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:	§	
PETER K. SCHAEFFER, JR.,	§	No. 73, 2012
Respondent.	§	(Board Case No. 2010-0093-B)

Submitted: May 16, 2012
Decided: May 21, 2012

Before **STEELE,** Chief Justice, **HOLLAND** and **BERGER,** Justices.

ORDER

This 21st day of May 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. Respondent, through counsel, declined to file objections. Objections to the Board's Report were filed by the Office of Disciplinary Counsel. 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 February 14, 2012 (copy attached) is hereby **APPROVED**.

The Court hereby imposes a public reprimand. The Office of Disciplinary Counsel is directed to file within ten days of the date of this Order the costs of the disciplinary proceedings. Thereafter, the Respondent is directed to have all costs paid within thirty days.

The matter is hereby **CLOSED.**

BY THE COURT:

/s/ Carolyn Berger
Justice

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:	)	**CONFIDENTIAL**
	)	Board Case No. 2010-0093-B
PETER K. SCHAEFFER, JR.,	)	
Respondent	)	

BOARD REPORT AND RECOMMENDATION OF SANCTIONS

I. Procedural Background

Pending before the undersigned panel (the "Panel") of the Board on Professional Responsibility (the "Board") is a petition (the "Petition") for discipline filed by the Office of Disciplinary Counsel (the "ODC") on October 5, 2011 in Case No. 2010-0093-B against Peter K. Schaeffer, Jr. (the "Respondent"), a member of the Bar of the Supreme Court of the State of Delaware (the "Court"). Respondent, then acting pro se, filed Respondent's Answer to Petition for Discipline (the "Response") in which Respondent effectively denied most of the factual allegations and legal conclusions related to the violations alleged in the Petition.

The Board convened a hearing (the "Hearing") which was held before the Panel on November 16, 2011. The transcript of the Hearing is cited herein as "TR. __." At the Hearing, the Panel received into evidence without objection ODC Exhibits 1 through 3 which had been attached to the Petition as Exhibits 1 through 3 (TR. 13-16), a CD audio 911 recording as ODC Exhibit 4 (TR. 18), a DVD videotape as ODC Exhibit 5 (TR. 18-19), additional e-mails as ODC Exhibits 6-10 (TR. 36-37), the transcript of a proceeding in the Court of Chancery in the State of Delaware Civil Action No. 5273 (CC) (the "Chancery Action") encaptioned Gerry Gray, Esquire and Gerry Gray, Individually, Plaintiffs vs. Peter K. Schaeffer, Jr., Individually and Peter

K. Schaeffer, Jr., as owner of Peter K. Schaeffer, Jr., Inc., Defendants dated February 19, 2010 as ODC Exhibit 11 (TR. 177) and a report from the Georgetown, Delaware Police dated February 15, 2010 from Complaint 81-10-000718 as Respondent Exhibit 1. The Hearing included playing of the audio tape (ODC Exhibit 4) and the videotape (ODC Exhibit 5). The Panel heard testimony from Respondent, Gerard Francis Gray, Esquire ("Gray"), Frederick W. Iobst, Esquire, Chief Disciplinary Counsel for the ODC ("Iobst"), Mr. Bradley A. Cordrey ("Cordrey"), an employee of the City of Georgetown Police Department, and Ms. Kelly Rene Jansen, a licensed Delaware private investigator, as well as legal argument from Patricia Bartley-Schwartz, Esquire of ODC, and Charles Slanina, Esquire, who had entered an appearance on behalf of Respondent subsequent to the filing of Respondent's Response and served as counsel to Respondent at the Hearing.

Following the conclusion of the Hearing, the Panel advised that it would study the transcripts, exhibits and applicable law and advise if future proceedings relating to imposition of sanctions would be necessary.

By letter dated December 6, 2011, Richard A. Levine, Esquire, Chairman of the Panel, advised that the Panel had reached a determination that Respondent had violated the Delaware Lawyers' Rules of Professional Conduct (the "Rules") 8.4(b), 8.4(c), and 8.4(d) as alleged in Counts I, II and III of the Petition[1] and therefore the Panel wished to convene a subsequent hearing (the "Sanction Hearing") to hear testimony and/or argument from counsel with respect to the appropriate sanction that the Panel should impose upon Respondent.

The Sanction Hearing was held before the Panel on January 6, 2012. The transcript of the Sanction Hearing is cited herein as "TRSH. __." At the Sanction Hearing the

[1] The Panel determined that it did not have sufficient evidence to make a finding with respect to Counts IV and V of the Petition.

Panel heard oral argument from Respondent's counsel and ODC counsel as well as testimony from Respondent and two character witnesses (TRSH. 4) called by Respondent's counsel, James D. Griffin, Esquire and Mr. Edwin K. Speraw.

II. Factual Findings

Based on the few factual allegations of the Petition admitted by Respondent and the Panel's evaluation of the testimony received at the Hearing from Respondent and the other witnesses and the Panel's review of the Exhibits, particularly ODC Exhibits 4 and 5, the Board makes the factual findings which follow:

1. Respondent is a member of the Bar of the Supreme Court of Delaware. He was admitted to practice in 2009 (Petition in Response ¶1). At all times relevant to matters in the Petition, the Respondent was engaged in the practice of law with offices located, inter alia, at 6 North Railroad Avenue, Georgetown, Delaware (the "Building") (Petition in Response ¶2). Respondent had been previously admitted to the Bar of the State of New York in 1998 following graduation from Widener Law School (TR. 10-11). Prior to his admissions to the Bar, Respondent had freelanced for various states and territories of the United States to perform financial solvency audits and market conduct audits on insurance companies doing business or domiciled in those states (TR. 11).

2. Gray was admitted as a member of the Delaware Bar in 1989 and specializes in the area of bankruptcy (TR. 64). It is uncontroverted that Gray practiced in the same Building as Respondent and occupied two offices on the second floor of the Building, one occupied by his staff of two paralegals and the other by himself (TR. 14). The Building was owned by Georgetown attorney James D. Griffin, Esquire and leased to Respondent, who occupied a portion of the Building for his own practice with the remainder of the Building

occupied by Georgetown attorney William M. Chasnoff, Esquire (TR. 26) and Gray. While the testimony as to the professional relationship between Respondent and Gray and the legal basis under which Gray occupied his space at the Building was at variance, it is clear that as of Friday, February 12, 2010, Gray was conducting his legal practice in the Building and paying rent therefor (Respondent Ex. 1 Pages 22-23). Respondent contended that Gray was his employee at that time (TR. 13) and Gray contended that he was an independent contractor and sub-tenant of Respondent (Respondent Ex. 1, Pages 11-12).[2] There was no written partnership agreement between Gray and Respondent. (Respondent Ex. 1, Page 23).

3. As Gray was exiting the Building at the conclusion of the day on Friday, February 12, 2010 at about 7:00 P.M., he popped his head into Mr. Schaeffer's office and asked if Mr. Schaeffer wanted to grab a beer with him and Mr. Schaeffer said "No." (TR. 65). Approximately three hours later, Mr. Schaeffer directed an e-mail to Mr. Gray (ODC Exhibit 1) advising as follows:

> "Mr. Gray, effective today you are no longer associated with this firm. The locks and security codes at 5 North Railroad Avenue have been changed. Please do not attempt to enter the building at any time in the future.
>
> I left your email and calendar accessible temporarily in order that you may obtain necessary items. Email me a list to me and I will have same delivered to you by Monday, February 15, 2010."

Respondent explained that his abrupt firing of Gray and Gray's exclusion from the Building were justified by Respondent's discovery of what he considered financial reporting inconsistencies by Gray which Respondent felt exposed him to financial reporting risk (TR. 156-

[2] The uncertainty with the respect to the legalities of the relationship between Respondent and Gray is apparently the subject of litigation, inter alia, the Chancery Action and, in the Panel's view, need not be determined in order to resolve this matter.

157; 177-182) in his capacity as Gray's employer. Respondent's abrupt termination of the relationship with Gray began the chain of events that led to the Hearing.

4. Gray responded to Respondent's e-mail at 4:09 A.M. on Saturday, February 13, 2010 (ODC Exhibit 2) requesting that Respondent provide him "a week or so to retrieve my belongings and get my staff re-established." Respondent replied at 8:09 A.M. that morning requesting that Gray "Please work on the list of items you will need on Monday. Your earliest cooperation will be greatly appreciated." (ODC Exhibit 6). Gray replied at 11:44 A.M. that morning requesting that Respondent call him on his home telephone number and advising Respondent "do us both a favor and don't force a confrontation about whatever is bothering you." (ODC Exhibit 8). Gray subsequently left a phone message with Respondent and confirmed it in an e-mail at 5:08 P.M. on Saturday, February 13, 2010 as follows:

> "Just wanted to reiterate that we still have a day left if you want to talk things over. There is absolutely no reason why two adults should not be able to work out their differences, particularly where I have no idea what you are upset about.
>
> To reiterate what I left on my phone message:
>
> I am not your employee, you cannot fire me. We share office expenses and I rent out one-third of the building. I employ you to do bookkeeping. You cannot legally change the locks and keep me and my staff out of the building."

5. On Sunday morning, February 14, 2010 at 7:23 A.M., Respondent advised Gray, allegedly for a third time, to "provide a list of items he needed to minimize any interruptions in your personal and professional life" (ODC Exhibit 3). The e-mail goes on to admonish Gray "Please do not attempt to enter my office at 6 North Railroad Avenue. You have been fired. You are not welcome." and advised Gray "when you provide the list, hopefully today in order to minimize interruptions in my personal and professional life, I will tell you when and

where on Monday you may pick up what you've requested." Respondent's e-mail ended with a warning that "If I do not receive this positive response by 3:00 P.M. today, I will take lawful measures in order to keep the peace." At 12:35 A.M. on Monday, February 15, 2010, Gray sent an e-mail to Respondent advising that a partial list of items included all of his client files, his computers and software. (ODC Exhibit 10)

6. While the exchange of e-mails between Respondent and Gray was ongoing, on Sunday, February 14, 2010, Respondent contacted Kelly Rene Jansen ("Jansen"), a licensed Delaware private investigator with whom Respondent had had some previous contact (TR. 119-122; TR. 149). Respondent requested that Jansen be at the Building on Monday morning "because he was worried about what might happen if Mr. Gray appeared at the office. He just wanted a witness to be there." (TR. 123). Ms. Jansen suggested that she bring a video camera because in her experience the presence of a camera usually would serve to keep a situation from escalating because it reminds everyone that their actions will be considered by a court or another body at some later point (TR. 123). Respondent agreed (TR. 124).

7. On Monday morning, February 15, 2010, Mr. Gray went to the Building accompanied by his two paralegals, Rhonda Palmer and Maria Foulke, Ms. Foulke's husband, Ms. Foulke's teenage daughter, a friend of Ms. Foulke's teenage daughter and Ms. Palmer's 14 or 15-year old son (TR. 65). Gray and those accompanying him carried Tupperware containers and boxes to retrieve files and computers (TR. 66). Mr. Gray and the others attempted to enter the Building through the back door and the side door, each of which were locked, so they went to the front of the Building which was unlocked (TR. 66). Respondent was at the Building together with Ms. Jansen and had his cellphone out (TR. 66). ODC 5 shows that as Gray entered the

Building, Respondent stood in the doorway and Gray pushed around him, although no altercation erupted.

8. Mr. Gray and those accompanying him headed up the staircase to the second floor where there were two offices on either side of the hall, one occupied by Mr. Gray's paralegals and the other by Mr. Gray (TR. 67). Respondent retreated to the top of the stairway and was engaged in some back and forth pushing with Ms. Foulke who loudly accused Respondent of "touching" her (TR. 21). Upon hearing her accusations, Ms. Foulke's husband then ran up the stairs toward Respondent (TR. 21). Respondent claims that this course of events made him "scared to the point where I had become nauseous" (TR. 23). It was at this time that Respondent placed the 911 call which is documented as ODC Exhibit 4.

9. Respondent's phone call to 911 begins by identifying the location of the Building, first advises that there is "an emergency situation, altercation," but then repeatedly states in an elevated voice "hostage situation." (ODC 5)

10. The Panel has reviewed the audiotape and the videotape and concludes that while there was substantial confusion in the Building, at no time did the events constitute a "hostage situation." While Respondent may have reasonably believed that he was possibly going to be assaulted by Mr. Foulke or possibly cornered by Mr. Foulke in an office, there is no evidence that Mr. Foulke ever assaulted Respondent nor that Mr. Foulke nor anyone else restrained Respondent. Respondent himself testified that he characterized the incident as a "hostage situation" to speed up the police response (TR. 19; TR. 137; TR. 152). Indeed, the videotape shows that at the very time that Respondent claims to have retreated into a rear office of the Building from which there was no exit (TR. 22), Mr. Foulke is standing in the doorway of the office across the hall. The videotape further shows that within minutes of placing the 911

call, Respondent is physically unharmed and walking freely through the Building on the first floor. Indeed, Respondent conceded that there was no actual hostage situation (TR. 137; TR. 206; TR. 208).

11. Prior to the arrival of the police, Respondent, while freely walking around the Building, placed a second call to the police asking "where the hell they were" (TR. 167; TR. 182). Respondent did not advise the police during this call that his prior call repeatedly claiming a "hostage situation" was neither true at the time of his call nor had it materialized.

12. Ultimately, the Georgetown police arrived at the Building (TR. 93-94) responding with lights and sirens (TR. 139) and heavily armed (TR. 132) to what was dispatched as a hostage situation (TR. 105). Apparently seven to ten police officers from the Georgetown Police and the Delaware State Police responded (TR. 106). Because it was deemed a hostage call, some of the officers had rifles and others had semi-automatic weapons. The Delaware State Police had a tactical shotgun (TR. 106). These weapons were drawn and displayed upon the police officers' arrival at the Building (TR. 106-107). This large showing of police force was a specific response to the characterization by Respondent that the events at the Building constituted a "kidnapping" (TR. 115-116). Even Respondent was frightened by the presence of the police with drawn guns and characterized his thoughts as "I thought I was going to die." (TR. 145). The Georgetown Police Department report of the incident (Respondent Exhibit 1) reported that "Mr. Gray was detained for further investigation, without incident" and that "Mr. Schaeffer advised that he was just robbed/burglarized/assaulted."

13. While Gray was walking to the back of the Building's parking lot, a police officer came around the corner wearing full body armor and pointed an assault rifle at Gray and told him to freeze (TR. 68). Gray was subsequently pushed to the ground, handcuffed and

placed in a squad car (TR. 141) for approximately 30 minutes. Gray was subsequently taken to the Georgetown Police Department (TR. 68) as was Respondent.

14. While Gray and Respondent were at the Georgetown police station, Cordrey was in telephone contact with Iobst (TR. 40-41; TR. 108-109). Following the call with Iobst, Cordrey advised Respondent that he was going to permit Mr. Gray and his associates back into the Building to take their personal goods and their files (TR. 143). Respondent advised that he had no problem with Mr. Gray removing personal items, but had concern about files leaving the office before he could get a clarification from the ODC (TR. 143) and Respondent then spoke directly to Iobst himself (TR. 144).

15. While Respondent's recollections and Iobst's recollections of that conversation are not the same, following the discussion with Iobst, the incident concluded with Mr. Gray being permitted to remove personal items and certain files from the Building. Apparently, the remaining files were removed following a teleconference before Chancellor William B. Chandler III in the Chancery Action on Friday, February 19, 2010.

16. Apart from the differences in their recollections of the February 15, 2010 conversation between Respondent and Iobst, Respondent contends (and Iobst denies) that Respondent had a second conversation with Iobst the following day that Iobst does not recall (TR. 48-49). Because Counts IV and V of the Petition are premised on the telephone discussions between Iobst and Respondent, the Panel finds that the inconsistencies between the testimony of Iobst and Respondent relating to those telephone calls cannot be reconciled and rather than electing to resolve the differences based on evaluations of credibility, the Panel has determined not to make an adjudication with respect to the violations alleged in Counts IV and V of the Petition.

III. Standard of Proof

Allegations of professional misconduct set forth in the ODC's Petition must be established by clear and convincing evidence. Delaware Lawyers' Rule of Disciplinary Procedure ("DLRFDP") 15.

IV. Violations of the Rules

Counts I, II and III of the Petition allege that Respondent violated Rule 8.4(b) when he falsely reported to police that a "hostage situation" was taking place (Count I) in violation of 11 Del. C. §1245, that Respondent violated Rule 8.4(c) when he falsely reported to police that a hostage situation was taking place (Count II), and that Respondent violated Rule 8.4(d) when he falsely reported a hostage situation (Count III). The factual gravamen of each of the three counts is that Respondent falsely reported to the police that a "hostage situation" was taking place on February 14, 2010. The Panel has determined that, as set forth in its Factual Findings, ODC established by clear and convincing evidence (1) Respondent knowingly, intentionally and recklessly filed an exaggerated 911 report of a "hostage situation" when he knew that no hostage situation had occurred or was in fact about to occur and, in fact, did not occur, (2) Respondent's actions resulted in a foreseeable dangerous police overreaction that even Respondent claimed made him fear for his life (TRSH Ex. 1) and (3) Respondent's actions therefore constituted violations of Rules 8.4(b), 8.4(c) and 8.4(d).

Count I alleges that Respondent's actions constituted a violation of 11 Del. C. §1245, a Class A misdemeanor when, knowing the information reported was false, he reported an allegedly impending occurrence of an offense or incident which did not in fact occur (11 Del. C. §1245(3)(b)) or reported false information relating to an actual offense or incident (11 Del. C. §1245(3)(c)). Although counsel for Respondent vehemently challenged the factual basis for a

violation of 11 Del. C. §1245, counsel for Respondent did not challenge the ODC assertion that a violation of 11 Del. C. §1245 would constitute a violation of Rule 8.4(b)[3]. While the Panel is unaware of any Delaware case finding that a violation of 11 Del. C. §1245 constitutes a violation of Rule 8.4(b), the Board and the Delaware Supreme Court have held that commission of various other criminal acts constitute violations of Rule 8.4(b). *In Re Melvin, Del. Supr. 807 A.2d 550 (2002), In Re Howard, Del. Supr. 765 A.2d 39 (2000), In Re Dorsey, Del. Supr. 683 A.2d 1046, In Re Agostini, Del. Supr. 632 A.2d 80 (1993), In Re Tennenbaum, Del. Supr. 880 A.2d 1025 (2005), In Re Enna, Del. Supr. 971 A.2d 110 (2009), In Re Steiner, Del. Supr. 817 A.2d 795 (2003).* The Panel has determined that, although not baseless, Respondent's report of a "hostage situation" was a knowing and intentional exaggeration of the situation occurring on February 15, 2010. There was no hostage situation so that Respondent's report constituted a violation of 11 Del. C. §1245(3)(b) and (c). This criminal act unquestionably reflects adversely on Respondent's honesty and constitutes a violation of Rule 8.4(b). See *In the Matter of Samuel Asbell, NJ Supr. 640 A.2d 837 (1994)* (filing of a false police report in violation of New Jersey statute constitutes a violation of Rules 8.4(b), (c) and (d)) and Cf. *In the Matter of Neal L. Grossman, Mich. Supr. 211 N.W. 2d 21 (1973)* (filing of a false police report constitutes engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent's conduct in making a false report to the police also constitutes a violation of Rule 8.4(c) as alleged in Count II of the Petition since the making of that report was engaging in conduct involving "dishonesty" and "misrepresentation," two alternate grounds for violations of Rule 8.4(c). See *In Re Melvin, supra at 553*; *In Re Gielata, Dela. Supr., 933 A.2d 1249 (2007) at Page 3*; *In the Matter of Asbell, supra, at 843.*

[3] In fact, Respondent's counsel did not challenge the applicability of any of Rules 8.4(b), 8.4(c) or 8.4(d) to Respondent's alleged conduct.

Count III of the Petition alleges that Respondent's conduct violated Rule 8.4(d) which provides that it is misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Although the Panel is not aware of any Delaware case in which abuse of police resources was found to be a violation of Rule 8.4(d) as "prejudicial to the administration of justice," the Delaware Supreme Court has held that filing frivolous lawsuits, *Steiner, supra.* or other matters involving court proceedings, *In Re Abbott, Del. Supr. 925 A.2d 482 (2007)* not involving actual civil proceedings are violation of Rule 8.4(d). Violations of Rule 8.4(d) have also been found by the Delaware Supreme Court for false certifications of attorney books and records *In Re Nowak, Del. Supr. 5 A.3d 631 (2010), In Re Witherell, Del. Supr. 998 A.2d 852 (2010), In Re Otlowski, Del. Supr. 976 A.2d 172 (2009),* as well as for failures to be forthcoming with other governmental agencies such as a failure to file taxes. *In Re Mekler, 689 A.2d 1171 (1976), In Re Tos, 610 A.2d 1370 (1992), In Re Sandbach, 546 A.2d 345 (1988).* It is the Panel's view that false reporting to the police is prejudicial to the administration of justice since filing of charges with the police is often a starting place for charges in the criminal justice system. Indeed, a foreseeable result of Respondent's police call would have been initiation of criminal charges against Gray or others involved in the alleged "hostage situation." The Panel's conclusion in this regard is supported by the decision of the New Jersey Supreme Court *In the Matter of Asbell, supra.* In that case, the New Jersey Supreme Court suspended a former Camden County prosecutor who staged an assassination attempt on his own life and filed a false police report, citing Rule 8.4(d) in addition to Rules 8.4(b) and 8.4(c). *In Re Asbell, supra at 843.*

V. Sanctions

1. Objectives and Standards for Imposing Sanctions. The Delaware Supreme Court has authority and wide latitude in disciplinary matters respecting members of the Delaware bar, *In Re Howard, supra. at 42,* including wide latitude in determining the appropriate form of discipline. *In Re Steiner, supra. at 796.* The objectives of the lawyer disciplinary system are to protect the public, to protect administration of justice, to preserve confidence in the legal profession and to deter other lawyers from similar misconduct. *In Re McCann, Del. Supr. 894 A.2d 1087, 1088 (2007); In Re Doughty, Del. Supr. 832 A.2d 724, 735-736 (2003).* In formulating an appropriate sanction, the Supreme Court looks to the framework set forth in the ABA Standards for imposing lawyer sanctions (the "ABA Standards") and to relevant precedent. In making an initial determination of an appropriate or presumptive sanction, the Court begins by examining three key factors: (a) the ethical duty violated; (b) the lawyer's mental state; and (c) the extent of the actual or potential injury caused by the lawyer's misconduct. After weighing these three factors and making an initial determination of an appropriate sanction, the Court will then look at the aggravating and mitigating circumstances of the particular case to determine if the discipline should be increased or decreased. *In Re Howard, supra. at 42.* Notwithstanding that the final decision lies with the Supreme Court, it is the Board's responsibility to recommend an appropriate sanction in the first instance (DLR FDP 9(d)(iv)) and what follows is the Panel's recommendation for sanction based on the foregoing standards, legal authorities and precedent.

2. Contention of Parties and Board Recommendation. ODC recommended a sanction of a suspension of at least one year (TRSH. 35) and counsel for Respondent recommended a private admonition (TRSH. 57-58) with or without imposition of conditions

(TRSH. 56). The Panel has concluded that the appropriate sanction is a public reprimand with imposition of costs.

3. Ethical Duty Violated. Respondent's actions violated duties to the general public by breaking the law and failing to maintain the public's trust as an officer of the court. Respondent's misconduct did not implicate any duty to a particular client. Both ODC (TRSH. 25) and counsel for Respondent (TRSH. 37) contend that the matter involves a violation of the duty owed to the public. ABA Standard 5.0 provides as follows, citing Rule 8.4(b):

> "The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct."

4. Mental State. The Panel has determined that Respondent acted knowingly, intentionally and recklessly. The ABA Standards discuss mental states as follows:

> "The most culpable mental state is that of intent, when the lawyer acts with conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct, both without the conscious objective or purpose to accomplish a particular result." (ABA Standards Page 6)

In this case, the evidence supports the Panel's conclusion that Respondent's report of a non-existing "hostage situation" was intentionally made with the conscious purpose to obtain an expedited police response. Respondent's behavior was also knowing. Counsel for Respondent does not really challenge the ODC contention that Respondent acted intentionally and knowingly, but focuses on Respondent's state of mind, contending that, while perhaps intentional and knowing, Respondent's actions were not motivated to impose harm on others, but to protect himself from what he believed was impending harm (TRSH. 47) and under

circumstances that appropriately clouded Respondent's judgment (TRSH. 40). The Panel will treat these arguments of Respondent's counsel as part of its discussion of the aggravating and mitigating circumstances below.

5. Extent of Actual or Potential Injury. As a result of Respondent's actions, an overstated police response was obtained, thus burdening the resources of the State of Delaware and the City of Georgetown. The unnecessarily armed police response created fear and apprehension to both Respondent and Mr. Gray. Gray was also subject to treatment by the police that would not have been characteristic of a simple trespass or breach of the peace police complaint. While there was potential for serious injury due to the presence of armed police, fortunately no such injury occurred.

6. Presumptive Sanction. Based on the foregoing, the Panel has concluded that the presumptive sanction is either suspension as submitted by ODC in accordance with ABA Standard 5.12 or reprimand as submitted by Respondent's counsel pursuant to ABA Standard 5.13.

ABA Standard 5.12 provides that suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11[4] and that seriously adversely reflects on the lawyer's fitness to practice. The commentary to ABA Standard 5.12 provides that lawyers who engage in criminal conduct other than that described above in ABA Standard 5.11 should be suspended in cases where their conduct seriously adversely reflects on their fitness to practice. The Standards provide that a suspension can be imposed even when no criminal charges have been filed against a lawyer which is in accord with Delaware precedents cited above. However, the commentary to ABA

[4] Neither ODC nor Respondent's counsel contend that Respondent's behavior is of the type contemplated by ABA Standard 5.11 and the Panel agrees.

Standard 5.12 continues, "not every lawyer who commits a criminal action be suspended, however" and observes that "the most common cases involve lawyers who commit felonies other than those listed above, such as the possession of narcotics or sexual assault." ABA Standard 5.13 provides that reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyer's fitness to practice law. The main distinction between Standard 5.12 and Standard 5.13 appears to be the seriousness of the conduct, with Standard 5.12 focused on "criminal conduct" that "seriously adversely reflects on the lawyer's fitness to practice" and Standard 5.13 focused on "other [presumably non-criminal] conduct."

Although Respondent was neither charged with nor convicted of a crime in this case, the Panel concludes that the presumptive sanction under the ABA Standards is no more severe than suspension pursuant to Standard 5.12.

7. Aggravating and Mitigating Factors. As stated above, both Delaware Supreme Court precedent and ABA Standard 9.1 provide that aggravating (as delineated in ABA Standard 9.22) and mitigating (as delineated in ABA Standard 9.32) circumstances should be considered to increase or decrease the degree of discipline to be imposed. *In Re Bailey, Del. Supr. 821 A.2d 851, 866 (2003)* The aggravating and mitigating circumstances identified in the ABA Standards and their applicability to this matter are discussed below.

A. Aggravating Factors

(i) Prior disciplinary offenses – ODC (TRSH. 27) and Respondent's counsel agree that Respondent has no prior disciplinary offenses.

(ii) Dishonest or selfish motive – ODC contends that Respondent's actions on February 15, 2010 were motivated by the dishonest and selfish motive of attempting

to seize Mr. Gray's bankruptcy practice (TRSH. 27-28). Respondent's counsel disagrees and contends that there was a good faith dispute as to the ownership of the files (TRSH 41-42). The Panel need not determine what Respondent's intentions were with respect to matters relating to the recovery of Mr. Gray's files since the relationship between Respondent and Gray is not the basis of the ODC Petition and is the subject of civil litigation between them. Rather, with respect to the gravamen of the ODC Petition, the false report of a "hostage situation" to the police, the Panel believes that Respondent was not motivated by dishonest or selfish motives, but rather by a desire to expedite the police response, albeit improperly or recklessly.

(iii) Pattern of misconduct – ODC (TRSH. 28) and Respondent's counsel (TRSH. 45) agree there was no pattern of misconduct.

(iv) Multiple offenses – ODC (TRSH. 28) and Respondent's counsel (TRSH. 45) agree there were no multiple offenses.

(v) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency – ODC (TRSH. 28) and Respondent's counsel (TRSH. 46) agree there was no such bad faith obstruction.

(vi) Submission of false evidence, false statements or other deceptive practices during the disciplinary process – ODC (TRSH. 28) contends that there is evidence that Respondent provided false statements to the ODC in connection with the matter. Respondent's counsel (TRSH. 47) denies this. The Panel made no finding with respect to Respondent's communications with ODC and does not treat submission of false evidence, etc. as an aggravating circumstance.

(vii) Refusal to acknowledge wrongful nature of conduct – ODC (TRSH. 28) contends that Respondent's refusal to acknowledge the wrongful nature of his

conduct at the November 16, 2011 hearing is an aggravating factor despite his January 6, 2012 Hearing statements of apology (TRSH. 17) and his admission that he wished he had handled matters differently (TRSH. 16). Counsel for Respondent rejects ODC's position (TRSH. 48). The Panel recognizes that in the context of a bifurcated hearing with a spirited defense to the claims of misconduct, it would have been awkward for Respondent to have acknowledged the wrongful nature of his conduct at the November 16, 2011 hearing so that the Panel does not consider Respondent's failure to do so an aggravating circumstance.

(viii) Vulnerability of victim; Substantial experience in the practice of law; Indifference to making restitution; Illegal conduct, including that involving the use of controlled substances - Neither ODC (TRSH. 29) or Respondent's counsel argued that any of these aggravating circumstances are involved in this matter.

Based on the foregoing, the Panel finds no reason to increase the presumptive sanction of suspension.

B. Mitigating Factors

(i) Absence of a prior disciplinary record - ODC (TRSH. 27) and Respondent's counsel agree that Respondent has no prior disciplinary offenses.

(ii) Absence of a dishonest or selfish motive – As discussed in Section V(7)(A)(ii) above, the Panel has concluded that Respondent acted with an absence of a dishonest or selfish motive, but was motivated by an improper and reckless desire to expedite the police response.

(iii) Personal or emotional problems – Respondent's counsel submits that the fear, excitement and panic of the events taking place on February 15, 2010 were mitigating circumstances and a partial explanation for Respondent's exaggerated police report of

a "hostage situation." The Panel agrees that the circumstances surround Respondent's police call are a mitigating factor, although not a sufficient excuse for Respondent's actions.

(iv) Timely good faith effort to make restitution or to rectify consequences of misconduct – The Panel rejects Respondent's counsel's contention that Respondent's alleged efforts to resolve the civil matters with Mr. Gray should be treated as a mitigating factor (TRSH. 46). In fact, the Panel believes that when it transpired that Respondent was not confined to his office and that his feared hostage situation did not occur, he should have recontacted the police to advise that the "hostage situation" did not exist.

(v) Full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings – The Panel agrees with Respondent's counsel that there was no evidence presented that Respondent has been uncooperative in the course of this matter (TRSH. 46), but the Panel views that circumstance as a neutral, rather than a mitigating, circumstance.

(vi) Inexperience in the practice of law – Both ODC (TRSH. 29) and Respondent's counsel (TRSH. 46-47) agree that Respondent was inexperienced in the practice of law.

(vii) Character or reputation – The character testimony of James D. Griffith, Esquire (TRSH. 8-9) is uncontroverted. Likewise, the testimony of Edwin K. Spearow with respect to Respondent's character and public service was uncontroverted (TRSH. 11-14).

(viii) Physical disability – Although Respondent's counsel submitted that Respondent's characteristics as older and smaller than his feared attacker (TRSH. 47), the Panel has previously considered those factors in connection with its evaluation of Respondent's motives and does not treat his physical condition as a separate mitigating factor.

(ix) Mental disability or chemical dependency – These factors were not the subject of any evidence at the hearing.

(x) Imposition of other penalties or sanctions – Although Respondent's counsel pointed to the civil litigation between Respondent and Mr. Gray as a mitigating factor, the Panel does not see how those proceedings mitigate Respondent's violation of 11 Del. C. §1245.

(xi) Remorse – See discussion in Section V(7)(A)(vii) above relating to Respondent's alleged refusal to acknowledge the wrongful nature of his conduct.

(xii) Remoteness of prior offenses – Since there were no prior offenses (TRSH. 27), this factor is not relevant.

* * *

Based on its analysis of the ABA Standards, the Panel has concluded that the appropriate sanction is a public reprimand with imposition of costs. If the presumptive sanction would be suspension in accordance with ABA Standard 5.12 as advanced by ODC (TRSH. 35), the balance of the aggravating and mitigating factors would cause the Panel to reduce the sanction to reprimand pursuant to ABA Standard 5.13. If the presumptive sanction would be a reprimand pursuant to ABA Standard 5.13, as contended by Respondent's counsel (TRSH. 49), the Panel does not find that the weight of the mitigating factors would reduce the appropriate sanction to a private admonition in accordance with ABA Standard 5.14 as advocated for by Respondent's counsel (TRSH. 57-58).

The Panel will discuss the legal arguments advanced by ODC and counsel for Respondent and the consistency of the Panel's decision with prior precedent in Section VI below.

VI. Conclusion and Precedence

The Panel has concluded that the appropriate sanction is a public reprimand. The Panel's conclusion is based on the assumption that if the presumptive sanction is suspension pursuant to Standard 5.12, the weight of the mitigating factors would reduce the recommendation to reprimand pursuant to ABA Standard 5.13 or, if the presumptive sanction is reprimand pursuant to ABA Standard 5.13, the aggravating factors do not warrant an increase of that sanction and the mitigating factors do not justify a reduction of that sanction. Moreover, the Panel believes that based upon the authorities and argument presented to it by ODC and counsel for Respondent, the sanction of a public reprimand conforms to precedent both within and outside Delaware.

ODC advanced two cases from other jurisdictions dealing with making a false report to the police as precedential support for ODC's recommendation that a suspension of at least one year is the appropriate sanction. In *In the matter of Asbell, supra*, the New Jersey Supreme Court held that a two-year suspension was appropriate for violations of Rules 8.4(b), 8.4(c) and 8.4(d) where the lawyer had staged an assassination attempt on his own life and then filed a false police report regarding the false attempt. In *In Re Neisner, supra*, the Vermont Supreme Court assessed a two-year suspension plus probation as the appropriate sanction for a lawyer convicted of the crime of impeding a public officer stemming from the lawyer's conduct of leaving the scene of a car accident and then falsely reporting to the police that his wife had caused the accident. The Panel does not consider either of these cases as sound precedent for suspending Respondent. The *Asbell* case involved a well thought out and orchestrated plot over an extended period of time to which the accused attorney entered a guilty plea. In this case, the action of Respondent in reporting a "hostage situation" was spontaneous, not planned, and, of

course, Respondent was not convicted of a crime, but credibly challenged the facts underlying the charges against him, although the Panel has determined that notwithstanding his challenge, the allegations were established by clear and convincing evidence. Similarly, in *In Re Neisner*, the attorney was convicted of criminal offenses that constituted a felony.

ODC also pointed the Panel's attention to three Delaware suspension cases, namely *In Re Melvin, supra, In Re Howard, supra*, and *In Re Steiner, supra* in support of its contention that Respondent should be suspended. *In Re Melvin*, unlike the current matter which involves contested claims of a misdemeanor, involved a guilty plea to criminal misdemeanor charges in a matter that also involved alleged felony counts in connection with violations of a family court prevention from abuse order by a member of the Delaware bar. *In Re Howard* involved a three-year suspension of an attorney who pled guilty to two drug related misdemeanors where the initial charges included felonies. In the same vein, *In Re Steiner* involved a member of the Delaware bar who pleaded guilty to two counts of second degree vehicular assault and one count of driving under the influence where the original charges had included felonies.

Two other cases submitted as precedent by ODC are worthy of discussion. In *In Re Grossman, supra*, the Supreme Court of Michigan determined that a public reprimand was appropriate where the lawyer reported that his car was stolen by a mechanic in connection with a dispute between the attorney and a mechanic who performed repair services to the vehicle. Like the case of Respondent, the lawyer was not criminally charged with a misdemeanor although his actions were determined to contain the elements of a misdemeanor of filing a false police report following a contested hearing. The final case cited by ODC, *In Re Gielata, Del. Supr. 933 A.2d 1249 (2007)* involved imposition of a public reprimand against a member of the Delaware bar

who following a contested hearing a panel of the Board on Professional Responsibility had determined violated Rules 8.4(b), 8.4(c) and 8.4(d) in connection with a scheme by the attorney and a friend to sell paintings to one another via the PayPal service and to then make claims against the company under the company's money-back guarantee. The Panel believes that the decisions in *In Re Grossman* and *In Re Gielata* support imposition of a public reprimand against Respondent.

At the January 6 hearing, counsel for Respondent pointed the Panel to several Delaware disciplinary cases imposing private admonitions for cases involving false notarizations as well as numerous other cases involving imposition of private admonitions for actions that were either adjudicated to be or were characterized as misdemeanors. Because these cases are not reported, it is difficult to weigh their precedental value, but the descriptions offered up by Respondent's counsel suggests that the circumstances of those matters, unlike the situation involving Respondent, did not involve the risk of serious harm to third parties.

* * *

Based on the foregoing considerations, the Panel recommends to the Court as action of the Board that the sanction of a public reprimand be imposed upon Respondent together with the imposition of costs of these disciplinary proceedings pursuant to Disciplinary Procedural Rule 27.

Dated: February 8, 2012

BOARD ON PROFESSIONAL RESPONSIBILITY

Richard A. Levine

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