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:	§	
JOHN M. MURRAY,	§	No. 223, 2012
Respondent.	§	(Board Case No. 2011-0170-B)

Submitted: June 13, 2012
Decided: June 18, 2012

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

ORDER

This 18th day of June 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 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 April 25, 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

ATTACHMENT

EFiled: Apr 25 2012 3:53PM EDT
Filing ID 43892135
Case Number 223,2012

Susan H. Kirk-Ryan
302 Brockton Road
Wilmington, Delaware 19803

CONFIDENTIAL

April 25, 2012

Patricia Bartley-Schwartz, Esquire
Office of Disciplinary Counsel
Carvel State Office Building
820 N. French Street, 11th Floor
Wilmington, DE 19801

Eugene H. Bayard, Esquire
Wilson, Halbrook & Bayard
107 West Market Street
P.O. Box 690
Georgetown, DE 19947

Re: **In the Matter of a Member of the Bar of the Supreme Court of Delaware: John M. Murray, Respondent; Case No. 2011-0170-B**

Dear Counsel:

Enclosed please find the recommendation of the Board on Professional Responsibility in the above-captioned matter.

Very truly yours,

Susan H. Kirk-Ryan

cc: Mr. Steven D. Taylor, Court Administrator (w/enclosure)
Karen L. Valihura, Esquire (w/enclosure)
Yvonne Anders Gordon, Ed.D. (w/enclosure)

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, JOHN M. MURRAY, RESPONDENT	)))))	**CONFIDENTIAL** Board Case No. 2011-0170 B

BOARD REPORT AND RECOMMENDATION OF SANCTION

I. Procedural Background

On November 2, 2011, the Office of Disciplinary Counsel ("ODC") filed a Petition for Discipline in Board Case No. 2011-0170 B ("Petition") in the matter of John M. Murray ("Respondent"), a member of the Bar of the Supreme Court of Delaware. The Petition alleged violations of Rules 3.4(c), 3.5(d), 6.2 and 8.4(d) of the Delaware Lawyers' Rules of Professional Conduct ("Rules").

The Respondent filed an Answer in response to the Petition on November 22, 2011, requesting findings that no violations of the above Rules occurred, and requesting that ODC's petition be dismissed.

The hearing was originally scheduled for Wednesday, December 14, 2011, but was rescheduled at the request of counsel for Respondent, for medical reasons.

A panel ("Panel") of the Board on Professional Responsibility ("Board") convened and the rescheduled hearing took place on Monday, January 23, 2012. Patricia Bartley Schwartz, Esquire, represented ODC, and Eugene H. Bayard, Esquire, represented the Respondent.

At the beginning of the hearing, the ODC and Respondent, through counsel, presented a joint submission of Exhibits (Exhibits will be referred to hereafter by the number assigned in the joint submission). During the hearing, ODC offered Exhibit 23 (a March 11, 2008, letter from Chief Judge Kuhn) which was entered without objection. Counsel also submitted copies of case law to which they referred in closing arguments.

The panel heard testimony from the following witnesses: Kelly Dunn Gelof, Esquire; and John M. Murray, Esquire, 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. Findings of Fact

The allegations center on three occasions where the Family Court in Sussex County appointed the Respondent, an attorney practicing in Sussex County, to serve as counsel in Family Court matters. The critical facts involve the correspondence between the Respondent and the Family Court regarding those appointments. ODC and the Respondent stipulate that the correspondence was exchanged. The language of the correspondence on both sides is material to the consideration of whether violations occurred in this disciplinary matter. The names of clients for whom appointment was sought are replaced in this Report with the symbol "[]."

1. The Respondent is a member of the Bar of the Supreme Court of Delaware, and was admitted in 1995. At all relevant times, the Respondent was engaged in the private practice of law in Sussex County, Delaware.
2. The Respondent represented a client in Family Court on May 13, 2009, and received a note of appreciation from the client on May 14, 2009. (Exhibit 1).

3. On November 24, 2009, the Respondent was appointed by Judge John E. Henriksen of the Family Court of Sussex County to represent an adult in a guardianship proceeding, scheduled for trial on April 7, 2010. (Exhibit 2). The Appointment letter advised the Respondent that he could apply to the Court for counsel fees, and that he could "designate another member of your firm to represent the person specified by notification to the party and to the Court." The Court further stated, "If you have any legally cognizable reason why you cannot represent the party indicated, please advise the undersigned."

4. On December 20, 2009, the Respondent wrote Judge Henriksen, stating (Exhibit 3):

> Kindly note that my practice is primarily devoted to corporate/entity matters, business transactional matters and certain tax matters. []'s legal needs, in this matter, would best be served by counsel with experience in guardianship proceedings and with counsel that has specific knowledge of the Family Court procedural and legal issues confronting [].
>
> If Your Honor still requires that I represent [], I respectfully request that the Court disclose to [] the following:
>
> a. [Respondent] informed the Court that his practice is primarily devoted to corporate/entity matters and business transactional matters and tax matters.
> b. [Respondent] informed the Court that he believes that []'s legal needs, in this matter, would be best served by counsel experienced with the Family Court procedural and legal issues confronting [] including, but not limited to, trying a case in Family Court connected with []'s legal issues.
> c. [Respondent] informed the Court that he believes it is in []'s best interest to have counsel with specific and significant experience in handling petitions for guardianship to represent him in this matter.
> d. [Respondent] asked the Court, on behalf of [], that counsel with experience with these types of matters be appointed.
> e. Noting the above disclosures by [Respondent], the Court nonetheless requires [Respondent] to represent [] in this matter.

The Respondent then noted that he would be "unavailable for the next couple of weeks."

5. On January 4, 2010, Judge Henriksen wrote the Respondent (Exhibit 4):

> With the presumption that you have been admitted to practice before the Delaware Bar, I must deny your request to be relieved from your appointment. In addition, I do not intend to comply with any of the other requests in your letter...
>
> We have several attorneys who do not practice family law, or any trial type of law, who have diligently, appropriately and graciously accepted their appointment as part of the long tradition of the Delaware Bar. Many of those same attorneys have found the work to be very gratifying. We have had two attorneys surrender their license to practice law in the State of Delaware rather than undertake this representation. Finally, and another alternative you may wish to pursue, is to contact attorneys who regularly deal in this area who might be willing to substitute themselves as counsel for you for a certain fee. I happen to know that Ashley Oland, Esquire and Patrick Vanderslice, Esquire have accepted cases from other attorneys such as yourself in the past. (Exhibit 4)

6. The Respondent sent a March 4, 2010, letter, via certified mail, to Judge Henriksen (Exhibit 5), stating:

> I apologize for my failure of expression, but I mistakenly thought Your Honor would understand the purpose of my December 20, 2009 letter was to protect [].
>
> I respect Your Honor's opinion, but a substantial portion of Your Honor's letter is not relevant to protecting [] in Family Court....statements that other lawyers have (a) "found the work to be very gratifying" and (b) "graciously accepted their appointment" are not germane to protecting [].
>
> With my December 20, 2009, letter, I disclosed to Your Honor that my primary practice does not include any family law, and that you are assigning a matter to counsel inexperienced with Family Court matters who does not have the time nor the resources (I am a solo-practitioner) to properly represent [].
>
> I will make the same disclosures to [] by providing him...a copy of (a) my December 20, 2009, letter, (b), your January 4, 2010 reply, (c) this letter, and (d) any response you provide once I have []'s mailing address and phone number, which I previously requested from your Honor... To date, this basic information...has not been provided....
>
> It appears that Your Honor does not know whether I am admitted to practice in Delaware – "With the presumption that you have been admitted to practice before the Delaware Bar" – I am.

> [P]erhaps in your reference to tradition, Your Honor has oversimplified []'s Family Court interests.
>
> In sum, it is not fair to [] to point to (a) the grace of other attorneys, (b) feelings of gratitude... and/or (c) tradition to support or justify Your Honor's appointment of inexperienced counsel.

In footnotes to the same letter, the Respondent adds:

> Although I have very limited experience with Your Honor...Your Honor may recall a case where I became involved after your initial judgment, where Your Honor convicted an unrepresented 13 year old of a felony (in violation of her constitutional right to counsel) stating on the record, incorrectly, that the 13 year old was represented by counsel. I submitted a post-conviction letter to Your Honor identifying these and other facts. Your Honor subsequently recognized his mistake and vacated/reversed the judgment.
>
> Even though a foot surgeon and brain surgeon are both doctors, you would not want a foot surgeon to perform your brain surgery. The elementary principal – if you don't know it, don't do it – should apply. For []'s protection, a business lawyer who does not practice family law should not be representing [] in Family Court.

(Ultimately, the Respondent represented the client until the conclusion of the Family Court matter in 2010. T-37.)

7. On June 11, 2010, Judge Jones of Family Court in Sussex County wrote the Respondent, commending the Respondent for his work on a different client's behalf as a guardian *ad litem* in Family Court since September 2005. (Exhibit 6).

8. On January 3, 2011, the Respondent was appointed by Family Court Commissioner Sonja T. Wilson to represent a juvenile in a criminal matter (Unlawful Sexual Contact 3^{d}) scheduled for trial on January 18, 2011. The appointment letter advised that the Respondent could apply for counsel fees, and could designate another member of the Respondent's firm to represent the client. (Exhibit 7).

9. On January 10, 2011, the Respondent sent a letter, via fax, to Commissioner Wilson, requesting to withdraw as counsel (Exhibit 8), stating among other things:

I have no experience in juvenile delinquent and/or juvenile criminal matters. My practice is primarily devoted to corporate/entity matters and business transactional matters.

[]'s legal needs, in this matter, would be best served by counsel that has specific experience with (a) criminal matters, (b) cases involving "unlawful sexual contact third", and (c) the Family Court procedural and substantive legal issues confronting [].

I am a solo-practitioner that does not have the resources nor the time to properly represent [] in this Family Court criminal matter. I am not available, nor could I be prepared for this Trial, on January 18, 2011 at 9:00 am.

If Your Honor still requires that I represent [], I respectfully request that (i) the record reflect, and (ii) the Court disclose to [] the following:

a. [Respondent] informed the Court that his practice is primarily devoted to corporate/entity matters and business transactional matters.
b. [Respondent] informed the Court that he has no experience with defending anyone in a Family Court criminal case, and that he has never defended anyone charged with "Unlawful Sexual Contact."
c. [Respondent] informed the Court that he has no experience in juvenile delinquent and/or juvenile criminal matters, including, but not limited to, trying a criminal case involving these issues.
d. [Respondent] informed the court that he believes it is in []'s best interest that [] be represented by counsel that has experience with (a) criminal matters, and (b) cases involving allegations of "unlawful sexual contact third", and (c) the Family Court procedural and substantive issues confronting [].
e. [Respondent] asked the Court, on behalf of [], that counsel with experience in these types of matters be appointed.

Request to Withdraw as Counsel – For the above stated reasons, I request that I be permitted to withdraw as counsel.

10. The Family Court denied the Respondent's Motion to Withdraw on January 12, 2011, via fax (Exhibit 9). The facsimile included a handwritten notation: "Motion denied – [Respondent] may find someone to substitute for him – Commissioner Holloway. If more time is needed, may request continuance"

11. The Respondent sent a January 13, 2011, letter via fax to Commissioner Holloway (Exhibit 10), informing the Commissioner that the Respondent spoke with the defendant's mother, telling her that the Respondent's practice is devoted to business...matters, that he has "no experience representing any party in a (a) criminal matter, or (b) Family Court criminal matter with allegations of unlawful sexual contact third degree." Citing "the Family Court's late notice of appointment," the Respondent told the Court that he read to the client's mother the Respondent's January 10 letter to the Court "and informed her that you denied my request to withdraw." The Respondent continued:

> As your Honor did not provide any reasons or justifications for the appointment of inexperienced counsel when responding to my request to withdraw, [the defendant's mother], on behalf of her son, respectfully requests that your Honor provide specific relevant and supported reasons in writing for your appointment of inexperienced counsel to represent her son.
>
> > [The defendant's mother] would specifically like to know how it is in the best interest of her minor child for your Honor to appoint an attorney with no experience with cases involving allegations of unlawful sexual contact third degree to represent her son in Family Court? [Emphasis in original text]

The Respondent then requested a 30 day continuance. In a footnote, the Respondent repeated for Commissioner Holloway the "foot surgeon/brain surgeon" theme from Respondent's March 2010 letter to Judge Henriksen (Exhibit 5):

> Even though a foot surgeon and brain surgeon are both doctors, you would not want a foot surgeon to perform your brain surgery. The elementary principle – if you don't know it, don't do it – should apply. For []'s protection, a business lawyer who does not practice family law or criminal law should not be representing [] in Family Court.

12. In a January 14, 2011, handwritten notation on the cover page of the Respondent's fax to the Court, the Court wrote, "Reschedule/Reappoint." (Exhibit 11).

13. On January 21, 2011, Commissioner Holloway directed correspondence from the January 2011 appointment, as well as correspondence from Judge Henriksen's 2009/2010 appointment, to ODC, noting that Respondent was permitted to withdraw from the January 2011 appointment since the "well had been poisoned." Commissioner Holloway noted the referral to ODC was prompted by the fact that her experience was not the first time that the Respondent had communicated with the Court in the manner he did. The Commissioner hoped the Respondent could be "educated about the appointment process so that this does not occur again, in the likely event that he is again appointed." (Exhibit 12).
14. On February 11, 2011, ODC informed the Respondent of the Family Court referral to ODC (Exhibit 13).
15. On February 24, 2011, counsel for Respondent replied on Respondent's behalf to ODC. (Exhibit 14).
16. On March 11, 2011, the Chief Judge Kuhn appointed the Respondent to serve as counsel in a Family Court criminal matter in Sussex County (Arraignment for Gun Court – Possession of Firearms by a Person Prohibited, Theft of Firearms, and Conspiracy Second Degree). The appointment letter advised the Respondent that he could designate another member of his firm to represent the client. (Exhibit 15).
17. On March 16, 2011, the Respondent wrote via fax (Exhibit 16) to Judge Henriksen, who was to preside over the criminal Family Court matter. The Respondent noted that he received the appointment information, including a 26-page fax, on March 16, 2011, for an arraignment the next day.

The Respondent added, in a letter substantially similar to his prior letters seeking to be relieved of appointment (only the italicized portions of the letter differ from the previous letter seeking relief from appointment):

> I have no experience *trying a criminal matter in Gun Court*. My practice is primarily devoted to corporate/entity matters and business transactional matters.
>
> []'s legal needs, in this matter, would be best served by counsel that has specific experience with (*i*) criminal matters, (*ii*) cases involving *allegations of: possession of a firearm by a person prohibited, theft, and conspiracy second degree*, and (*iii*) the Family Court procedural and substantive legal issues confronting [].
>
> I am a solo-practitioner. *I do* not have the resources nor the time to properly represent [] in this Family Court criminal matter. I am not available *on March 17, 2011, and I could not* be prepared for this matter *with the short notice given.*
>
> If Your Honor still requires that I represent [], I respectfully request that (i) the record reflect, and (ii) the Court disclose to [] the following:
>
> a. [Respondent] informed the Court that his practice is primarily devoted to corporate/entity matters and business transactional matters.
> b. [Respondent] informed the Court that he has no experience with defending anyone in a Family Court *gun* case, and he has never defended anyone charged with *(i) possession of a firearm by a person prohibited, (ii) theft, and (iii) conspiracy second degree.*
> c. [Respondent] informed the Court that he has no experience *with the legal issues confronting []*, including, but not limited to, trying a criminal case involving these issues.
> d. [Respondent] informed the court that he believes it is in []'s best interest that [] be represented by counsel that has experience with (*i*) criminal matters, and (*ii*) *the specific charges [] is facing*, and (*iii*) the Family Court procedural and substantive issues confronting [].
> e. [Respondent] asked the Court, on behalf of [], that counsel with experience *with []'s legal issues* be appointed.

Then the Respondent takes a new tack, by pointing out to Judge Henriksen the ODC matter now pending, saying that Commissioner Holloway had filed the complaint and had forwarded letters from Judge Henriksen to the ODC. Respondent then stated:

Although I do not know the extent of your involvement in the ODC matter, I will inform [] of Your Honor's participation. [] can then consider this information and determine its relevance. He may conclude Your Honor's role in the ODC matter is evidence of a conflict.

Under these circumstances, I do not believe it is (i) in the best interest of [] for me to represent him before Your Honor, and/or (ii) appropriate for me to appear in Family Court or before Your Honor while the ODC's evaluation is pending.

I believe the Court will want to avoid even the appearance of a conflict.

Request to Withdraw as Counsel

As is my practice, I will disclose to [] my areas of expertise and my lack of experience (in this case, I have no experience) with the Family Court criminal issues confronting []. I respectfully submit that this appointment is not in the best interest of the minor. ...

Request for Continuance

If Your Honor denies my request to withdraw as counsel, on []'s behalf, I request a 35 day continuance...

Alternate Way to Assist the Court

Instead of being assigned cases in matters where I have no experience or expertise, I would be glad to discuss a possible alternate way that I might be able to assist the Family Court within my area of expertise after the ODC matter is resolved.

Represented by Counsel

I am represented by Eugene F. Bayard, Esq..... Until the ODC matter is resolved, please send all future correspondence to Mr. Bayard.

18. On March 23, 2011, the Respondent wrote the client's mother (Exhibit 17), confirming a meeting the Respondent held with her and the client. The Respondent repeated in writing to the client's mother disclosures he had made to them in a meeting on March 17, 2011:

> I disclosed to you and your son that I am a business transactional lawyer and that my practice is primarily devoted to corporate/entity matters. I also disclosed that

I have no experience with the Family Court (i) legal, and (ii) procedural issues confronting your son; and that I have no experience in trying a Gun Court case.

In the office conference with Chief Judge Kuhn, I made the same disclosures and requested that counsel with experience with the legal and procedural issues confronting your son be appointed.

I informed you that Chief Judge Kuhn denied my request to withdraw. Chief Judge Kuhn added that she would assign a lawyer to work with me on your son's case.

Telephone Call

On March 22, 2011 you called indicating that you spoke with someone at the Family Court about having other counsel appointed...

You indicated that you were going to write the Court to express your concerns. I informed you that as of March 22, 2011, I had not heard from Chief Judge Kuhn with respect to the lawyer she was going to have work with me on this case.

On March 23, 2011, I received a call from Chief Judge Kuhn's secretary. She indicated that Bruce Rogers, Esquire will serve as my mentor on your case. I do not know the extent of his involvement as a mentor. ...

[The Respondent asks the client's mother to provide further documentation for the case].

19. The Respondent wrote Chief Judge Kuhn on March 30, 2011 (Exhibit 18), advising her that

On March 17, 2011, I disclosed to [] and his mother my areas of expertise and the fact that I do not have any experience with the Family Court legal and procedural issues confronting her son. I also disclosed to [] and his mother that I have no experience in trying a Gun Court case.

Office Conference
I informed [] and her son that during the office conference on March 17, 2011, Your Honor denied my request, on [], to have counsel with the requisite experience represent [] and that you denied my motion to withdraw.

I also informed [] that you were going to assign counsel that has experience with the legal and procedural issues confronting her son to work with me on his case.

I brought to your Honor's attention a conflict issue connected with a pending ODC matter. Your Honor asked about the conflict. ... You stated, why was a

complaint even filed with the ODC if the motion to withdraw was granted. I agreed with your point.

Telephone Call from []
On March 22, 2011,...I reminded [client's mother] that Your Honor was going to assign someone to work with me...I informed [client's mother] that as of March 22, 2011, you had not yet had the opportunity to assign another lawyer to work with me.

March 23, 2011 Call
On March 23, 2011...I was informed that you spoke to Bruce A. Rogers, Esquire, and that you asked him to serve as my mentor.

Please note that in the documents I received from the Family Court on March 16, 2011, there is a letter from Mr. Rogers...indicating that he had a conflict in the [] matter.

March 28, 2011 Call
I called [] on March 28, 2011... [] informed me...that she retained Eric Mooney, Esquire to represent her son. ...

If acceptable to Your Honor, please allow this as notice of (i) substitution of counsel, and (ii) my termination of the attorney-client relationship with [].

20. ODC submitted, without objection, a March 11, 2008, letter from Chief Judge Chandlee Johnson Kuhn to Justice Henry duPont Ridgely, seeking to extend the Family Court's method of appointing attorneys for Family Court matters in New Castle County from the list of attorneys practicing in New Castle County, noting the "method is utilized by the Family Court in Kent and Sussex County and has worked well." (Exhibit 23)

21. Hearing Testimony of Kelly Dunn Gelof, Esquire

Counsel for ODC called Kelly Dunn Gelof, Esq., an attorney practicing in Sussex County, to speak about the mandatory appointment of counsel process in Sussex County.

Counsel for Respondent made a continuing objection to Ms. Gelof's testimony, on the basis that the testimony was "outside the four corners of the charging document,"

and was "extraneous," although at the same time he had "no objection to [Ms. Gelof's] testimony beyond that. It's information the Panel needs." T-9.

The Panel allowed the testimony, giving it appropriate weight.

Ms. Gelof testified from her experience as a private practitioner and co-manager of a personal injury firm of nine attorneys. Ms. Gelof said that a Family Court judge typically appoints an attorney by letter, at which time her firm does a conflict check and alerts the Court if a conflict arises. T-11. If there is no conflict,

> it is our understanding that if we are appointed by the Court, that we then take on that appointment. Even if it's not something that we've ever done before or are familiar or feel comfortable with, because the Court has appointed us to do that because they didn't have a conflict attorney available or for whatever reason they need representation.
>
> ...it's our understanding that we are able to bill at a significantly reduced amount per hour. ...[t]hat's just something that we accept and do because ...over the 15 and a half years that I've been in Sussex County, that's how it's been done and presented to us. T-12.

Ms. Gelof said that attorneys seek guidance from other experienced attorneys. T-13. She said she has been appointed about four times in 15 years. T-21. Ms. Gelof said she understands that she could seek counsel on her own to take her place, either from within or outside of her firm, so long as the attorney was admitted in good standing in Delaware. T-14.

> And my understanding is, again, that I take on the appointment and don't put it back on to the Court for them to find someone else. I take it on whether it's me or another attorney. T-14.

Ms. Gelof estimated that in the last three years, her firm has been appointed once or twice a year, and that individuals might get called once "every couple of years." T-17. Ms. Gelof recalled being appointed to a Superior Court case where a defendant faced serious charges, and no one in her firm was familiar with that level of a criminal matter,

but she took on the case: "That's something you take on and find a way to get your information to adequately defend that person." T-18-19. Ms. Gelof added, "I'm not familiar with anything within the Family Court that any of my attorneys within our firm would not be able to seek out some assistance to help." T-20.

Ms. Gelof testified that if no one in the firm could handle a Family Court matter, "we have given that case or requested that another attorney outside our firm handle that and we've been able to...make our own arrangements... And whether it's them accepting the minimal amount per hour...or if we agree to pay them from our own firm the difference...it is my understanding we are allowed to do that." T-22-23.

Ultimately, while the Panel appreciates Ms. Gelof's appearance and testimony, that testimony was not critical to the Panel's decision. The Respondent conceded that he was aware of the Sussex County Family Court mandatory appointment process and its obligations, that his requests to withdraw would likely be denied, and that he was advised expressly on numerous occasions – both in appointment letters and in direct communications from the Family Court - that he could avail himself of substitute counsel or the assistance of other attorneys to help him with representation.

22. Hearing Testimony of John M. Murray, Esquire (Respondent)

The Respondent testified that he was admitted to the Delaware Bar in 1995, and is also admitted in Massachusetts, New Jersey and Pennsylvania. He practices out of his home in Sussex County, doing business transactional work with small corporate clients and some contract work. The Respondent said "probably a majority of the time has been on other than legal matters." The Respondent, whose letterhead titles himself as "John M. Murray, Esquire, C.P.A.," is not active as a C.P.A. T-29.

The Respondent acknowledged representing a client in 2009, pursuant to a Family Court appointment over parental rights, where the client was convicted in Superior Court of sexually abusing his stepdaughter. T-29-30. The Respondent was familiar with the Family Court appointment process. T-31.

The Respondent acknowledged receiving a November 24, 2009, Notice of Appointment from Family Court, and writing the Court on December 20, 2009, asking the Family Court to withdraw its appointment of the Respondent and to appoint another, more experienced lawyer. T-31.

The Respondent acknowledged that in denying the Respondent's request, Judge Henriksen suggested that the Respondent find another lawyer to handle the appointment (the Court suggested two attorneys, Ms. Oland and Mr. Vanderslice. Exhibit 4). The Respondent said that he did not seek alternative counsel. He said in one of the three appointments at issue in this ODC matter, he contacted a former contract attorney, Ms. Cooper, who quoted an hourly fee of $250.00 to handle the case. Ms. Cooper was the only attorney he contacted. T-33.

The Respondent said that he does not accept a lot of matters outside his limited, narrow area of expertise, and he is concerned with the client's right to effective assistance of counsel. T-36.

The Respondent said that ultimately, he represented the client for whom he was appointed on November 24, 2009, to its conclusion. T-37.

The Respondent acknowledged his appointment by the Family Court to serve as a Guardian ad Litem for a 13 year-old foster care case, with hearings in Family Court about twice a year for over four and a half years. T-39-40. Pursuant to that case, the

Respondent sought and obtained post-conviction relief for his client's conviction of a criminal charge in Family Court. T-37-38.

The Respondent acknowledged receipt of a January 3, 2011, Family Court Notice of Appointment (Exhibit 7), and of writing his January 10, 2011, letter (Exhibit 8) seeking to withdraw as counsel. T-40-41. The Respondent acknowledged that in denying his request, the Commissioner included a handwritten note (Exhibit 9) stating that the Respondent could find someone to substitute for him, and that if he needed more time he could request a continuance, but he did not seek alternative counsel (Respondent sought alternative counsel in one of these three matters in which he asked to be relieved of his appointments). T-45.

The Respondent did not seek the advice of any other attorney as to what he should do as a result of the Commissioner's denial of his request to withdraw. T-45.

The Respondent said the purpose of his January 13, 2011, letter (Exhibit 10), after the Respondent's disclosure to the client's mother that he had "no expertise in ever handling an individual accused of unlawful sexual contact, and...had never tried a case in Family Court," T-46, was to "set forth in the record the mother's concerns with the appointment of inexperienced counsel for her 14-year-old minor child, who, if convicted, would have to register as a sex offender." T-46-47.

The Respondent said he was not expecting the Court to grant his motion to withdraw. T-47. Other counsel was appointed, however. T-49.

The Respondent acknowledged receipt of a March 11, 2011, Notice of Appointment from Family Court (Exhibit 15), and that he requested leave to withdraw as counsel on March 16, 2011 (Exhibit 16). The Respondent acknowledged some similarity

in the basis on which the Respondent requested that alternative counsel be appointed. ODC clarified that it was how the Respondent handled the appointments, not the substantive issues behind the appointments, which are at issue. T-52.

The Respondent estimated that he was appointed by the Family Court in five to seven matters, over a period of about five years, one of which lasted over four and a half years. T-53. The Respondent served his appointments in five cases, and he was relieved of his appointments in two cases. T-54.

The Respondent pointed out that he had offered to discuss an alternate way to assist the Court (Respondent's March 16, 2011, letter, Exhibit 16), but nothing has gone further than his offer. T-55.

The Respondent said his March 30, 2011, letter to Chief Judge Kuhn (Exhibit 18), was intended to inform the Court that the Respondent spoke to the defendant's mother, who said she had retained private counsel, and he was now asking to be excused. The Respondent said that Judge Kuhn had offered to find someone to help the Respondent, and that his communication with the proffered attorney was brief, since it was shortly before the client's mother told the Respondent she had found other representation. T-55-57.

On cross-examination by his counsel, the Respondent said he had less than 24 hours between his receipt of the Family Court appointment of counsel and the client's scheduled arraignment. T-58.

The Respondent said that he did not knowingly refuse to accept the appointments of January 2011 or March 2011. He said that he moved to withdraw, although he did not

expect his motions to be granted, and he also asked for a continuance in each case. T-58-59.

The Respondent said he did not make "repeated requests to withdraw," in that he only made one request in each case. T-59-60.

The Respondent said he did not intend to be disruptive, undignified, or discourteous, T-60, and that he did not seek to avoid appointments by the Court after his motions were denied. T-60. As he did not expect his withdrawal motions to be granted, the Respondent said he also asked for continuances and for documents in each case. T-60-61.

The Respondent said his concern was that his clients be given proper representation, he apologized for any improper tone in his correspondence, and said he meant no disrespect. T-62.

The Respondent conceded that he had handled five matters in Family Court, and that in each of these cases he sought to be relieved from appointment. T-63. In fact, in all seven matters in which he received a Family Court appointment, the Respondent wrote the Court seeking to withdraw. T-67.

The Respondent said that he prepared adequately for the cases he completed, and did "the best I could for the client." T-68-69.

The Respondent acknowledged that the Family Court appointments all involved indigent clients. T-72-73. Once the Family Court has denied the Respondent's motion to withdraw as counsel, the Respondent said, he meets with the client and "I disclose my background, my experience, and if the issue is something I've never dealt with in these

three particular appointments, I say I have no experience [for example] I never represented anyone with seven felony counts, so I tell them that." T-73.

The Respondent said he considers the matter in each case, but "I have no practice in Family Court and never have." T-75. The Respondent said that if he were appointed by the Family Court "to a case involving business transactional work, evaluation work," he could proceed in Family Court without asking to be relieved of his appointment. The Respondent said that he understands child support is "complicated," but he would be "comfortable doing something like that." T-76.

The Respondent said that in hindsight, he would change anything in his letter that was perceived as "improper tone." T-76.

The Respondent conceded that he has gained some Family Court experience by serving five of his appointments to completion. T-77. Some of the appointments were completed before the three cases at issue here. T-79-80. However, he said, "I've not had one where it was the exact same issue." T-78.

The Respondent said that he does not litigate in courts, that his work is commercial or business transactional. T-82. He acknowledged, however, that he was lead counsel in a class action suit in Superior Court against Blue Cross/Blue Shield, and that he did most of the work in the case, including an appeal to the Supreme Court. T-82-83. When asked by ODC if he ever advised his class action clients that he was not a litigator and did not ordinarily practice in Superior Court, the Respondent said he believed he did, but he was very comfortable with the substantive issues in that case. T-83. The Respondent agreed that in addition to having Mr. Bayard as co-counsel in the

class action, he sought the assistance of the public defender, and he knew he could get help from other attorneys when he needed it in litigation. T-83.

COUNT ONE: The Panel does not find that Respondent Knowingly Disobeyed an Obligation under the Rules of Family Court in Violation of Rule 3.4 (c).

The Panel finds that ODC did not establish by clear and convincing evidence that the Respondent refused to accept the appointments in the January and March 2011 matters (ODC does not argue that Respondent refused to accept the November 2009 appointment, as the Respondent ultimately represented the client in that case). There is certainly a good argument that the Respondent constructively refused the appointments, by presenting his abilities as an attorney in such a poor light to his clients as to cause them to seek other representation. Technically (albeit weakly in the face of the rest of the Respondent's correspondence with the Court), the Respondent requested documentation and continuances in both cases, a nominal sign of his willingness to proceed. The documentation and continuance requests appear insincere at best when coupled with the Respondent's demand that the Court put "on the record" that the Court insisted on the Respondent's appointment despite his lack of experience and despite the clients' wishes, and where, in March 2011, the Respondent suggested the Court was involved in a possible conflict itself.

The Respondent's conduct falls more clearly under other rule violations, and the Panel does not find, by clear and convincing evidence, a violation of Rule 3.4 (c).

COUNT TWO: The Panel Finds the Respondent Violated Rule 3.5 (d) by Engaging in Conduct Intended to Disrupt a Tribunal and Engaging in Undignified or Discourteous Conduct That is Degrading to a Tribunal.

The Panel finds the ODC established by clear and convincing evidence that the Respondent engaged in conduct intended to disrupt a tribunal, and in undignified or discourteous conduct that is degrading to a tribunal.

1. The November 24, 2009, Appointment

In his December 20, 2009, letter (Exhibit 3) to Judge Henriksen seeking to be excused from his November 24, 2009 Appointment (Exhibit 2), the Respondent states:

> If Your Honor still requires that I represent [], I respectfully request that the Court disclose to [] the following:
>
> a. Mr. Murray informed the Court that his practice is primarily devoted to corporate/entity matters...
>
> b. Mr. Murray informed the Court that he believes []'s legal needs, in this matter, would best be served by counsel experienced...
>
> c. Mr. Murray informed the Court that he believes it is in []'s best interest to have counsel with specific experience...
>
> d. Mr. Murray asked the Court, on behalf of [], that counsel with experience...be appointed.
>
> e. Noting the above disclosures by Mr. Murray, the Court nonetheless requires Mr. Murray to represent [] in this matter.
>
> Please note that I will be out-of-state and unavailable for the next couple of weeks.

By this first letter, the Respondent already ignored the Court's provision in the 11/24/09 Appointment Letter that the Respondent himself could obtain substitute counsel. At the same time he is attempting to put back on the Court the burden of finding alternate counsel, the Respondent makes the unsubtle request in advance of the

Court's ruling that if the Court persists in appointing him, the Court should put on the record and disclose to the client that the Respondent does not have the proper experience or background, and that while the Respondent asked the Court to appoint someone else, the Court nonetheless made the Respondent represent the client.

The Court denied the Respondent's request on January 4, 2009 (Exhibit 4), as the Respondent was presumed to be admitted in Delaware (and thus subject to mandatory appointment). The Court pointed out that other attorneys who do not practice family or trial law have served, in the "long tradition of the Delaware Bar," and have found the work gratifying, although two attorneys surrendered their license rather than be subject to mandatory appointment. The Court noted that the Respondent could find an attorney who would serve as substitute counsel for a fee, and the Court even suggested two attorneys (Ms. Oland and Mr. Vanderslice), who have accepted such cases before.

The Respondent never contacted either attorney suggested by the Court. Instead, he wrote the Court two months later, on March 4, 2010 (Exhibit 5), saying, *inter alia*:

> ...I mistakenly thought Your Honor would understand that the purpose of my December 20, 2009 letter was to protect [].
>
> I respect Your Honor's opinion, but a substantial portion of Your Honor's letter is not relevant to protecting [] in Family Court. For example, Your Honor's statements that other lawyers have (a) "found the work to be very gratifying" and (b) "graciously accepted their appointments" are not germane to protecting [].
>
> ...you are assigning a matter to counsel inexperienced with Family Court matters who does not have the time nor the resources...to properly represent [].
>
> I will make the same disclosures to [], providing him... a copy of...my letter ...your reply, this letter, and ...any response...
>
> It appears that Your Honor does not know whether I am admitted to practice in Delaware – "with the presumption that you have been admitted to practice before the Delaware bar" – I am.

> Lastly, Your Honor references a tradition. Perhaps in your reference to tradition, Your Honor has oversimplified []'s Family Court interests.
>
> In sum, it is not fair to [] to point to (a) the grace of other attorneys, (b) the feelings of gratitude of other attorneys, and/or (c) tradition to support or justify Your Honor's appointment of inexperienced counsel....

Thus, not getting the answer he wanted in his first attempt, and still ignoring his option to obtain substitute counsel, the Respondent tells the Court that if the Court won't tell the client that the Respondent is not competent to represent the client, the Respondent will tell the client himself.

Interestingly, in a letter where the Respondent characterizes the Court's words as "irrelevant" and "not germane," the Respondent offers the following in a footnote:

> Although I have very limited experience with Your Honor (another reason why [] should have an experienced Family Court attorney), Your Honor may recall a case where I became involved after your initial judgment, where Your Honor convicted an unrepresented 13 year old of a felony (in violation of her constitutional right to counsel) stating on the record, incorrectly, that the 13 year old was represented by counsel. I submitted a post-conviction letter to Your Honor identifying these and other facts. Your Honor subsequently recognized his mistake and vacated/reversed the judgment.

The above footnote is not "relevant" to the Respondent's attempt to be excused, on the basis of lack of experience, time or resources, from representing a client pursuant to the November 2009 appointment, and can only serve to embarrass or insult the Judge. Further, the Respondent's argument that his "very limited experience with Your Honor" is another reason why he should be excused is baseless. The fact that an attorney has not appeared before a particular judge, or has only "limited experience" before him, does not mean the attorney is not competent to appear. Otherwise, no attorney would ever appear before any judge, because there would be no opportunity for a first appearance.

The Respondent offers his own aphorisms, to the same Judge he accused of "oversimplifying" this matter:

> Even though a foot surgeon and brain surgeon are both doctors, you would not want a foot surgeon to perform your brain surgery. The elementary principle – if you don't know it, don't do it – should apply. For []'s protection, a business lawyer who does not practice family law should not be representing [] in Family Court.

2. The January 3, 2011, Appointment

Pursuant to the January 3, 2011, Appointment Letter (Exhibit 7), the Respondent again was afforded the opportunity to designate another attorney to represent the defendant. Instead of accepting the Appointment or getting someone else to take the case, the Respondent wrote Commissioner Wilson on January 10, 2011 (Exhibit 8), saying:

> ...I am a solo-practitioner that does not have the resources nor the time to properly represent [] in this Family Court criminal matter. I am not available, nor could I be prepared for this Trial, on January 18...
>
> If Your Honor still requires that I represent [] I respectfully request that (i) the record reflect, and (ii), the Court disclose to [] the following:
>
> - Mr. Murray informed the Court that his practice is primarily devoted to corporate...
> - Mr. Murray informed the Court that he has no experience...
> - Mr. Murray informed the Court that he believes it is in []'s best interest that [] be represented by counsel that has experience...
> - Mr. Murray asked the Court, on behalf of [], that counsel with experience...be appointed.

The Court, through Commissioner Holloway, responded on January 12, 2011 (Exhibit 9), denying Respondent's motion to withdraw, noting that the Respondent could

"find someone to substitute for him," and "[i]f more time is needed, may request continuance."

Ignoring the second suggestion from the Court in this appointment that the Respondent could get substitute counsel, the Respondent instead wrote Commissioner Holloway on January 13, 2011 (Exhibit 13). Apparently, since his veiled threat to the Court -- that if the Court would not excuse him that he would tell his client that the Court was appointing ineffective counsel -- did not work in the 2009 appointment, the Respondent made good on that in 2011:

> I spoke with [client's mother]... I disclosed that my practice is primarily devoted to business...and that I have no experience representing any party in a (a) criminal matter, or (b) Family Court criminal matter with allegations of unlawful sexual contact third degree.
>
> Due to...the Family Court's late notice of appointment...I read to [client's mother] my letter to Your Honor dated January 10, 2011, and informed her that you denied my request to withdraw.
>
> As Your Honor did not provide any reasons or justifications for the appointment of inexperienced counsel when responding to my request to withdraw, [client's mother], on behalf of her son, respectfully requests that Your Honor provide specific relevant and supported reasons in writing for your appointment of inexperienced counsel to represent her son. (Emphasis supplied).
>
> > [Client's mother] would specifically like to know how it is in the best interest of her minor child for Your Honor to appoint an attorney with no experience...? I will provide a copy of any response Your Honor provides to [client and his mother].
>
> [Client and his mother] request that an experienced Family Court practitioner...represent him...

It appears that in his efforts to "disclose" his situation to his client's mother, the Respondent neglected to tell her that the Respondent was free to obtain substitute "experienced" counsel on her son's behalf, and free to request a continuance. Rather, he

caused the client and his mother to believe that the Court had callously appointed, with no recourse, incompetent counsel, on the eve of trial.

In a footnote, the Respondent repeats, verbatim, for Commissioner Holloway the aphorism he tried out on Judge Henriksen previously:

> Even though a foot surgeon and brain surgeon are both doctors, you would not want a foot surgeon to perform your brain surgery. The elementary principle – if you don't know it, don't do it – should apply.

Given the untenable situation in which the Court was placed by the Respondent's communications to the Court, the client and the client's mother, the Court rescheduled the case and appointed alternate counsel.

3. The March 11, 2011, Appointment

Once again, the Respondent was advised in the Appointment Letter (Exhibit 15, Appointment by Chief Judge Kuhn) that he could designate alternate counsel. Instead, the Respondent sent a March 16, 2011, letter (Exhibit 16) to Judge Henriksen, who was to preside over the matter, outlining essentially the same litany relating to the Respondent's business law focus and lack of Family Court experience that the Respondent sent Judge Henriksen in 2010 and the Commissioners in 2011. Again, rather than accepting the appointment or obtaining substitute counsel, the Respondent stated:

> ...I do not have the resources nor the time to properly represent [] in this Family Court Criminal Matter. I am not available on March 17, 2011, and I could not be prepared for this matter with the short notice given.
>
> If Your Honor still requires that I represent [] I respectfully request that (i) the record reflect, and (ii) the Court disclose to [] the following:
>
> Mr. Murray informed the Court that his practice is primarily devoted to...business...
>
> Mr. Murray informed the Court that he has no experience...

> Mr. Murray informed the Court that he believes it is in []'s best interest that [] be represented by counsel that has experience...
>
> Mr. Murray asked the Court, on behalf of [], that counsel with experience ... be appointed.
>
> As Your Honor may be aware, Commissioner Holloway filed a complaint with the ODC... [and] submitted letters to the ODC that she indicates you gave her.
>
> ...Although I do not know the extent of your involvement with the ODC matter, I will inform [] of Your Honor's participation. [] can then consider this information and determine its relevance. He may conclude that Your Honor's role in the ODC matter is evidence of a conflict.
>
> ...I do not believe it is (i) in the best interest of [] for me to represent him before Your Honor, and/or (ii) appropriate for me to appear in Family Court before Your Honor while the ODC's evaluation is pending.
>
> I believe the Court will want to avoid even the appearance of a conflict.
>
> As is my practice, I will disclose to [] my areas of expertise and my lack of experience (in this case, I have no experience)...

Apparently the Respondent participated in an office conference with Chief Judge Kuhn the next day, March 17, 2011. Following the office conference, the Respondent wrote his client's mother on March 23, 2011 (Exhibit 17):

> I disclosed to you and your son that I am a business transactional lawyer... I also disclosed that I have no experience with the Family Court (i) legal, and (ii) procedural issues confronting your son...
>
> In the office conference with Chief Judge Kuhn, I made the same disclosures and requested that counsel with experience...be appointed.
>
> I informed you that Chief Judge Kuhn denied my request to withdraw. Chief Judge Kuhn added that she would assign a lawyer to work with me on your son's case.
>
> ...You indicated that you were going to write the Court to express your concerns. I informed you that as of March 22, 2011, I had not heard from Chief Judge Kuhn with respect to the lawyer she was gong to have work with me on this case.

> On March 23, 2011, I received a call ...that Bruce Rogers, Esquire will serve as my mentor on your case. I do not know the exact extent of his involvement as a mentor.

By his communication with the client's mother (and his continued omission to the mother that it is the Respondent's task, upon appointment, to obtain substitute counsel), the Respondent undermines the client's faith in the Respondent's abilities and in the Court's integrity, and encourages the client's mother to take her concerns (ones he, in fact, generated) to the Court.

Apparently, the Respondent's communication with the client's mother achieved the Respondent's desired result – unsuccessful in getting the Court to change its mind, the Respondent succeeded by causing the mother of an indigent client to obtain private representation herself. The Respondent's next letter is to Chief Judge Kuhn, on March 30, 2011 (Exhibit 18):

> In my letter dated March 16, 2011, I outlined the reasons why (i) the defendant should have an experienced Family Court lawyer representing him...and (ii) why I should be permitted to withdraw.
>
> On March 17, 2011, I disclosed to [] and his mother my areas of expertise and the fact that I do not have any experience with the Family Court legal and procedural issues confronting her son...
>
> I informed [] and her son that during the office conference on March 17, 2011, Your Honor denied my request...to have counsel with the requisite experience represent [] and that you denied my motion to withdraw.
>
> ...On March 22, 2011, I received a call from [client's mother]. ...During our telephone conversation...I reminded [client's mother] that Your Honor was going to assign someone to work with me on her son's case. I informed [client's mother] that as of March 22, 2011, you had not yet had the opportunity to assign another lawyer to work with me.
>
> On March 23, 2011...I was informed that you spoke to Bruce Rogers, Esq., and that you asked him to serve as my mentor...Please note that...there is a letter from Mr. Rogers dated March 8, 2011, indicating that he had a conflict in the [client's] matter.

> I called [client's mother] on March 28, 2011... [Client's mother] informed me during that phone call that she retained Eric Mooney, Esquire to represent her son. She indicated that she was releasing me from responsibility with respect to her son's defense and that I did not need to appear on March 31, 2011.
>
> If acceptable to Your Honor, please allow this as notice of (i) substitution of counsel and (ii) my termination of the attorney-client relationship with [].

The Panel finds that through the language and tenor of the Respondent's communications with the Court and with his clients, his persistent efforts to be excused from his appointments, and his failure to avail himself of the opportunity to obtain substitute counsel, the Respondent's actions were disruptive to the tribunal, and that the Respondent engaged in undignified and discourteous conduct, in violation of Rule 3.5(d).

COUNT THREE: The Panel Finds the Respondent Sought to Avoid Appointment by the Family Court in Violation of Rule 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause.")

The Panel finds that the ODC established by clear and convincing evidence that the Respondent sought to avoid appointment by the Family Court on three occasions (the November 2009, January 2011, and March 2011 appointments), without good cause, in violation of Rule 6.2. The Respondent admits that in each of the seven times he was appointed by the Family Court, he requested to withdraw from his appointment. The Respondent stated that he did not seek to avoid appointments as alleged by ODC ("By continuously seeking to avoid appointment by the Family Court after the Court denied his motions to withdraw as counsel"), in that he did not renew or refile motions after his initial motions to withdraw. The Panel finds that in these three cases, he sought to avoid appointment by a tribunal. He sought to avoid all three of the appointments at issue: he knew he was subject to mandatory appointment but requested to withdraw, even though

he believed his requests to withdraw would be denied, and he persisted in seeking to avoid the appointments through his communications with the Court and his clients, even after his requests were denied. While he was given the option to obtain substitute counsel in each case, he never availed himself of that option.

While the Respondent argues that he has no experience with various Family Court matters, by the time he sought to avoid appointment in January and March of 2011, he had already handled five different Family Court cases. His "modesty" about his Family Court experience is disingenuous where, in one of his first Family Court cases, he successfully obtained post-conviction relief of a criminal matter for his client, where he had not even represented her in the criminal case. (Exhibit 5, page 2, footnote 2). His four-and-a-half year representation as a guardian ad litem involved approximately nine Family Court hearings, by the Respondent's testimony. T-40. He had also represented a Family Court client in May 2009 (Exhibit 1), and represented an adult with multiple issues in a Family Court proceeding pursuant to the November 2009 appointment. T-68. He had also litigated a class-action suit in Superior Court, through its appeal to the Supreme Court. T-82-83.

Every attorney begins at some point with no experience. If the attorney declines to represent clients from the very start because the attorney lacks experience, the attorney will never gain that experience and will never begin to practice law.

Each case brought to an attorney is unique, with new facts and new legal issues. To decline each case where there is a new element would be to decline every case. The Family Court cannot grant every request to be excused from a mandatory appointment on the basis that the attorney has never handled that particular case before, or everyone

would be excused (attorneys could argue they have handled three felony charges but not four; assault first but not second; a case where a minor is 13, but not 14).

The Family Court's mandatory appointment process in Sussex County has been in place for years. The Court appoints attorneys from all areas of practice, on the basis that attorneys admitted to practice law in Delaware have a basic general competency in the law.

The Family Court offered, both in its appointment letters and in specific communications with the Respondent, the option for the Respondent to seek substitute counsel. In January 2010, the Court named two attorneys who the Court believed might be willing to undertake such representation. Exhibit 4. The Respondent never contacted either of the attorneys suggested by the Court, but instead sent what amounts to a form letter attempting to place the burden back on the Family Court.

Examining Count Three (Violation of Rule 6.2, an attorney shall not seek to avoid appointment by a tribunal to represent a person except for good cause), and each of the three Court appointments in turn, it is illuminating to see what happened in each case – both the Respondent's request to withdraw as counsel for each matter, and the communications that followed in his efforts to continue avoiding the appointments. The following is an outline of the three appointments (Court's communications are in italics):

1. <u>The November 24, 2009 Appointment (Adult in a guardianship proceeding, trial scheduled for April 4, 2010)</u>

Exhibit 2. *11/24/09, Judge Henriksen Appointment Letter to Respondent:*

> *"You are hereby appointed to represent []...You may designate another member of your firm to represent the person..."*

Exhibit 3. 12/20/09, Respondent letter to Judge Henriksen (Emphasis supplied):

Kindly note that my practice is primarily devoted to corporate/entity matters, business transactional matters and certain tax matters. []'s legal needs...would best be served by counsel with experience in guardianship proceedings and with counsel that has specific knowledge of the Family Court procedural and legal issues confronting [].

If Your Honor still requires that I represent [], I respectfully request that the Court disclose to [] the following:

a. Mr. Murray informed the Court that his practice is primarily devoted to corporate /entity matters...
b. Mr. Murray informed the Court that he believes that []'s legal needs...would best be served by counsel experienced with the Family Court procedural and legal issues...
c. Mr. Murray informed the Court that he believes it is in []'s best interest to have counsel appointed with specific and significant experience in handling petitions for guardianship...
d. Mr. Murray asked the Court, on behalf of [], that counsel with experience with these types of matters be appointed.
e. Noting the above disclosures by Mr. Murray, the Court nonetheless requires Mr. Murray to represent [] in this matter.

[Mr. Murray also makes document requests for the case].

Please note that I will be out-of-state and unavailable for the next couple of weeks.

Exhibit 4. *1/4/10, Judge Henriksen letter to Respondent:*

With the presumption that you have been admitted to practice before the Delaware Bar, I must deny your request to be relieved from your appointment. In addition, I do not intend to comply with any of the other request in your letter. ...

We have several attorneys who do not practice family law, or any trial type of law, who have...accepted their appointment as part of the long tradition of the Delaware Bar....We have had two attorneys surrender their license to practice law in the State of Delaware rather than undertake this representation. Finally, and another alternative you may wish to pursue, is to contact attorneys who regularly deal in this area who might be willing to substitute themselves as counsel for you for a certain fee. I happen to know that Ashley Oland, Esquire and Patrick Vanderslice, Esquire, have accepted cases from other attorneys such as yourself in the past.

At any rate, your Court appointment to represent [] remains in full force and effect.

Exhibit 5. 3/4/10 Respondent letter to Judge Henriksen:

...a substantial portion of Your Honor's letter is not relevant to protecting [].

I disclosed to you that my primary practice does not include any family law, and that you are assigning a matter to counsel inexperienced with Family Court matters who does not have the time nor the resources (I am a solo practitioner) to properly represent [].

I will make the same disclosures to []....

In sum, it is not fair to [] to point to [other attorneys or tradition] to support or justify Your Honor's appointment of inexperienced counsel. [] should have an experienced Family Court practitioner representing him in Family Court.

Although I have very limited experience with Your Honor (another reason why [] should have an experienced Family Court attorney), Your Honor may recall a case... where Your Honor convicted an unrepresented 13 year old of a felony (in violation of her constitutional right to counsel) stating on the record, incorrectly, that the 13 year old was represented by counsel. I submitted a post-conviction letter to Your Honor identifying these and other facts. Your Honor subsequently recognized his mistake and vacated/reversed the judgment.

(Respondent ultimately handled this case to conclusion.)

(It is interesting to note that the Respondent, seeking to avoid appointment by pleading inexperience in guardianship matters, inexperience in Family Court and inexperience before the trial judge, had apparently "schooled" the same judge previously on constitutional, criminal, and Family Court procedure regarding the prior Family Court felony case of a minor for whom the Respondent served as a guardian in Family Court.)

2. <u>The January 3, 2011, Appointment</u>

Exhibit 7. *1/3/11, Commissioner Wilson Appointment Letter to Respondent:*

> *You are hereby appointed to represent...a juvenile alleged delinquent...Trial Date: January 18, 2011... You may designate another member of your firm to represent the person specified by notification to the party and to the Court.*

Exhibit 8. 1/10/11, Respondent "faxed" letter to Commissioner Wilson:

> I have no experience in juvenile delinquent and/or juvenile criminal matters. My practice is primarily devoted to corporate/entity matters and business transactional matters.

[]'s legal needs, in this matter, would best be served by counsel that has specific experience with (a) criminal matters, (b) cases involving allegations of "unlawful sexual contact third", and (c) the Family Court procedural and substantive issues confronting []..

I am a solo-practitioner that does not have the resources nor the time to properly represent []. I am not available, nor could I be prepared for this Trial, on January 18, 2011 at 9:00 am.

If Your Honor still requires that I represent [], I respectfully request that (i) the record reflect, and (ii) the Court disclose to [] the following:

a. Mr. Murray informed the Court that his practice is primarily devoted to corporate...matters.
b. Mr. Murray informed the Court that he has no experience with defending anyone in a Family Court criminal case, and that he has never defended anyone charged with "Unlawful Sexual Contact Third."
c. Mr. Murray informed the Court that he has no experience in juvenile delinquent...matters...
d. Mr. Murray informed the Court that he believes it is in []'s best interest that [] be represented by counsel that has experience...
e. Mr. Murray asked the Court, on behalf of [], that counsel with experience with these types of matters be appointed.

Request to Withdraw as Counsel – For the above stated reasons, I request that I be permitted to withdraw as counsel.

Exhibit 9. *1/12/11, Commissioner Holloway "faxed" letter to Respondent:*

Notes: Motion to withdraw denied....1/12/11 Motion denied – Mr. Murray may find someone to substitute for him – Commissioner Holloway. If more time is needed, may request continuance.

Exhibit 10. 1/13/11, Respondent "faxed" letter to Commissioner Holloway:

In my letter dated January 10, 2011, I outlined the reasons why the defendant (a) should have an experienced Family Court lawyer representing him..., and (b) why I should be permitted to withdraw as his counsel.

...I was notified of Your Honor's decision to deny my request to withdraw on January 12, 2011... I spoke with [client's mother] on January 13, 2011... I disclosed to [client's mother] that my practice is primarily devoted to business... and that I have no experience representing any party in a (a) criminal matter, or (b) Family Court criminal matter involving allegations of unlawful sexual contact third degree.

Due to the very limited time (as a result of the Family Court's late notice of appointment), I read to [client's mother] my letter to Your Honor dated January 10, 2011, and informed her that you denied my request to withdraw.

As Your Honor did not provide any reasons or justification for the appointment of inexperienced counsel when responding to my request to withdraw, [client's mother], on behalf of her son, respectfully requests that Your Honor provide specific and relevant supported reasons in writing for your appointment of inexperienced counsel for her son.

[Client's mother] would specifically like to know how it is in the best interest of her minor child for Your Honor to appoint an attorney with no experience...

[Client's mother] and [] request that an experienced Family Court practitioner...represent him....

...I request a thirty day continuance.

Exhibit 11. *1/14/11 Family Court fax to Respondent:*

"Reschedule, re-appoint."

3. The March 11, 2011 Appointment

Exhibit 15. *3/11/11, Chief Judge Kuhn Appointment Letter to Respondent:*

You are hereby appointed to represent [], a juvenile alleged delinquent... Arraignment for Gun Court is scheduled for Thursday, March 17, 2011... You may designate another member of your firm to represent the person specified...

Exhibit 16. 3/16/11, Respondent faxed letter to Judge Henriksen:

I understand this matter is before Your Honor... I received a 26-page fax on March 16, 2011 about an arraignment for [] on March 17, 2011...The fax contained 17 different documents. I am not familiar with a substantial majority of the documents.

Disclosure to Protect *[]*

I have never represented a party charged with the referenced crimes.... My practice is primarily devoted to corporate/entity matters and business transactional matters. []'s legal needs, in this matter, are best served by counsel that has specific experience...

I am a solo- practitioner. I do not have the resources nor the time to properly represent [] in this Family Court Criminal Matter. I am not available on March 17, 2011, and I could not be prepared for this matter with the short notice given.

If Your Honor still requires that I represent [], I respectfully request that (i) the record reflect, and (ii) the Court disclose to []:

a. Mr. Murray informed the Court that his practice is primarily devoted to ...business...
b. Mr. Murray informed the Court that he has no experience with defending anyone in a Family Court gun case...
c. Mr. Murray informed the Court that he has no experience with the legal issues confronting []...
d. Mr. Murray informed the Court that he believes it is in []'s best interest that [] be represented by counsel that has experience...
e. Mr. Murray asked the Court, on behalf of [], that counsel with experience with []'s legal issues be appointed.

As Your Honor may be aware, Commissioner Holloway filed an ODC complaint against me... [and] submitted letters to the ODC that she indicates you gave her... my practice is to provide the client with complete information, so that the client can make informed decisions. Although I do not know the extent of your involvement in the ODC matter, I will inform [] of Your Honor's participation. [] can then consider this information and determine its relevance. He may conclude that Your Honor's role in the ODC matter is evidence of a conflict.

Under these circumstances, I do not believe it is (i) in the best interest of [] for me to represent him before Your Honor, and/or (ii) appropriate for me to appear in Family Court or before Your Honor while the ODC's evaluation is pending.

I believe the Court will want to avoid even the appearance of a conflict.

Request to Withdraw as Counsel

As is my practice, I will disclose to [] my areas of expertise and my lack of experience (in this case, I have no experience) with the Family Court criminal issues...I respectfully submit that this appointment is not in the best interest of the minor...For []'s protection...I request that I be permitted to withdraw as counsel. (Respondent also asks for 30 day continuance, makes a document request, suggests unnamed "alternate way" to assist the Court "after the ODC matter is resolved," and directs all future correspondence from the Court to Respondent's counsel in the ODC matter).

Exhibit 17. 3/23/11, Respondent to Client's mother:

I disclosed to you and your son that I am a business transactional lawyer...I also disclosed that I have no experience with the Family Court ...issues confronting your son; and that I have no experience trying a Gun Court case.

In the office conference with Chief Judge Kuhn, I made the same disclosures and requested that counsel with experience...be appointed.

I informed you that Chief Judge Kuhn denied my request to withdraw. Chief Judge Kuhn added that she would assign a lawyer to work with me on your son's case.

On March 22, 2011, you called indicating that you spoke with someone at the Family Court about having other counsel appointed... You indicated that you were going to write the Court to express your concerns. I informed you that as of March 22, 2011, I had not heard from Chief Judge Kuhn with respect to the lawyer she was going to have work with me...

On March 23, 2011, I received a call ...that Bruce Rogers, Esquire will serve as my mentor on your case. I do not know the exact extent of his involvement as a mentor... (Respondent also asks for documents and statements for the case).

Exhibit 18. 3/30/11, Respondent to Chief Judge Kuhn:

...In my letter dated March 16, 2011, I outlined the reasons why the defendant (i) should have an experienced Family Court lawyer representing him...and (ii) why I should be permitted to withdraw as counsel.

On March 17, 2011, I disclosed to [] and his mother my areas of expertise and the fact that I do not have any experience with the Family Court legal and procedural issues confronting her son. I also disclosed to [] and his mother that I have no experience trying a Gun Court case.

I informed [client's mother] and her son that during the office conference on March 17, 2011, Your Honor denied my request...to have counsel with the requisite experience represent [] and that you denied my motion to withdraw.

I also informed [] that you were going to assign counsel...to work with me...

I brought to Your Honor's attention a conflict issue connected with a pending ODC matter...

On March 22, 2011, I received a call from [client's mother]. She indicated that she spoke with someone at the Court about having other counsel appointed... I reminded [] that Your Honor was going to assign someone to work with me...I informed [] that as of March 22, 2011, you had not yet had the opportunity to assign another lawyer to work with me.

> On March 23, 2011...I was informed that... Bruce A. Rogers, Esquire... [would] serve as my mentor. Please note that in the documents I received...he had a conflict in the [] matter.
>
> I called [client's mother] on March 28, 2011. ... [Client's mother] informed me ...that she retained Eric Mooney, Esquire, to represent her son. She indicated that she was releasing me from responsibility... If acceptable to Your Honor, please allow this as notice of (i) substitution of counsel, and (ii) my termination of the attorney-client relationship with [].

Thus, in all three appointments at issue in this ODC complaint, the Court appointed the Respondent, giving him the option to obtain substitute counsel. The Respondent instead asked the Court to be allowed to withdraw as counsel. The Court denied the Respondent's request. The Respondent wrote the Court, asking that the Court state on the record and to the client that the Court was appointing, essentially, ineffective counsel. In two of the cases where the Court still did not do as the Respondent wished, the Respondent contacted the client and told the client that he was, essentially, wrong for the part, but the Court was going to make him, an inexperienced unskilled attorney, represent the client anyway, and then told the Court what he told his client. In one case an indigent client's mother retained private counsel. In each case the Respondent sought to avoid the appointment, and persisted after his motion was denied. His conduct violates Rule 6.2.

COUNT FOUR: The Panel Finds the Respondent Engaged in Conduct Prejudicial to the Administration of Justice in violation of Rule 8.4 (d) ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.")

The ODC established by clear and convincing evidence that the Respondent engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4 (d). The Respondent wasted judicial resources in continuing to request to withdraw from the appointments, where the Respondent knew the Family Court could appoint him under the Rules; where the Respondent felt his motions to withdraw were futile; and, once the Court denied his requests, where the Respondent continued to press the issue with the Court through less-than-subtle form letters asking the Court to put "on the record" and disclose to the client the fact that he should not be appointed but the Court was appointing him anyway; by causing his clients to believe that he could not represent them, that they needed other counsel, and that the Court refused to consider what was in their best interests; and by failing to obtain substitute counsel, or even contact the two attorneys whose names were provided by the Court for just that purpose.

To the extent the Court had to appoint other counsel in the January 2011 matter, it was a waste of the Court's time to find and appoint a second attorney to the case, and of the other attorney's time; that attorney could have served in another conflict matter for another indigent client.

The Respondent, in pressing the issue with his clients and the Chief Judge of Family Court, necessitated repeated telephone calls and meetings which could otherwise have been avoided.

In each case, the Respondent had the express option, when appointed by the Court, to obtain substitute counsel himself. Had he done so, or had he accepted the appointments from which he believed he would not be excused, no judicial resources would have been wasted. Instead, the Respondent never made a real effort to obtain

substitute counsel, and ignored the 2009 Family Court suggestion of two attorneys who might be willing to serve. The Respondent chose instead in each of these three cases to send at least two letters to the Court arguing why he should be relieved of the appointments, necessitating further time to consider and respond to the Respondent's attempts to avoid the appointments, and to deal with the clients understandably alarmed by the Respondent's presentation of their situation. In two out of the three cases, the Respondent ultimately avoided appointment, by presenting himself, and the Court, to the client in such an unpalatable light that in one case the Court appointed alternate counsel, and in the other the client's mother sought private counsel.

Recommendation of Sanctions

Having concluded that the Respondent violated Rules 3.5 (d), 6.2 and 8.4 (d) of the Delaware Rules of Professional Conduct, the Panel reconvened on March 8, 2012, to hear evidence and legal argument from counsel on appropriate sanctions. The Respondent prepared a brief, which he submitted through counsel on March 7, 2012 ("Respondent's Pre-Hearing Memorandum").

At the March 8, 2012, hearing, counsel for ODC argued as a preliminary matter that the Respondent's pre-hearing memorandum reargued the existence of violations on which the Board had already ruled, and that only pages 4 and 5 addressed sanctions arguments. ODC further argued that there was no sanctions argument in the Respondent's memorandum for Counts III and IV of the ODC complaint.

No witnesses testified during the sanctions portion of the hearing.

ODC argued that the Board should impose "no less than a public reprimand." March 8 Sanctions hearing transcript pages 4-5 (hereinafter, e.g., S-4-5). ODC applied

the four factors of the ABA standards (respondent's mental state – intentional, with knowledge, or negligent; the real or potential injury to clients or third parties; the nature of the violations; and aggravating/mitigating circumstances). ODC argued that the Board already found the Respondent's conduct was intended to disrupt the tribunal and was discourteous and degrading, thus establishing that the Respondent acted intentionally, and that the Respondent's conduct was "knowing" in that he knew or should have known the effect of his correspondence, since his requests had been denied previously. S-8.

ODC argued that the Respondent's conduct violated his ethical duties to the legal system and the legal profession, citing ABA standards 6.0 (expectations to abide by legal rules and refrain from interfering with judicial process), 6.2 (sanction appropriate for failure to obey obligation under rules of a tribunal), 6.22 (suspension appropriate for knowing violation of court order or rule and...potential interference with legal proceeding), 6.23 (reprimand appropriate for negligent failure to comply with court order/rule...causing potential interference with legal proceeding), 7.0 (ethical duty to the profession) and 7.3 (reprimand appropriate for violation of duty to the profession). S-9.

ODC argued that the Respondent's multiple offenses and refusal to acknowledge the wrongful nature of the conduct, as well as his substantial experience (Respondent admitted to the Bar in 1995) were aggravating factors. ODC took issue with the mitigating factors cited in the Respondent's brief (inexperience in family law, character and reputation, and remorse), arguing "inexperience" is with the general practice of law, not a specific area (in mitigating factors under 9.32 of the ABA Standards); that there was no character testimony offered in this case; and that the Board should assess the

Respondent's testimony from the violations hearing to determine if he demonstrated any remorse.

ODC offered four cases in support of its recommendation: In the matter of Abbott, Del. Supr., 925 A. 2d 482 (2007) (public reprimand appropriate for undignified, discourteous and degrading statements against opposing counsel and the Court in violation of 3.5(d) and 8.4 (d)); In the matter of Ramunno, Del. Supr., 625 A. 2d 248 (1993) (public reprimand for violation of what is now 3.5 (d), insulting and vulgar language to opposing counsel and the Court); In the matter of Guy, Del. Supr., No. 138, 1995 (1995) (public reprimand for discourteous, degrading and disrespectful remarks about the Court); and Hawkins v. The Commission for Lawyer Discipline, 988 S. W. 2d 927 (Tex. App. – El Paso, 1999) (suspension for disobeying an order to represent an indigent client, "snide letters to the trial court" and failure to communicate with client).

ODC distinguished the cases cited by the Respondent in briefing: Board Case No. 42-1995) (private admonition for a single rule violation, one matter); Board Case Nos. 46-2006, 26-2007) (different conduct); ODC File No. 2011-0305 (different rules and different underlying conduct).

ODC argues that the Respondent's tone and language in his letters and his continuous requests to withdraw, even when he did not expect the requests to be granted, in three matters before the Board (and seven matters to which the Respondent testified), support the imposition of "no less than a public reprimand."

The Respondent, through counsel, argued that the Respondent's conduct is far less egregious than that in Ramunno, in that it was not an appearance in court before a tribunal but written motions; they were not undignified or discourteous, but intended to

protect his clients' rights to have effective counsel; and he expressed regret if his tone was misperceived.

Regarding Rule 6.2 (Accepting appointments), Respondent points out there is no Delaware precedent for sanctions, and argues that Hawkins, the Texas case, is distinguishable in that the Texas lawyer undertook representation and stopped in the middle of that representation. Respondent argued he "represented all of his appointed clients in Family Court....except...where he represented the client until private counsel was retained and the case where ...Mr. Murray was relieved of the appointment." S-29. Respondent argues that in each case he asked for more experienced counsel, and knowing his request would be denied, for more time. Respondent argues that "he continues to believe in the principle...that even indigent clients are entitled to experienced counsel, particularly in... this case two serious criminal matters. S-29-30.

Respondent denied attempting to "sabotage the appointment" and argued he was making the application based on the same principle that he made previously. "He continues to believe that it's his obligation...to make disclosure to his clients about his ...lack of skills and his ... lack of experience because it's fundamental to the relationship between lawyers and clients....How that poisons the well he does not understand...if he were trying to avoid an appointment, he never would have asked for a continuance..." S-30-31.

Respondent argued, regarding Rule 8.4, that no harm to the client or public occurred, and that if there was any harm, it was to the administration of justice in Family Court. Respondent argues that his disclosures "cannot be prejudicial to the administration of justice, but, instead, is part of the administration of justice." S-31.

Even if there was an 8.4 violation, Respondent argues, the only judicial resources involved were a letter from Judge Henriksen, which Respondent argues includes a "gratuitous shot" S-32 ("presuming you're a member of the Delaware Bar"), and Commissioner Southmayd's handwritten note granting a continuance and the appointment of new counsel. The Respondent argued "That's not a great deal of judicial resources." S-32.

Arguing that the Respondent has already "been publicly embarrassed," S-44, Mr. Bayard argued that the Respondent should "not be a poster child for bad lawyer behavior in Family Court," S-44-45, that he represented clients, that he believes in the principle of effective representation, and that there was no financial injury, harm to the client, or harm to the public. The Respondent has no prior disciplinary record and cooperated with ODC. S-45.

Mr. Bayard distinguished the Abbott case as involving egregious behavior in insulting two tribunals and opposing counsel, and the Guy case as egregious behavior far beyond any conduct on the part of the Respondent. Mr. Bayard referred to the Respondent's cited cases, for private admonitions, and argued that the behavior in those cases was more serious than those alleged in this case, in that they involved insulting language (1995), lateness and incompetence (2007), and lying to the Court (2011). S-47.

Mr. Bayard said that "Mr. Murray has been made painfully aware that any further motions to withdraw will not be tolerated in Family Court and he will conform his behavior accordingly. But he will continue in the best traditions of the Delaware Bar to advocate zealously for his appointed clients. This he knows how to do." S-49.

Respondent's counsel submitted a copy of Exhibit 6, a letter from Judge Jones in a prior matter, commending the Respondent for service in a guardian *ad litem* case, over four and a half years, "in the highest tradition of the Delaware Bar." S-49.

In response to questions from the panel, counsel for the Respondent indicated that conflict appointments arise in the cases of indigent clients, and in the 2011 case where a client's mother hired a private attorney, said, "based on her discussion with Mr. Murray and her understanding of the seriousness of the charges, she took it upon herself to retain private counsel. How she raised the funds to do that, I don't know." S-51.

Counsel acknowledged that Respondent had the option, in each court appointment, to find someone experienced to handle the case... "if [Respondent] would pay them. That's his option. " S-51-52.

ODC said that if this had been a one-time violation of 6.2 or 8.4 (d), it "probably would have been not even a sanction if it was one time and if it was just those two things." S-54. ODC argued that there are three different violations before the Board, and a total of seven times that the Respondent acknowledged [seeking to withdraw as counsel]. It was the manner, method and tone the Respondent used in the three cases, in his correspondence: "The letters, the more you read them, the more offensive they become." S-54-55. Since the Respondent did not expect to be relieved of the appointments, ODC asked what purpose he could have other than to disrupt the tribunal. S-55. ODC pointed out, in addition to the exchange of letters with the Court, a meeting with Chief Judge Kuhn and several judges involved in correspondence. S-55.

ODC noted a purpose "to educate the public and the lawyers" and said maybe [private admonition] would have been acceptable in this case, but the addition of the 3.5

(d) violations and the manner in which the cases were handled warrants a public reprimand. S-55. Ms. Schwartz said, given the Respondent's pre-hearing memo and counsel's closing argument, "I don't think he gets it. And I don't believe that there's any remorse in his actions." S-56. ODC hoped the tone of Respondent's correspondence with the Court or personnel in the future would improve, but that a public sanction is warranted "not only to educate the bar, but also to sanction Mr. Murray." S-56.

The Panel applies the four-part analysis of the ABA Standards for Imposing Lawyer Sanctions (1991 & Supp. 1992) ("ABA Standards"), looking first to the ethical duty violated; the lawyer's mental state; the extent of actual or potential injury caused by the lawyer's misconduct; and finally, whether there are aggravating or mitigating circumstances.

The Panel finds:

1. Ethical Duties Violated. The Respondent violated Rule 3.5 (d), engaging in conduct intended to disrupt a tribunal and engaging in undignified or discourteous conduct that is degrading to a tribunal, in multiple pieces of correspondence with the Court during three Family Court appointments (November 2009, January 2011, and March 2011). He violated Rule 6.2, by seeking to avoid each of those appointments by the Family Court. He violated Rule 8.4 (d), by engaging in conduct prejudicial to the administration of justice, in connection with the three Court appointments. The violations are of duties owed to the legal system (failure to obey an obligation under the rules – the obligation to represent a client appointed by the Court), and to the legal profession.

2. Mental State. The Panel finds the Respondent knew of his obligation to represent an appointed client, and that he did not have a legally cognizable reason to be excused, but

he persisted in seeking to avoid appointment. Thus, he acted intentionally. He concedes that he never took the Court-approved alternatives available to him – to obtain substitute counsel, or, with the assistance of others, to inform himself sufficiently to provide capable representation, as he did in a class action Superior Court case. The Respondent wrote his correspondence with deliberation, and knew or should have known its effect, particularly where his near-form letters had previously been unsuccessful.

3. Injury caused by Respondent's Misconduct. While the clients in these three cases ultimately had representation (one by the Respondent), the family of one indigent client felt it had no choice but to raise funds to pay for private counsel, as a direct result of the Respondent's actions. Judicial resources were wasted in resolving the issues created by the Respondent's conduct.

Before applying the aggravating/mitigating factor analysis, the Panel finds that a public reprimand would be appropriate. The Respondent was appointed, pursuant to the Family Court mandatory appointment process, to represent clients on three different occasions. The Respondent was well aware of the appointment process and by his testimony, also sought to avoid appointment on prior occasions. In each of the three appointment letters at issue here, the Respondent was advised that he could obtain substitute counsel. He never made a serious effort to do so, but rather sent what amounted to serial (and discourteous) form letters to the Court, saying that he was not experienced, that he did not have the time or resources to serve, and that he was not available. He ignored Judge Henriksen's offer of two attorneys who might be willing to take the case. Rather, his letters told the Court, in essence, that he wanted the Court to "put on the record" the fact that the Respondent was incompetent but the Court was

insisting that he represent the client. His communications with the clients did, as the Court said, "poison the well."

4. Aggravating and Mitigating Factors.

A. Aggravating Factors

1. Prior disciplinary offenses. There was no evidence of a prior disciplinary offense.
2. Pattern of misconduct. The Panel finds the Respondent engaged in a pattern of misconduct in the three Court appointments at issue.
3. Multiple offenses. The Panel finds multiple offenses, relating to the several items of correspondence and communications within each of the three appointments.
4. Bad faith obstruction of the disciplinary process. There is no evidence of this factor.
5. False or deceptive practices during the disciplinary process. There is no evidence of this factor.
6. Refusal to acknowledge wrongful nature of conduct. While the Respondent's counsel argued that "to the extent that the tone of [Respondent's] letters is perceived as inappropriate, he has on several occasions apologized" and "expressed regret" S-27, counsel says that his client "continues to believe in the principle...that even indigent clients are entitled to experienced counsel..." Sanctions S-29-30, and "continues to believe that it's his obligation to make disclosure to his clients about his skills or lack of skills and his experience or lack of experience... How that poisons the well he does not understand..." Sanctions

S-31. Counsel said the Respondent "has been made painfully aware that any further motions to withdraw would not be tolerated in Family Court and he will conform his behavior accordingly. But he will continue in the best traditions of the Delaware Bar to advocate zealously for his appointed clients. This he knows how to do." S-48.

As ODC pointed out, the Respondent's self-prepared pre-hearing memo on sanctions spends as much effort challenging the Panel's findings of violation (not within the scope of briefing) as it does on addressing sanctions. The memo also refers to numerous portions of the Respondent's correspondence with Family Court (cited by ODC), isolating sentences to ask, "When is being honest, considered discourteous or undignified?", and to state, "If a person says, I disagree with what you said – it does not mean the person is being undignified or discourteous." Pre-hearing memo, Exhibit J. The Respondent does not show sincere remorse, perhaps because he still does not believe he did anything wrong.

In his testimony before the Panel, the Respondent said that he does not believe his conduct was prejudicial to the administration of justice. T-61. He did say, "I apologize for any improper tone in my correspondence, no disrespect was ever intended." T-61-62. He later added, "...there's not a letter that I [have] written that I wouldn't change a sentence, a paragraph, take out words, add words. I may have been inartful or clumsy with my words. I can tell you that there was no intent to be disrespectful." T-70.

The Respondent offers a nominal apology and speaks generally of regrets in hindsight for "every letter he has written," but he does not appear to

acknowledge that his actions were wrong, to understand why his conduct was found to be in violation of the rules, or even the discourtesy of his letters to the Court. The Panel is left with the sense that the Respondent, if appointed again, would conduct himself as he has before – not obtaining substitute counsel, not seeking the assistance of others to help him represent an indigent client in need of service, and communicating the Court in the same manner.

7. Vulnerability of victim. The indigent clients for whom the Respondent was appointed were vulnerable. The Respondent's conduct in the March 11, 2011, appointment caused the mother of an indigent client, for whom the Court had appointed counsel, to believe she had no recourse but to find and pay for a private attorney for her son.
8. Substantial experience in the practice of law. Respondent has been a member of the Bar since 1995. While the Respondent's primary practice is not in the area of family law, the Respondent, by admission to the Bar, demonstrated a basic general level of competency to practice law. Further, before these appointments, the Respondent had already served as Family Court-appointed counsel in other cases, including service in one Family Court matter for over four years. The Respondent was fully aware of his obligations, and his options, upon appointment.
9. Restitution. This factor does not apply.
10. Illegal conduct, including that involving the use of controlled substances. This factor does not apply.

B. Mitigating Factors

1. Absence of Prior Disciplinary Record. There is no prior disciplinary record.
2. Absence of dishonest or selfish motive. There is no evidence of dishonest or selfish motive.
3. Personal or emotional problems. This factor does not apply.
4. Timely good faith effort to make restitution or rectify consequences of misconduct. This factor does not apply.
5. Full and free disclosure to the disciplinary board. The Respondent was cooperative with the disciplinary process.
6. Inexperience in the practice of law. See aggravating factor above. Respondent has been a member of the Bar for 16 years and had some experience in Family Court. He was free to obtain assistance from others, or to obtain substitute counsel in this case. The Panel does not consider this to be a mitigating factor.
7. Character or reputation. The Respondent did not offer any testimony at the sanctions hearing as to character or reputation. Counsel referred to Exhibit 6, Judge Jones' 2010 letter thanking Respondent for his "crucial" service in a prior Family Court case.
8. Physical disability. This factor does not apply.
9. Mental disability/chemical dependency. This factor does not apply.
10. Delay in disciplinary proceedings. This factor does not apply.
11. Interim rehabilitation. This factor does not apply.
12. Imposition of other penalties or sanctions. This factor does not apply. (See addendum).

13. Remorse. While the Respondent stated an apology, he does not appear to understand why his actions were subject to this disciplinary proceeding, and although counsel said he would "conform his actions," he does not appear remorseful.

14. Remoteness of prior offenses. This factor does not apply.

III. Conclusions and Recommendations

The Panel considered carefully the Rules violated – 3.5(d), 6.2 and 8.4 (d), the ABA Standards, and the cases offered by the ODC and Respondent. The Panel considered possible sanctions, including the private admonition sanctions in Board Case No. 42, 1995, Board Case Nos. 46, 2006 and 26, 2007, Consolidated, and ODC File No. 2011-0305-B (February 9, 2012).

After considering all of the factors, including aggravating and mitigating factors, the Panel recommends that a public reprimand be imposed.

> Most courts impose a reprimand on lawyers who ...violate a court order or rule that causes injury or potential injury to a client or other party, or who cause interference or potential interference with a legal proceeding.
>
> ABA Commentary, Standard 6.2 ("Abuse of the Legal Process")
>
> Reprimand is the appropriate sanction in most cases of a violation of a duty owed to the profession. Usually there is little or no injury to a client, the public, or the legal system, and the purposes of lawyer discipline will best be served by imposing a public sanction that helps educate the respondent lawyer and deter future violations. A public sanction also informs both the public and other members of the profession that his behavior is improper.
>
> ABA Commentary, Standard 7.0 ("Violations of Other Duties Owed as a Professional")

Thus, education of the public and the profession are valid results of a public reprimand. In this instance, however, the Panel wishes to make clear that its main

purpose in recommending this sanction is not to make the Respondent "a poster child for bad behavior in Family Court," a concern expressed by Respondent's counsel (S-62). It is, rather, the Panel's view of the appropriate sanction in light of Respondent's own pattern of behavior in these three cases.

One of Respondent's letters to the Court, taken alone, might not support the public reprimand sanction for an isolated violation of Del. Prof. Cond. R. 3.5(d). It is true that the Respondent's language does not amount to the inflammatory language of Abbott, Ramunno or Guy. The Respondent, however, sent discourteous letters to the Court in three different cases, and violated other ethical rules in each of those cases.

While there is no apparent Delaware precedent for imposition of a sanction pursuant to Del. Prof. Cond. R. 6.2 ("Accepting Appointments"), the Family Court mandatory appointment practice has been in place in Sussex County, where the Respondent practices, for fifteen years. The Respondent had been appointed on numerous occasions prior to the cases at issue and was aware of his responsibilities upon receipt of these three Family Court appointments. Mandatory appointments are newer in New Castle County, but the Respondent's appointments, and underlying duties, were not new to him or his fellow members of the Sussex County Bar. The Respondent testified that upon appointment in the three cases in this ODC matter, and in four others, he did not obtain substitute counsel, as permitted by the Court. Rather, he attempted to throw the burden back on the Court, by writing to the Court and asking to withdraw as counsel. In the three cases at issue here, the Court's first denial of the Respondent's request did not satisfy the Respondent, and he persisted through correspondence with the Court and his client, until in the two later cases, he

achieved his purpose (to be relieved of the appointment). His conduct amounts to the repeated, intentional avoidance of three valid Court appointments, without a legally cognizable excuse.

The Respondent's 8.4(d) violation (conduct prejudicial to the administration of justice) in the wasting of judicial resources is not *de minimus*. The Respondent testified that he did not seek to avoid appointments after the Court denied his requests, that he did not continue to request to withdraw after his motions were denied, and that he did not believe his conduct was prejudicial to the administration of justice. T-60-61. The evidence shows, however, that in each of these three cases, the Respondent began the waste of judicial resources in filing motions to withdraw when he did not believe the motions would be granted (T-60), and when he could have obtained substitute counsel but did not do so. He continued to waste judicial resources, and in contradiction to his testimony, by persisting with the Court after his motions were denied (see Exhibit 5, March 4, 2010, letter to Judge Henriksen following January 4, 2010, denial of motion to withdraw; Exhibit 10, January 13, 2011, letter to Commissioner Holloway after a January 12, 2011, denial of motion to withdraw; March 17, 2011, office conference with Chief Judge Kuhn regarding March 11, 2011, appointment; March 23, 2011, correspondence with client, and March 30, 2011 letter to Chief Judge Kuhn).

Taken as a whole, for violations of Rules 3.5(d), 6.2 and 8.4(d) in connection with each of three Family Court appointments, the Panel recommends the imposition of a public reprimand.

Board Case No. 2011-0170-B Addendum

Respondent, through counsel, alleged at the March 8, 2012, sanctions hearing that Family Court breached the confidentiality of the ODC process "less than 24 hours after the hearing on January 23" (S-32) at a CLE seminar, "Common Ethical Pitfalls With Family Court Appointments." Mr. Bayard, counsel for Respondent, said he attended the seminar where a Family Court practitioner "described in some detail the facts of this matter tried before the Panel the day before." S-33. Mr. Bayard did not accuse Panel Members or Ms. Schwartz of ODC, but said that evidently the "confidentiality required by Rule 13...doesn't apply to Family Court personnel." S-33.

Mr. Bayard speculated that this matter has "been in the public domain for some time" and that if a New Castle County attorney is familiar with it, "the entire Sussex County Family Court bar not only knows the facts of this case but can put two and two together and has figured out who the respondent is. Even before today, Mr. Murray has been publicly embarrassed and that's wrong." S-33. Mr. Bayard argued that the "integrity of the process has been threatened," and while "obviously it has no impact on this Panel...the Panel needs to be aware that confidentiality has been breached." S-33.

The Panel expressed grave concern about the allegations, made for the first time at the March 8 hearing, and inquired further. Ms. Schwartz said that ODC had investigated Mr. Bayard's charge. Mr. Bayard said he had "absolutely [no idea] where the source of the leak is, but I have a good guess, and that would be Family Court. Nobody else would have the information." S-35.

Ms. Schwartz said that an ODC colleague, speaking at a Melson Inn of Court, addressed trends at ODC, including the issue of Family Court appointments, without

identifying cases, and the need to raise awareness of mandatory appointments, particularly in New Castle County where the practice is newer. S-36. Ms. Schwartz said that at the later January 24, 2012, seminar, a presenter (not from ODC) who had attended the Inn of Court months before (S- 42) said she understood there were two cases proceeding through ODC. Later in the seminar, Ms. Schwartz said, the presenter talked of a lawyer's writing the client to tell the client the lawyer was incompetent, which could be viewed as "sabotaging the appointment." S-37.

Ms. Schwartz suggested that those familiar with the case, such as Respondent's counsel and the Panel, might recognize the facts, but that there was nothing identifying at the seminar. Ms. Schwartz also argued the allegations, while unfortunate and an issue to be dealt with by ODC, the Family Court and perhaps the Board in another venue, are not relevant to this case. S-38-39.

Mr. Bayard argued that the Respondent has "already been publicly pilloried," and although there was no name disclosed in the seminar, Mr. Bayard said he believed "'Sussex County' was included, and the word she used was 'percolating within the system.'" S-40. Mr. Bayard acknowledged that no one suggested the case was being heard by a panel of the Board, but "It was astonishing for me less than 24 hours after appearing in front of you to hear this come up and hear three lawyers in the room say, 'I know who that is.'" S-41. He agreed that any revelation "had nothing to do with the Panel and nothing to do with Ms. Schwartz." S-42.

Mr. Bayard said that "lawyers love to gossip, and they do...But there obviously was a leak somewhere and I'm betting it was Family Court. That's just my experience." S-59. Mr. Bayard said that while the allegation should not be "factored into the

thinking" of the Board on this disciplinary matter, S-62, "I just wanted you to be aware of it....It was mentioned for the purpose of, one, my concern about confidentiality, and, two, on the premise that I don't believe that Mr. Murray's behavior warrants poster child treatment." S-62. When asked the relevance of the allegations to the sanctions hearing, Mr. Bayard responded, "Well, to the extent there are mitigating circumstances, it's in the public domain, that may be mitigating. I don't know....As a guy who is getting dealt with by the Board on Professional Responsibility for doing bad things in Family Court....I just think that's out there and that's the troublesome thing." S-63. Mr. Bayard pointed to the small size of the Sussex bar, and that three people attending the seminar tied the information to Mr. Murray. S-65.

Given the seriousness of the allegations raised at the March 8 sanctions hearing, the panel requested a copy of the DVD of the seminar in question, as well as a transcript of the seminar. The DVD and transcript were distributed to the Board on March 26, 2012.

Having read the seminar transcript and having viewed the DVD of the seminar presentation from January 24, 2012, the Panel is satisfied that there was no reference to the Respondent, or even to the county in which an ODC matter might have originated.

The seminar ("Common Ethical Pitfalls in Family Court Appointments") was presented in New Castle County, and presented by simultaneous transmission remotely to Kent and Sussex Counties. Margot Alicks, Esquire and Ms. Shauna Hagan, Esquire, both New Castle County practitioners, were the presenters. Ms. Alicks, who had been admitted to the Bar for two months and was in her firm's business department when she received her first Family Court appointment, spoke of her experience in handling the

appointment. Ms. Hagan, a New Castle County Family Court practitioner, gave the history of the mandatory Family Court appointment process. Ms. Hagan, who had attended the Inn of Court, said "there are two cases that I currently know about that are proceeding through ODC because of ...attorneys' failure to accept the Court appointment." Ms. Hagan pointed to rule 6.2 to note that an attorney can only decline appointment for good cause. CLE Seminar transcript -5 (Hereinafter, e.g., CLE-5).

There were extensive discussions of how to get assistance if one is appointed, how to keep sufficient records, and how and where to communicate with clients. Ms. Hagan stated that one is considered competent to represent a client if one has passed the Delaware Bar. CLE-37.

Noting Ethical Rule 8.4(d), Ms. Hagan said "there is a rumor going around that there was an attorney who was Court appointed who sent a letter to the client telling them that they weren't competent to represent them. That has been found to be – it's going up – I think ODC action is being taken on this." CLE-37. Later, Ms. Hagan speculated, "I think the point of that case was I think the person was doing that in order to try to get the client to 'fire them,' I put that in quotes because...Court appointment is a little hard to fire somebody. But...that's probably...they were trying to set it up to get out of it by doing it, by sabotaging the case... you can say this is not my normal area of practice...I'm not saying be dishonest. You can openly say this is not my area...but it's your obligation as a Delaware lawyer to become competent in that case, to do the research and talk to the people that you need to talk to about it. And I think that's where they're coming from with that." CLE- 38-39.

Ms. Hagan mentioned a "second ODC case that's floating around as well where someone was Court appointed and just simply didn't do anything." CLE-39.

The only reference to Sussex County during the presentation (53 pages of transcript) arose in regard to a male audience member's question in New Castle County. CLE-37. Following the discussion, Ms. Alicks, the other presenter, commented on the question at CLE-37: "So, that was a good question, though. I think he said it loud enough, they probably heard him in Sussex." CLE-41.

The Panel concludes that the Sussex County mention was not linked to any ODC case. Having viewed the DVD and scrutinized it for any possible link to this case, the Panel is satisfied that the "Sussex County" mention simply addressed whether the audience member's question could be heard at the other remote locations during the seminar. There were similar references to whether speakers could be heard in Kent and Sussex Counties during the other presentations that day.

In fact, because Ms. Hagan and Ms. Alicks practice in New Castle County and they were speaking from their own experiences, one who was unfamiliar with the facts at the time of the seminar could easily surmise that the ODC cases referred to originated in New Castle County.

There is concern about how the three Sussex County practitioners, to whom Mr. Bayard referred as linking the seminar references to the Respondent, drew their conclusions. As the presenters said, the Family Court Bar in Delaware is small. The Sussex County Bar is smaller. It is very possible that, before this case was ever referred to ODC on January 21, 2011, by Commissioner Holloway, the Respondent's unique style of correspondence and continued efforts to avoid appointment could have been the

subject of courthouse chatter in Sussex County, by the clients and families of clients he ultimately did not represent, the practitioners who were appointed in his stead, opposing counsel, and others. If there was general knowledge in advance of the Respondent's conduct among those in Sussex, they might have drawn their conclusions upon hearing the (non-identifying) presentation. However, one might also speculate that those who enjoy such gossip might have been doing their own speculation regarding New Castle County practitioners at the northern seminar location.

The Panel does not minimize the grave concern if there was a breach of confidentiality in this matter. ODC should take great care to avoid any potential breach, and may wish to reconsider how even non-identifying information is disseminated, particularly in pending matters, if there is a risk of disclosure.

For purposes of this disciplinary case, however, the Panel is satisfied that the Respondent was not "publicly pilloried" (S-40) by anyone connected with the CLE seminar presentation, the ODC, or the Board, nor should any loose speculation at the seminar be considered as a "mitigating circumstance" in this case.

Respectfully submitted,

Date: April 25, 2012 Susan H. Kirk-Ryan

Susan H. Kirk-Ryan, Esq. (I.D. No. 1070), Chair

Date: April 24, 2012 Karen L. Valihura

Karen L. Valihura, Esq. (I.D. No. 2789)

Date: April 24, 2012 Yvonne Anders Gordon

~~Yvonne~~ Anders Gordon, Ed. D.