case at issue in *Matter of Chasanov* involved a Family Court hearing on a Rule to Show Cause, at which Chasanov represented to the Family Court that his client was not in arrears on mandatory alimony payments because the client had paid his ex-wife in full. *Id.* at *1. In reality, the client had entered into a settlement, pursuant to which the debt was discharged *without* payment of the full alimony sum. *Id.* The Board found that Chasanov's misrepresentation constituted a violation of the Rules of Professional Conduct in that it was (1) a failure to provide competent representation, (2) a failure to adequately explain a matter to the client, (3) a knowingly false statement of material fact made to the Court, (4) an act of dishonesty, fraud, deceit or misrepresentation and (5) conduct prejudicial to the administration of justice. *Id.*

The second case at issue involved Chasanov's failure to record or refund a client's $250 retainer payment upon demand. *Id.* Chasanov was found to have violated the Rules by (1) failing to act with reasonable diligence and promptness, (2) failing to keep his client reasonably

informed, (3) failing to adequately explain a matter to the client, (4) failing to safeguard and deliver client funds and (5) failing to properly maintain books and records. *Id.*

On review, the Court considered the circumstances of the cases and noted that, with regard to the first case, Chasanov agreed to provide the Family Court with correspondence disclosing the status of the client's debt, and provided the Family Court and the adverse party with creditor contact information permitting verification of the status of the debt. *Id.* at *2. Holding that these facts mitigated the severity of Chasanov's violations, the Court rejected the Board's recommended two-year suspension and instead imposed a six-month suspension as sanction. *Id.*[19]

It is worth focusing on Respondent's conduct in the *Cheswold* case and the violations relating to his lack of candor to the Supreme Court. This Court has recently expressed its view of attorneys being less than candid with the Court. In *In re Michael R. Davis*, No. 76,2012 (Del. Supr. April 10, 2012), the Delaware Supreme Court emphasized the importance the attributes of honesty and candor as part of an attorney's obligation to demonstrate good moral character. *Davis*, slip op. at 14. ("Honesty has been the fundamental qualification for admission to the legal profession since ancient times"). While the facts in *Davis* are distinguishable, the Board found that Davis had violated Rules 8.1(a), 8.4(b) and 8.4(d). Rule 8.1(a) provides that, in connection with a disciplinary matter, a lawyer shall not "knowingly make a false statement of material fact." Among other violations, Davis made misrepresentations to an arm of the Delaware Supreme Court in his Reinstatement Questionnaire. Slip op. at 22.[20]

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[19] The Panel notes, however, that one month after Chasanov's reinstatement to the Bar, he was subject to discipline for failing to avoid or remediate another lawyer's violation of the Rules. *See Matter of Chasanov*, 886 A.2d 1277, 2005 WL 2883572, at *4 (Del. 2005). Chasanov was publicly reprimanded for this violation. *Id.* at *1.

[20] Davis, a Delaware attorney, had been suspended from the practice of law in May of 2009 for numerous violations of the Rules, including violations arising out of a 2008 vehicular accident. *See id.* at *1-*2. Davis initiated reinstatement proceedings after his suspension expired, but allegedly violated the Rules in doing so. *See id.* After disciplinary proceedings, the Board found that "Davis violated Rule 8.1(a) when he knowingly made a false

While neither the ODC nor Respondent have relied upon cases construing Rule 8.1 – and indeed, Respondent has not been charged with a violation of Rule 8.1 – these cases may be at least somewhat useful by analogy with respect to their treatment of issues of candor to the tribunal, although they are readily distinguishable on their facts.

In *In re Becker*, 947 A.2d 1120, at *1 (Del. 2008), the Supreme Court imposed sanctions, in part for a violation of Rule 8.1(b). Becker, a Delaware lawyer, had been reprimanded and given a three-year probationary period following a 2001 finding of professional misconduct relating to, *inter alia*, mishandling of client funds. In proceedings below, "[t]he Board determined that Respondent knowingly failed to comply with his obligations under the terms of his 2001 probation and that he knowingly made a false statement of material fact in the course of the ODC investigation of his mishandled client trust funds." *Id.* Specifically, in the course of a 2006 investigation by the Office of Disciplinary Counsel, Becker stated "that it was not until in or about May 2006 that [he] became aware that client trust funds in excess of $35,000 were missing from his general escrow account." *Id.* at *10. Finding that this was a knowingly false statement made in the course of disciplinary proceedings, the Board held that Becker's conduct violated Rule 8.1(a). In addition to the misrepresentation claim, the Board found violations of Rules 1.1, 1.2(a), 1.3, 1.4(a)1.4(b), 1.15(a), 1.15(d), 8.1, 8.1(b), 8.4(c), and 8.4(d). *Id.* at *14. The Supreme Court found that "[o]n the facts, Respondent has repeatedly failed to comply with

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statement of material fact concerning the motor vehicle accident in his Reinstatement Questionnaire." *See id.* Specifically, when presented with "clear and convincing evidence that Davis improperly frustrated a police investigation by drinking alcohol after the accident and before the police arrived," the Board found Davis's statement "I provided full cooperation with their [the police] investigation of the crash" to be materially false and sanctionable under Rule 8.1. *See id.* Moreover, the Board found that Davis's post-accident conduct had "intent to circumvent the police investigation, and that this conduct involved dishonesty, deceit and misrepresentation in violation of Rule 8.4(c) and was prejudicial to the administration of justice in violation of Rule 8.4(d)." *Id.* at *2. Summarizing the case, the Supreme Court wrote that "[Davis] was suspended for knowingly violating this Court's ethical rules through deceit and misrepresentation. Davis then defied this Court by violating our Suspension Order and compounded that misconduct when he made misrepresentations to an arm of this Court in his Reinstatement Questionnaire . . . . If Davis is not honest with this Court, we have no trust or confidence that he will be honest with other courts, his clients, or third parties." *Id.* at *8. After consideration of the Board's recommended sanction, the Supreme Court disbarred Davis. *See id.* at *9.

basic professional requirements," and imposed the sanction of three years' suspension from practice. *Id.* at *18. As in *In re Davis*, *Becker* involved a series of more serious violations than appear on the present facts, and also included misconduct in the course of a probationary period.

Similarly, in *Matter of Sullivan*, 530 A.2d 1115, 1119 (Del. 1987), the facts in *Sullivan* are also distinguishable. But notably there, the Supreme Court seemed to indicate that making false statements to the Court in the course of a disciplinary proceeding could, in some cases, be enough to merit disbarment. In *Sullivan*, the disciplined attorney commingled client funds and subsequently "compounded his misconduct by filing false certifications that he was in compliance with the disciplinary rules regarding the segregation of clients' funds, and by falsely testifying to this." *Id.* at 1118. In justifying the imposition of sanctions, the Supreme Court surveyed other jurisdictions' law, writing that "[t]he Supreme Court of California has stated that fraudulent misrepresentations to the State Bar and before the Supreme Court may constitute a "greater offense" than misappropriation . . . . This Court has also taken a stern view of misconduct involving false representations before it . . . . [and o]ther courts have held that false testimony alone, absent other misconduct, warrants disbarment." *Id.* at 1118-19 (internal citations omitted). Put more directly, "when there can be no reliance upon the word or oath of a party, he is, manifestly, disqualified, and, when such fact satisfactorily appears, the court not only have the power, but it is their duty to strike the party from the role of attorneys."

Although *Sullivan* involved affirmative misrepresentations to a court, the Supreme Court has indicated a willingness to impose sanctions even when the misrepresentation was unintentional. For example, in *In re Doughty*, the Supreme Court imposed a public reprimand and two-year probationary period when a Delaware attorney was negligent in filing certifications to the Court that "failed to reflect, for over three years, that the Firm had unidentified client funds in its escrow account." *In re Doughty*, 832 A.2d 724, 734 (Del. 2003). Moreover, when presented with the question on first impression, the Court held that even "a negligent

misrepresentation also may form the basis for a charge of misconduct under the literal terms of DLRPC Rule 8.4(c)." *Id.* at 735.

Perhaps somewhat more on point is *In re Amberly* where the Supreme Court recently imposed a six-month suspension on an attorney who had been publicly admonished by the Virginia bar for knowingly making false statements of fact to a Virginia state court, to an opposing party, and to counsel for the Virginia bar in its investigation of the matter. *See In re Amberly*, 996 A.2d 793, at *2-*3 (Del. 2010). Taking the Virginia Board's findings of fact as true, the Delaware Board found that "it is clear that Respondent's conduct violates Rule 3.3(a)(1) of the Delaware Lawyer's Rules of Professional Conduct ("DLRPC"), by knowingly making a false statement of fact to a tribunal." *Id.* at *7. The Board also found that Amberly's conduct "violates DLRPC Rule 8.4(c), by engaging in conduct involving deceit or misrepresentation," and noted that "[c]andor to any tribunal must be the hallmark of lawyer conduct." *Id.* Considering Delaware precedent and the ABA Standards (in addition to the punishments imposed on Amberly by other jurisdictions for the same conduct), the Board recommended a 30-day suspension. *Id.* at *11. Nonetheless, the Delaware Supreme Court imposed a six-month suspension. *Id.* at *1. In doing so, it expressly refused to adopt a 30-day suspension identical to that imposed on Mr. Amberly in the District of Columbia. The Delaware Supreme Court stated that, "[t]he misconduct involving false statements to a tribunal and misleading statements to counsel for the Virginia State Bar Disciplinary Board warrant substantially different discipline in Delaware."

While these cases involved affirmative misstatements, Comment 3 to Rule 3.3 states, "There are circumstances where failure to make disclosure is the equivalent of an affirmative misrepresentation." D.L.R.P.C. 3.3, Comment.

The ODC pointed to *State v. Guthman*, 619 A.2d 1175, 1179 (Del. 1993), as illustrative of this point. Although the substantive holding of *State v. Guthman* did not involve attorney

discipline, the case arose in large part from a trial attorney's improper conduct. Considering the importance of professional conduct, the Delaware Supreme Court, in overturning a Superior Court finding of law, chose to admonish the attorney in its opinion. *Id.* Writing that, "Counsel may not, knowingly or otherwise, engage in conduct which may reasonably be perceived as misleading either to the court or to opposing counsel," the Court found that the attorney had not been forthright in failing to disclose certain contacts with opposing counsel to the trial court. *Id.*

There, Defendant Billy J. Guthman was accused of driving under the influence and on a suspended driver's license, and later appeared for arraignment without counsel in the Justice of the Peace Court. *Id.* at 1176. At arraignment, Guthman waived his right to have the case transferred to the Court of Common Pleas. *Id.* Nonetheless, Guthman's later-retained trial counsel served a discovery request on the State bearing a caption indicating that the case was in that Court. *Id.* On two occasions thereafter, Guthman's counsel notified State attorneys that the matter would soon be transferred to the Court of Common Pleas. *Id.* Acting in reliance on these assurances, counsel for the State failed to attend Guthman's trial, apparently believing the trial notice to have been sent in error or superseded. *Id.*

After waiting 35 minutes for the State's counsel to appear, the Magistrate Judge and Guthman's counsel had a conversation in open court in which the Judge explicitly asked Guthman's counsel whether she had been in contact with the Office of the Attorney General prior to the hearing. *Id.* at 1177. Guthman's counsel stated that "[t]he only thing [sic] I've had contact with them is to get a copy of the police report." *Id.* Subsequently, Guthman's counsel affirmed that she had not otherwise discussed the case with any of the State's counsel. *Id.* After this discussion, the charges against Guthman were dropped for failure to prosecute. *Id.*

Two days later, a clerk at the Court discovered a letter from Guthman's counsel to the Court, postmarked two days before the trial, requesting that the case be transferred to the Court of Common Pleas. *Id.* Subsequent proceedings involved the State's appeal of the case's

dismissal, eventually leading the Supreme Court to hold that a criminal matter may be reopened for good cause even if dismissed with prejudice. *Id.* at 1179. Despite this substantive ruling, the Court devoted the concluding paragraph of its opinion to Guthman's counsel's conduct, noting that "[r]egrettably, we must also conclude that this case would never have been dismissed in the first place if trial counsel for defendant had fulfilled her duty as an officer of the court . . . .An attorney, acting as an officer of the court, has a duty to respond with complete candor to court inquiries." *Id.*

Here, Respondent attempted to address his nondisclosure by disclosing his prior Private Admonition within 24 hours. In addition, as to his other violations and misconduct, he has undertaken a serious effort to remedy not only his drug addiction problems, but also his law practice management problems and appears to have made significant progress on both fronts. The Panel was impressed with Respondent's sincerity in this regard and with the steps that he has voluntarily taken to address his issues. Nevertheless, the cases relied upon by Respondent for the proposition that no suspension is warranted, appear to be distinguishable as to certain key points.

In *Matter of Reardon*, 759 A.2d 568, 569 (Del. 2000), the Delaware Supreme Court refused to impose the Board's recommended disciplinary sanction after finding that two similar but unrelated incidents of professional misconduct did not establish a "pattern" sufficient to warrant suspension. *Id.* at 569. Although the Board recommended that attorney Dennis A. Reardon be suspended for six months and subsequently subject to a two-year probation period, the Court determined that, on the case record, a public reprimand followed by probation was the appropriate sanction. *Id.*

On review of the Board's findings, the Court found that Reardon had violated Rule 1.3 with regard to two separate client representations. In the first case, Reardon signed a settlement stipulation providing that, in addition to completing roofing repairs that were the subject of the

original suit, his client would perform additional work demanded by the opposing party in a counterclaim. *Id.* at 570. Reardon relied on an informal agreement that opposing counsel would not pursue the counterclaim if the original repairs were completed, but knew that his client denied all liability for the counterclaim work and was not authorized to agree to its completion. *Id.* After the counterclaim work was not completed, opposing counsel moved for a default judgment pursuant to the terms of the stipulation. *Id.* at 571. Reardon failed to attend the hearing on opposing counsel's motion, and failed to inform his client of its existence or consequences. *Id.* After disciplinary proceedings, Reardon admitted that these actions constituted a failure to act with reasonable diligence and promptness. *Id.*

In the second case, Reardon was approached by a potential client with regard to a civil complaint filed against the potential client and one of Reardon's existing clients. *Id.* Although Reardon informed the potential client that he "would look into the matter," she believed that Reardon agreed to represent her and the other client in the matter. *Id.* Reardon failed to clarify the potential client's misperception, and did not notify her (or his existing client) of a default judgment entered in the matter. *Id.* Again, Reardon admitted that his actions violated Rule 1.3. *Id.* at 572.

In reviewing the Board's findings, the Court considered Reardon's attempt to distinguish his case from those in which suspensions were ordered. *Id.* at 574. Specifically, Reardon argued that (1) his misconduct in the second case caused no injury, (2) the two instances of misconduct were isolated and distinguishable, thus no "pattern" was present, and (3) imposing a sanction would be unduly punitive, because prior cases imposed sanctions only when the misconduct amounted to fraud or misrepresentation or involved persistent serious harm. *Id.* at 573-74. Although the Court rejected Reardon's first argument, it agreed that the two incidents did not constitute a "pattern" of misconduct. *Id.* at 576. Here, Respondent concedes that there is a pattern of misconduct and that there are multiple violations.

Moreover, the Court found the facts to be distinguishable from previous cases involving suspension because Reardon's conduct was negligent, did not involve intentional or knowing misconduct, and did not cause serious or potentially serious injury. Considering these and other mitigating factors, the Court ordered a public reprimand and probationary period. *Id.* at 581-82. Here, the Panel has concluded that Respondent's conduct was "knowing" and opposed to negligent, which is a less culpable standard.

Respondent also relies on *Matter of Cordrey*, 741 A.2d 16, 1999 WL 652065, at *1 (Del. 1999). In reviewing disciplinary proceedings regarding attorney John H. Cordrey, the Court approved the Board's extension of his preexisting probationary period in light of Cordrey's two additional violations of the Rules.. Although the original probationary term was one year, the Board considered several aggravating and mitigating factors in deciding to extend the term to two years. *Id.* at *3.

The events giving rise to *Matter of Cordrey* concerned two separate client representations. *Id.* at *2. In the first case, Cordrey failed to file an action on behalf of a client, thereby missing the applicable statute of limitations. *Id.* at *1. Cordrey then failed to notify the client of the problem, but later admitted to the violation. *Id.* In the second case, Cordrey was retained by clients who had been served with a complaint in the Court of Chancery, but failed to file a timely response thereto. *Id.* at *2. Eventually, a default judgment was entered. *Id.* Again, Cordrey admitted that his actions constituted a violation of the Rules. *Id.*

In recommending the one-year extension to Cordrey's existing probationary period (which had been imposed as a result of an earlier disciplinary proceeding), the Board considered two aggravating and six mitigating factors. *Id.* at *3. The aggravating factors included (1) Cordrey's three earlier private admonitions for violations of the Rules, and (2) the fact that Cordrey had practiced law for 19 years, and was an experienced attorney. *Id.*

In mitigation, the parties presented evidence regarding (1) the absence of any dishonest or selfish motive on Cordrey's part, (2) Cordrey's expressed remorse and knowledge of the wrongfulness of his conduct, (3) Cordrey's full disclosure of the underlying facts to the Office of Disciplinary Counsel, and his cooperation therewith, (4) Cordrey's full restitution for the clients' injuries, (5) psychiatric reports indicating Cordrey's phobic disorder with baseline anxiety, and (6) delays in the disciplinary proceedings. *Id.* at *3-*4.

Considering these factors, the Board recommended a one-year extension of Cordrey's existing probationary period, in addition to other requirements such as quarterly written reports to the ODC, monitoring of Cordrey's actions by another attorney, and mandatory attendance at psychological counseling sessions. *Id.* at *4-*5. These recommendations were subsequently adopted by the Court. *Id.* at *1. It did not appear that any issues of candor were presented in *Cordrey* unlike the present case.

Finally, in *Matter of Solomon*, 745 A.2d 874, 887-88 (Del. 1999), the Court approved the Board's recommendation of a public reprimand coupled with a four-year probationary period for multiple violations of the Rules arising out of eight separate client representations. Considering the facts of the case, the Board's recommendation, and the four factors relevant to setting an appropriate sanction for attorney misconduct, the Court imposed a public sanction and a probationary period, in addition to certain ancillary requirements such as a required disclosure to all clients. *Id.* at 892.

In the underlying Board proceedings, Solomon admitted that she had violated the Rules by, on multiple occasions, (1) failing to properly identify and maintain client funds, (2) failing to properly maintain books and records, (3) failing to act with reasonable diligence and promptness in representing a client, (4) failing to properly explain a matter such that a client could make an informed decision regarding the representation, (5) knowingly disobeying an obligation under the rules of a tribunal, (6) failing to return an unearned advanced fee, (7) failing to abide by a

client's decisions concerning the objectives of representation and (8) abandoning her representation of a client. *Id.* at 876-86. In her disciplinary hearings, Solomon expressed remorse for her violations and disclosed that, since the violations occurred, she had joined a new firm, submitted to monitoring of her practice by another attorney and ensured that she would have no control over her books and financial records. *Id.* at 888.

In making its recommendation, the Board considered stipulated aggravating and mitigating factors. *Id.* at 889. Aggravating factors included (1) Solomon's "substantial experience in the practice of law," (2) Solomon's pattern of misconduct and multiple violations of the rules, and (3) Solomon's initial failure to cooperate with the ODC in its investigation of four of the eight consolidated cases. *Id.* Mitigating factors included (1) the absence of a prior disciplinary record, (2) Solomon's lack of a dishonest or selfish motive, (3) Solomon's cooperation with the ODC and full and free disclosures to the Board, (4) Solomon's physical disabilities and impairments and (5) Solomon's agreement to make restitution to several of her clients. *Id.*

Upon review of the Board's recommendation, the Court considered the nature of the duty violated, Solomon's mental state, the injury caused by the misconduct, and the aforementioned aggravating and mitigating circumstances. *Id.* at 892. Having done so, the Court approved the Board's recommended sanction with minor additions. *Id.*

It should be noted, however, that Solomon was the subject of three later disciplinary proceedings, which eventually led to the imposition of a three-year suspension on October 26, 2005. *See In re Solomon*, 886 A.2d 1266, 1271 (Del. 2005) ("Solomon's record of repeated ethical violations, notwithstanding the extraordinary limitations and safeguards imposed during her original and extended probationary periods, mandate that Solomon demonstrate her rehabilitation before she can return to active status. Consequently, we have concluded that for the protection of the public and to accomplish the other objectives of the lawyer disciplinary

system in Delaware, Solomon must be suspended from the Bar of this Court for three years beginning on March 1, 2005 and ending March 1, 2008."); *see also In re Solomon*, 870 A.2d 1189 (Del. 2005); *In re Solomon*, 847 A.2d 1122 (Del. 2004). In the course of its efforts to adjudicate the repeated violations, the Court first extended Solomon's probationary period for one year, subsequently imposed a six-month suspension, and finally imposed a three-year suspension from practice. *See In re Solomon*, 886 A.2d at 1269-71.

Based upon its review of the precedent and the facts presented herein, the Panel concludes that a suspension of six months and one day should be imposed.

In conclusion, the Panel recommends the following:

1. That Respondent be suspended for six months and one day. The Panel does not believe that automatic reinstatement after the period of suspension is appropriate. Given the drug dependency issues, and given the short track record on Respondent's ability to manage his practice in view of his ADD and ADHD issues without the aid of medication, we believe that Respondent should be required to demonstrate his fitness to practice law before being re-admitted.

2. In addition, Respondent must fully cooperate with the ODC in its efforts to monitor his compliance with the suspension order. During the period of suspension, Respondent should have no contact directly or indirectly constituting the practice of law, including the sharing or receipt of legal fees, except that Respondent be entitled to any legal fees earned prior to the date of the Court's order.

3. As soon as possible, it is further recommended that the ODC file a petition in the Court of Chancery for the appointment of a receiver for Respondent's law practice. Respondent should assist the receiver in following the directives of the Delaware Lawyers' Rules of Disciplinary Procedure. The receiver shall make arrangement as may be necessary to protect the interests of any of Respondent's clients.

4. Respondent shall pay the costs of the disciplinary proceedings in accordance with the Delaware Lawyer's Rules of Disciplinary Procedure, promptly when presented with a statement of costs by the ODC.

5. Finally, the Panel believes that should Respondent apply for reinstatement pursuant to Rule 22 of the Delaware Lawyers' Rules of Disciplinary Procedure, any such application would be strengthened if Respondent were to show a commitment to practice law in an arrangement other than as a solo practitioner and if his practice was restricted to employment

and civil rights cases. If Respondent were to practice as a solo practitioner, then the Panel we recommends that he be assigned to a practice monitor for a period of at least six months.

BOARD ON PROFESSIONAL RESPONSIBILITY

Karen L. Valihura, Panel Chair

Lisa Schmidt

Yvonne Anders Gordon

Dated: June 19, 2012