IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a	§	
Member of the Bar of the	§	
Supreme Court of Delaware:	§	No. 231, 2013
	§	
RICHARD B. LYLE, II,	§	Board Case No. 2012-0107-B
Respondent.	§	

Submitted: July 3, 2013
Decided: August 23, 2013

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

O R D E R

1. This 23rd day of August 2013, it appears to the Court that the Board on Professional Responsibility ("Board") has filed a Report on this attorney discipline matter pursuant to the Delaware Lawyers' Rules of Disciplinary Procedure. The Office of Disciplinary Counsel ("ODC") filed objections to the Board's Report, and the Respondent filed an answer to the ODC's Objections. The Court has reviewed the matter and concurs in the Board's Report. We adopt the Board's recommendation of a public reprimand and six-month suspension of the Respondent, Richard B. Lyle, II, Esquire ("Lyle").

2. Lyle was admitted to the Delaware Bar in 2006 and began work as an Assistant Public Defender in the Public Defender's Office ("PD") in 2007. On March 21, 2011, co-Defendant Ron S. Roundtree ("Roundtree") was arrested and charged with Attempted Murder in the First Degree, Robbery, and other related

offenses arising out of a shooting. Wilmer Milton ("Milton") and three other co-Defendants were also charged. On March 24, 2011, a PD investigator interviewed Milton and summarized Milton's statements in a Client Information Form. In his statement, Milton accused Roundtree of the shooting that had occurred.

3. On March 30, 2011, Lyle began his representation of Roundtree. At some point during Lyle's representation, Roundtree accused Milton of shooting the victim. According to the Board Report, Lyle then searched the PD files to determine "whether Milton [had given] a statement to an []PD investigator. [Lyle] believed the statement would prove helpful in defending Roundtree. [Lyle] found Milton's statement in his []PD file, copied that statement (Client Information Form) and placed it in Roundtree's file." The next day, on March 31, 2011, Lyle "showed the Milton statement to Roundtree and/or discussed the content of Milton's statement . . . with Roundtree." Lyle's disclosure of Milton's statement to Roundtree violated Milton's attorney-client privilege and formed the basis for the ODC's Petition for Discipline against Lyle.

4. In a letter to the ODC, Lyle admitted that he had reviewed the other co-Defendants' files, made copies of all available co-Defendants' statements, and placed the statements in Roundtree's file. He also admitted that in doing so he had erred.

5. The Board found that Lyle had violated Rules 1.6(a), 1.8(b), 4.4(a), and 8.4(d) of the Delaware Lawyers' Rules of Professional Conduct ("Rules"), all of which Lyle admitted. The Board found, however, that Lyle did not violate Rule 8.4(c), under which "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

6. The Board found that although Lyle had acted "knowingly" in obtaining and revealing Milton's statement to Roundtree, "[m]ere knowing conduct does not constitute a violation of Rule 8.4(c)." Quoting from *In re Freebery*[1] and the ABA Standards, the Board concluded that "knowledge" under the ABA Standards is "the conscious awareness of the nature or attendant circumstances of the conduct *but without the conscious objective or purpose to accomplish a particular result*."[2] Here, the Board found, Lyle tried to defend Roundtree zealously, but had no "intent" to engage in dishonest behavior. Therefore, the Board concluded, Lyle had not violated Rule 8.4(c).

7. The ODC contends that Lyle violated Rule 8.4(c), because his conduct was "dishonest." The ODC claims that dishonesty "does not require a purpose to deceive" and includes "false assertions, omissions and/or failure to correct, as well as conduct evidencing a lack of integrity and principle." The ODC contends that

[1] 947 A.2d 1121 (Del. 2008).

[2] Emphasis in original (internal quotations omitted).

Lyle, despite lacking a specific intent to engage in dishonesty, violated Rule 8.4(c), and specifically relies on *In re Pankowski*[3] as authority on-point.

8. Lyle responds that even if Rule 8.4(c) does not require a showing of a specific intent to engage in dishonest behavior, at most he exercised "poor judgment" and never acted in violation of that Rule. Lyle further argues that *In re Pankowski* is factually distinguishable.

9. This Court has the "inherent and exclusive authority to discipline members of the Delaware Bar."[4] Although Board recommendations carry considerable weight, we are not bound by those recommendations.[5] We review the record independently to determine whether there is substantial evidence to support the Board's factual findings.[6] We review the Board's conclusions of law *de novo*.[7]

10. The Board's reliance upon *In re Freebery*[8] is misplaced, because that case concerned a Rule 8.4(b)—and not Rule 8.4(c)—violation. So also is ODC's reliance on *In re Pankowski*,[9] because the conduct at issue in *Pankowski* was an

[3] 947 A.2d 1122, 2007 WL 4245472 (Del. Dec. 5, 2007) (TABLE).

[4] *In re Martin*, 35 A.3d 419, 2011 WL 2473325, at *3 (Del. June 22, 2011) (TABLE) (citation omitted).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] 947 A.2d 1121, 2008 WL 1849916 (Del. Apr. 21, 2008) (TABLE).

[9] 947 A.2d 1122, 2007 WL 4245472 (Del. Dec. 5, 2007) (TABLE).

attorney's false signing and notarization of a pleading, despite the absence of any intent to deceive the court or to harm the client. That false notarization, by its very nature, bears a more direct relationship to Rule 8.4(c)'s "dishonesty, fraud, deceit or misrepresentation" requirement than did Lyle's conduct here.

11. Lyle's act of knowingly disclosing Milton's statement to Roundtree is distinguishable from our previous decisions that have found Rule 8.4(c) violations. As the Board itself highlighted, this Court has found Rule 8.4(c) violations where an attorney: 1) falsely signed a client's name and notarized a pleading,[10] 2) filed a mortgage application without disclosing an outstanding loan,[11] 3) failed to disclose prior ethical violations and sanctions to the Court,[12] and 4) knowingly made a false statement to a court.[13] Lyle's disclosure of Milton's statement to Roundtree is qualitatively distinguishable from these instances of "dishonesty, fraud, deceit or misrepresentation." We therefore conclude that the Board correctly found that Lyle violated Rules 1.6(a), 1.8(b), 4.4(a), and 8.4(d), and that he did not violate Rule 8.4(c).

[10] *In re Pankowski*, 947 A.2d 1122, 2007 WL 4245472 (Del. Dec. 5, 2007) (TABLE).

[11] *In re Freebery*, 947 A.2d 1121, 2008 1849916 (Del. Apr. 21, 2008) (TABLE).

[12] *In re Poliquin*, 49 A.3d 1115 (Del. 2012).

[13] *In re Amberly*, 996 A.2d 793 (Del. 2010); *In re Hull*, 767 A.2d 197 (Del. 2001).

NOW, THEREFORE, IT IS ORDERED that the Report filed by the Board on Professional Responsibility on May 6, 2013 (copy attached) is hereby **APPROVED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

EFiled: May 06 2013 10:56AM EDT
Filing ID 52125033
Case Number 231,2013

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a	)	
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RICHARD B. LYLE, III	)	**Board Case No. 2012-0107-B**
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REPORT OF THE BOARD ON PETITION FOR DISCIPLINE

The Petition for Discipline in this matter was filed on January 10, 2013 (the "Petition") by the Office of Disciplinary Counsel ("ODC"). The ODC seeks sanctions against Richard B. Lyle, III ("Lyle" or "Respondent"), in short, for violation of the attorney/client privilege. A hearing was held on February 28, 2013, in the Supreme Court Hearing Room, 11th Floor, Carvel State Building, 820 North French Street, Wilmington, Delaware ("the Hearing")[1]. The members of the panel for the Board were Daniel F. Wolcott, Jr., Esquire, Ms. Carey C. McDaniel and Wayne J. Carey, Esquire as Chair (the "Panel"). Jennifer-Kate Aaronson, Esquire represented the ODC, and Respondent represented himself.

I. Facts[2]

Lyle was admitted to the Bar of the Supreme Court of Delaware in 2006. (AA¶ 1). During the relevant time, Respondent was employed as an Assistant Public Defender in the Public Defender's Office in Georgetown, Delaware ("OPD"). (AA¶ 2). He joined the Public Defender in 2007 (Hearing Tr. 5). During his tenure with the Public

[1] References to the hearing transcript are cited as "Hearing Tr.__".
[2] Most of the facts set forth in the Petition are admitted in the Amended Answer to the Petition for Discipline filed by Respondent. Such facts are cited as AA¶ __ and at times are taken verbatim from the Petition. Respondent's original answer was apparently in response to a version of the Petition for Discipline that had some paragraph numbering errors. Those errors were corrected in the version of the Petition submitted to the Board. As such, the original Answer did not correspond to the correct paragraphs in the Petition. To remedy this situation, the Panel chair requested that the Respondent file an amended answer to coincide with the corrected Petition (Hearing Tr. 57-60), which Respondent did do.

Defender, Respondent estimates that he handled "a couple hundred maybe" felony cases (Id.). As such, Lyle was no novice to the criminal justice system or the rules on conflicts of interest and ethics applicable to all Delaware attorneys in multiple defendant cases.

On March 21, 2011, Ron S. Roundtree ("Roundtree") was arrested and charged with Attempted Murder in the First Degree and other related offenses, including robbery.[3] (AA¶3). Named as co-defendants were Treymen Atkins ("Atkins"), Adreine Bennett, Darrell Trotter and Wilmer Milton ("Milton") (Id.). The victim of the attempted murder and robbery was Deshawn C. Blackwell.[4]

On March 24, 2011, an OPD investigator, Todd Bates, interviewed Milton at the Sussex County Correctional Institute where Milton was being held in default of bail. Milton had been arrested on March 23, 2011, two days after Roundtree's arrest. Mr. Bates summarized Milton's statements in a Client Information Form. (AA Ex. 2). Milton's statement detailed the events surrounding the arrest and criminal charges involving all five defendants, including Roundtree. (AA Exhibit 3). It is the statement by Mr. Milton summarized in Mr. Bates Client Information sheet that is the privileged communication alleged to have been improperly shared by Respondent with Roundtree. Nowhere in his statement, did Milton admit any culpability in shooting Blackwell. To the contrary, Milton blamed Roundtree for the shooting.

On March 25, 2011, another OPD investigator, Nilsa Pedersen, interviewed Roundtree at Sussex County Correctional Institute where Roundtree was held in default

[3] *State v. Roundtree*, ID No. 1103018827.
[4] Joint Hearing Exhibit 2, hereinafter cited as "JHE __".

of bail. Ms. Pedersen summarized Roundtree's statements in a Client Information Form. (AA Exhibit 4).

Respondent first became aware that he was representing Roundtree on March 30, 2011, according to entries by Respondent in the Public Defender's database, when he received a call from a woman purporting to be Roundtree's girlfriend (JHE 5; Hearing Tr. 7). After that phone call, Respondent reviewed Roundtree's file. The file contained the Affidavit of Probable Cause and the Client Information Form prepared by Investigator Pedersen. Respondent learned from review of the Affidavit of Probable Cause that Roundtree was identified by the victim as the "shooter." (AA Exhibit 3). In a police interview, Roundtree confessed and identified Milton and Atkins as involved in the incident. (Id.).

On March 30, 2011, Respondent also learned from Detective Jonathan King that co-defendant Milton had invoked his Fifth Amendment privilege against self-incrimination and declined to make a statement to the police. (AA Exhibit 4).

The chronology of Respondent's data base entries for March 30, 2011 read as follows:

> "Performed by RBL [Lyle]:
>
> **3/30/2011** I called client's fiancée, Akisha Scott, at 362-8617. She stated that she is not a face W but has heard rumors. She put me in touch w/her neighbor, Angelika Flowers, @ 956-0440. She stated that she talked to the V after the shooting and that he expressed doubt as to whether client did the shooting. I asked both women to contact me if they learn more. (Jt. Ex. 6).

> **"3/30/2011** Reviewed client's file. We will keep this case and conflict out of his four co-Ds, Wilmer Milton (1103018831), Treymen Atkins (1103018832), Adreine Bennett (1103022133) and Darrell Trotter (1103019669).
>
> **"3/30/2011** I called Det. Jonathan King at 856-5850 x 208. He informed me that based on further investigation he believes that Milton may have been the shooter. He stated that Atkins gave the most credible statement. Milton refused to talk, and Trotter gave some info. He also said that the V [victim] may be paralyzed for life and is not sure who shot him. Finally, he said that a female suspect, Adreine Bennett, has been arrested and is viewed as one that helped plan the home invasion."

That sequence of entries indicates that Lyle had made a determination on March 30, 2011, that the OPD should continue to represent Roundtree and conflict out the other co-defendants in the Blackwell shooting (Hearing Tr. 7).

As indicated in his data base entries, Lyle spoke with Detective King who indicated that he was beginning to think Milton may have been the actual shooter. However, as noted above, Milton invoked his Fifth Amendment right not to speak to the police so he could not be further interviewed. Roundtree, on the other hand, had professed his innocence so far as shooting Blackwell and accused Milton of doing the actual shooting (Hearing Tr. 11-12).

Only after (i) talking to Detective King, (ii) unilaterally making the determination to keep the Roundtree representation and (iii) with the knowledge of the conflict with Milton, fresh in his mind, did Respondent then search the OPD files to determine whether the OPD had a file for Milton and whether Milton gave a statement to an OPD investigator, as he believed the statement would prove helpful in defending Roundtree

(Hearing Tr. 10, 16, 24). Respondent found Milton's statement in his OPD file, copied that statement (Client Information Form) and placed it in Roundtree's file (AA ¶8).

On March 31, 2011, Respondent appeared in the Court of Common Pleas in Sussex County to represent Roundtree at his scheduled Preliminary Hearing. Respondent met with Roundtree, for the first time, in a holding cell in the Sussex County Courthouse. Respondent showed the Milton statement to Roundtree and/or discussed the content of Milton's statement to OPD investigator Bates with Roundtree.[5] Respondent apparently never gave any consideration to the propriety of reviewing the files of other OPD clients and sharing the obtained information with his client in preparing a defense. Nor did he obtain the prior consent of Milton (Hearing Tr. 31). Being an aggressive type on behalf of his clients, Respondent's focus was on doing what he could to help his client, namely Roundtree (Hearing Tr. 39-40, 56). He had no focus on conflicts issues.

The OPD does have procedures in place to identify conflicts (Hearing Tr. 33). According to the record, when new matters are received, the OPD sends investigators out to do an initial interview (Hearing Tr. 33). If there are co-defendants, the OPD investigators typically will not interview any other defendants beyond the first one actually interviewed. The first defendant interviewed will then be the defendant represented by the OPD (Hearing Tr. 34, 112-113). However, in this case, the procedure was not followed because, due to lack of communication, two investigators were sent out, one from the Sussex County OPD office and one from the Kent County office who happened to be in Sussex County. Those investigators failed to

[5] The record is unclear as to whether or not Lyle actually showed Milton's statement to Roundtree or just told him about it. We do not believe the distinction is critical to our findings or sanctions recommendation in this matter.

communicate so that the inherent conflict could have been identified at the outset (Hearing Tr. 34-35). As such, Respondent could not rely on the OPD's standard internal procedure to "red flag" the procedure for him (Hearing Tr. 35). Nevertheless, the policy of the OPD was not to permit attorneys in its office to go through files of co-defendants "to see if there's any statements or confidential information that could be used to" benefit the defendant the OPD was keeping (Hearing Tr. 122). Regardless, the mere fact that there were co-defendants should have alerted Respondent, an experienced criminal defense attorney, that a conflict was possible (Hearing Tr. 130).

To resolve the conflict of interest with Roundtree's co-defendants, on April 12, 2011, the OPD filed four Public Defender Declarations of Conflict/Requests for Appointment of Counsel with the Superior Court seeking appointment of counsel for four co-defendants. (AA Exhibit 5, JHE 8). The Declarations listed Ron Roundtree, the Respondent's client, as the conflicting client and stated "PD represents co-defendant in this case" as the basis of conflict. Respondent, himself, on behalf of the OPD, signed two of the four conflict declarations, one for Adreine Bennett and one for Treymen Adkins (JHE 8).

On or about April 13, 2011, Roundtree's file was reassigned to Stephanie Tsantes, Esquire ("Tsantes") of the Sussex County OPD. Respondent was replaced as Roundtree's counsel to permit his taking a leave of absence to deal with some family issues (Hearing Tr. 71).

On April 20, 2011 and September 23, 2011, Roundtree made written requests to Tsantes seeking to obtain co-defendant Milton's statement. (AA Exhibit 6). Upon receiving those requests, Ms. Tsantes had no idea what Roundtree was referring to be-

cause she had not seen the Milton statement in Roundtree's file. She did not understand "initially the significance of what my client was asking for" (Hearing Tr. 73, 75). Later, she searched the file and discovered Milton's statement in Roundtree's OPD file (Hearing Tr. 75).

It became readily apparent to Ms. Tsantes that she had a conflict with continuing to represent Roundtree because he was demanding to see documents improperly taken from Milton's file, documents that she could not share with Roundtree. When she refused to give Roundtree the documents from Milton's file, her relationship with Roundtree suffered an immediate breakdown (Hearing Tr. 77). This untenable situation was upsetting to Ms. Tsantes because she had managed to develop a good working relationship with Roundtree in a fairly short time (Hearing Tr. 72).

On September 28, 2011, The Honorable Richard F. Stokes held an *ex parte* conference with Tsantes, at her request, and determined that the OPD had a conflict in continuing to represent Roundtree. (AA¶ 14). The Court stated, "It appears that Mr. Lyle has mined the file and obtained information that he should not have given to Mr. Roundtree from Mr. Milton." (AA¶15). Judge Stokes then appointed James Liquori, Esquire to represent Roundtree. This change of counsel resulted in Roundtree's trial being delayed (Hearing Tr. 79). Mr. Liquori ultimately submitted a statement for his services for $2880, an expense that would not have been incurred, but for Respondent's actions presently under consideration (JHE 1).

The Superior Court referred Respondent to the ODC for investigation of his misconduct. In a letter to the ODC dated June 15, 2012, Respondent admitted that on March 30, 2011, he reviewed the other co-defendants' files, made copies of all available

co-defendants' statements and placed the statements in Roundtree's file. Further, in the same letter, the Respondent admitted that he "erred in obtaining any statement(s) made by co-defendants to the Public Defender's Office." (AA Exhibit 7, JHE 5).

II. COUNTS OF THE PETITION

The Petition alleges violations of five different rules of professional conduct, all relating to Lyle's having violated the rights of Wilmer Milton to have communications with his attorney kept confidential.

Count One alleges that by revealing Milton's privileged statement to Roundtree without Milton's informed consent, Respondent violated Rule 1.6(a) that provides:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

Count Two asserts that by taking and copying a confidential client statement given to the OPD's investigator by the OPD's client, Milton, and allowing another co-defendant, Roundtree, involved in the same criminal matter to read Milton's statement, the Respondent used information relating to representation of Milton to the disadvantage of Milton without Milton's knowledge or consent in violation of Rule 1.8(b). Rule 1.8(b) prohibits a lawyer from "using information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

Count Three contends that Respondent violated Rule 4.4(a) by utilizing means to obtain evidence that violated the legal rights of Milton. Rule 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay

> or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Count IV claims that Lyle violated Rule 8.4(c), which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Specifically, the Petition states that "by searching a confidential client's file after determining the existence of a conflict for the purpose of obtaining the client's statement, Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(c).

Finally, Count V alleges, "by obtaining Milton's confidential statement and providing it to Roundtree, Respondent engaged in conduct prejudicial the administration of justice in violation of Rule 8.4(d)," which provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

Respondent admits that he violated Counts I, II, III and V. He denies that he violated Count IV.

III. STANDARD OF PROOF

Allegations of professional misconduct must be established by the ODC by clear and convincing evidence.[6] Because of Respondent's admissions, that burden is satisfied as to Counts I, II, III, and V.[7] As to the remaining Count IV, we must make our own findings as to whether the ODC met its burden of proof by clear and convincing evidence. We conclude that it did not.

[6] In Matter of Tos, 576 A. 2d 607 (Del. 1990); Delaware Lawyers' Rule of Disciplinary Procedure ("DLRFDP") 15(c).
[7] In the Matter of Lassen, 672 A.2d 988, 994 (Del. 1996).

IV. FINDINGS OF THE BOARD AS TO COUNT IV

The Board is guided and bound by the precedents of the Delaware Supreme Court and the ABA Standards for Imposing Lawyer Sanctions ("ABA Standard or ABA Standards").[8]

Therefore, our inquiry is whether Respondent by his misconduct in obtaining Milton's statement to the OPD investigator and by revealing that statement to Roundtree, engaged in conduct involving dishonesty, fraud, deceit and misrepresentation. Obviously, the ODC contends that it did meet its burden of proof as to Count IV.

The ODC in its post-hearing submission contends that Respondent acted knowingly when he obtained and revealed Milton's statement. Respondent concedes that he did act knowingly, but that he did not focus on the ethical violation of his conduct. That knowing conduct seems to be the basis for ODC's argument that its burden has been met. If so, the ODC is wrong.

Mere knowing conduct does not constitute a violation of Rule 8.4(c).[9] In Freebery, the Court adopted the Board's report verbatim. The Board stated, "This distinction [between knowing and intentional] is critical, since the recommendations suggested by the ABA Standards are based on the mental state that forms the basis of an attorney's misconduct—i.e., more culpable mental states generally receive more severe sanctions. Specifically, under the ABA Standards, 'knowledge' is defined as 'the conscious awareness of the nature or attendant circumstances of the conduct *but*

[8] In re Agostini, 632 A.2d 80 (Del. 1993).
[9] In re Freebery, 947 A. 2d 1121 (Del. 2008).

without the conscious objective or purpose to accomplish a particular result'."[10] In other words, one's mental state is relevant.

Fraud, dishonesty, deceit or misrepresentation requires a "conscious objective or purpose to accomplish" something specifically constituting fraud, etc.[11] Signing a client's name and then falsely notarizing that signature meets the standard of Rule 8.4(c).[12] Filing a mortgage application and not disclosing an outstanding loan falls within the ambit of Rule 8.4(c).[13] Failure to disclose prior ethical violations and sanctions to the Court constitutes, "dishonesty...deceit or misrepresentation" under Rule 8.4(c).[14] Knowingly making a false statement to a court violates Rule 8.4(c).[15] Respondent's conduct did not rise to that level.

The elements of fraud are hornbook law: "(1) a false representation of material fact; (2) the knowledge or belief that the representation was false, or made with reckless indifference for the truth; (3) the intent to induce another party to act or refrain from acting; (4) the action or inaction taken was in justifiable reliance on the representation; and (5) damage to the other party as a result of the representation."[16]

Nothing in Respondent's conduct even suggests he had any intent other than to obtain information that might be helpful in his defense of Roundtree. He found the Milton file and looked through it. He found the investigator's interview form and copied it, inserting it into the Roundtree file. He then met with Roundtree and either showed his client the interview form or told him what Milton said to the investigator. As abhorrent as that conduct was, given the sanctity of the attorney/client privilege, it does not rise to the

[10] In re Freebery, part VD, emphasis in Board report.
[11] In re Freebery, *supra*.
[12] In re Pankowski, 947 A2d 1122 (Del. 2008).
[13] In re Freebery, *supra*.
[14] In re Poliquin, 49 A.3d 1115 (Del. 2012).
[15] In re Amberly, 996 A.2d 793 (Del. 2010); In re Hull, 767 A.2d 197 (Del. 2001).
[16] Matter of Enstar Corp., 593 A.2d 543, 549 (Del. 1991).

level of fraud, deceit, dishonesty or misrepresentation. Respondent did not deceive anyone, he was not dishonest with anyone, he did not misrepresent anything to anyone nor did he represent anything falsely so as to defraud anyone. Accordingly, we find the ODC has not met its burden of proof of clear and convincing evidence sufficient to carry the day as to Count IV.

V. SANCTIONS

a. Basis For Attorney Client Privilege

The attorney/client privilege is perhaps the oldest confidential communications recognized as a privilege in the history of the law.[17] Its purpose is "'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'[18]The privilege 'rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.'"[19] Given that need, it is not overstating things to say that the privilege is critical to the orderly operation of the judicial system. Indeed, the policy behind the privilege "places a premium on the need for confidence and trust between attorneys and clients in order to promote full disclosure by the client."[20] The protection afforded by the privilege "is viewed as the vehicle by which a lawyer may gain a sense of 'rapport' and 'empathy' with his client in order to more effectively deal with the particulars of the case."[21]

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[17] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061, 1069 (1978) (the privilege can be traced to holdings from the Elizabethan period.).
[18] The Attorney-Client Privilege and Discovery of Electronically-Stored Information, Duke Law & Technology Review, No. 001 (2011), quoting Upjohn, 449 U.S. at 389.
[19] Id. quoting, Trammel v. United States, 445 U. S. 40, 51 (1980).
[20] *Sanctions Imposed for Revealing Attorney-Client Confidences*, The Journal of the Legal Profession, 167, 168.
[21] Id. at 167, quoting Gardner, *A Re-Evaluation of the Attorney Client Privilege*, 8 Vill. L. Rev.279, 310 (1963).

The attorney/client privilege has been codified in the Delaware Rules of Evidence, specifically DRE 502(b).[22] That rule provides:

> *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

There is no doubt that Respondent's actions violated the attorney-client privilege belonging to Milton. For a time, Milton was a client of the Office of the Public Defender, as was Roundtree. Anything Milton told any attorney, employee or investigator of the OPD was protected as confidential under the attorney/client privilege. Disclosure of that information could only be justified if one of the exceptions applied.[23] The only possible exception would be the last one, joint clients, since both Roundtree and Milton were at the relevant time being represented by the OPD. However, for that exception to apply there must be communications of common interest. The interests of Roundtree and Milton were not common, but clearly adverse since each was pointing the finger of blame at the other for shooting Blackwell.

Given the importance of the privilege, the sanction imposed in this case must be one that gives assurance to participants in the judicial system that what they say to their attorneys in furtherance of the business of the justice system will remain confidential,

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[22] Id. "Most states codify the privilege in a statute or rule; others still rely on common law." Citing Restatement (Third) of law Governing Lawyers §68 (2000).

[23] Delaware recognizes six exceptions: (1) to prevent furtherance of crime or fraud, (2) claimants through same deceased client, (3) breach of duty by a lawyer or client, (4) accusations against a lawyer, (5) document attested by a lawyer and (6) joint clients. DRE 502(d).

i.e., preserve their confidence in the judicial system. After all, with the privilege belonging to the client and not the attorney, it is only the client that can waive the privilege or authorize that it be waived[24]. Without the privilege, the necessary rapport between client and attorney may not be obtained to the detriment of the efficacy of the judicial system.

b. Objectives and Standards for Imposing Sanctions

"The objectives of the lawyer disciplinary system are to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct."[25] It is the duty of the Board to recommend a sanction that will promote those objectives, while remembering the Supreme Court's admonishment that sanctions are not to be punitive or penal.[26]

In determining the appropriate sanction for lawyer misconduct, the Delaware Supreme Court follows the ABA Standards:

> The ABA framework consists of four key factors to be considered by the Court: (a) the ethical duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and, (d) aggravating and mitigating factors.[27]

i. The Ethical Duties Violated

Based on his own admissions and the related findings of the Panel, Lyle has violated four different duties. The findings of the Panel, coupled with Lyle's admissions are summarized accordingly:

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[24] The Journal of the Legal Profession, *supra*, at 167.
[25] In re McCann, 894 A.2d 1087, 1088 (Del. 2005); In re Fountain, 878 A.2d 1167, 1173 (Del. 2005) (quoting In Re Bailey, 821 A.2d at 866); In re Doughty, 832 A.2d 724, 735-736 (Del. 2003).
[26] In re Katz, 981 A.2d 1133, 1149 (Del. 2009); In re Garrett, 835 A. 2d 514, 515 (Del. 2003).
[27] In re Doughty, 832 A.2d at 736; In re Goldstein, 990 A.2d 404, 408 (Del. 2010); *See also* In Re McCann, 894 A.2d at 1088; In re Fountain, 878 A. 2d at 1173; In re Steiner, 817 A.2d at 793, 796 (Del. 2003).

Rule Violated	Description
Rule 1.8(b) using privileged information of one client to the detriment of another client	Lyle improperly used privileged information from one client of the OPD, Milton, to try to advantage another client, Roundtree, to Roundtree's benefit and Milton's detriment.
Rule 1.6(a) revealing privileged information without client consent	Lyle violated this rule by revealing Milton's privileged statements to Roundtree.
Rule 4.4(a) used means that violated rights of another to obtain evidence	This rule was violated when Lyle wrongly searched the files of Roundtree's co-defendants and improperly copied statements from Milton.
Rule 8.4(d) engaged in conduct prejudicial to the administration of justice	Lyle's violation of the attorney-client privilege was detrimental to the administration of justice.

ii. **The Lawyer's Mental State**

There was no testimony to suggest that Respondent suffered from any impairment of his mental state that would prevent him from meeting his obligations under the Rules.

iii. **Actual or Potential Injury**

There was limited, if any, harm to Milton as a result of his attorney/client privilege having been violated (Hearing Tr. 53, 142).[28] Milton said nothing inculpatory.

However, the inquiry cannot stop there. Ms. Tsantes testified that she had developed a good rapport with Roundtree after she took over his representation when Respondent took his leave of absence from the OPD. That relationship deteriorated rapidly when she refused to provide Roundtree with copies of Milton's statements that Roundtree knew existed from his conversations with Lyle. This damage caused by the deterioration in the attorney/client relationship between Ms. Tsantes and Roundtree is

[28] ODC argues that improper disclosure of privileged communications can affect a defendant's whole defense strategy (Hearing Tr. 43-44).

immeasurable (Hearing Tr. 77). Roundtree's trial was also delayed for several months while Mr. Liquori got up to speed (Hearing Tr. 79).

When Ms. Tsantes went to the Superior Court and explained the conflict she had with her client, the Court immediately removed her from further representation of her client, and appointed Mr. Liquori as outside counsel to represent Roundtree. Mr. Liquori ultimately submitted a bill for $2880, an expense that would not have been incurred but for Respondent's violation of the privilege at the outset.

Respondent should never have even looked at Milton's file because the conflict generally between Roundtree and his co-defendants with respect to the OPD's office was only exacerbated (Hearing Tr. 18). Once Respondent looked at Milton's file, he, Lyle, was conflicted out of representing any of Roundtree or his co-defendants. By not acknowledging his conflict at the outset, Respondent, by continuing to represent Roundtree, put, not only the OPD in an untenable position, but put the integrity of the justice system in general at risk.

iv. Aggravating and Mitigating Circumstances

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanctions to impose.[29] "Aggravation or aggravating circumstances are any consideration of factors that may justify an increase in the degree of discipline to be imposed."[30]

The Panel finds the there is only one aggravating factors as set forth in ABA Standard 9.22: substantial experience in the practice of law.[31] Lyle was admitted to the Delaware Bar in 2006. He has spent most of his career as a lawyer practicing with the

[29] In re Bailey, 821 A.2d 851 (Del. 2003), In re Goldstein, 990 A. 2d at 408.
[30] ABA Standard 9.21; In re Steiner, 817 A.2d 793, 796 (Del. 2003).
[31] ABA Standard 9.22(i).

OPD, having handled several hundred cases. He was familiar with the ODC's procedure for handling conflicts with multiple defendants. In fact, he signed two of the four Public Defender Declarations of Conflict/Requests for Appointment of Counsel with the Superior Court seeking appointment of counsel for four co-defendants. He admitted there was a clear conflict, one that he made worse (Lyle Depos. P. 35)

Mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed."[32] We find that the mitigating factors are as follows:

(1) absence of prior disciplinary record.[33] This is Lyle's first time before the Board of Professional Responsibility; (2) absence of dishonest or selfish motive.[34] There is no doubt that Lyle had no dishonest or selfish motive. He was motivated solely by his desire to represent his client zealously. Unfortunately, Respondent did not perform his duties to represent his client without crossing the line to impropriety; (3) cooperative attitude toward proceedings.[35] By all indication, Lyle was professional and cooperative throughout these proceedings); (4) character or reputation.[36] The testimony offered establishes this factor (Hearing Tr. 109-110); (5) expression of remorse.[37] Lyle stated his remorse on the record convincingly and repeatedly.

[32] ABA Standard 9.31.
[33] ABA Standard 9.32(a).
[34] ABA Standard 9.32(b).
[35] ABA Standard 9.32(e).
[36] ABA Standard 9.32(g).
[37] ABA Standard 9.32(m).

Lyle would also have us give consideration in our sanction recommendation to the fact that he has young children, and what effect his suspension, if any, would have on them. Unfortunately, we are not permitted to give consideration to this factor.[38]

The Board finds that the mitigating factors, while outnumbering the aggravating factor, do not outweigh the aggravating factor. As such, a public sanction is justified in order to satisfy the requirement of protecting the public and maintaining the integrity of the justice system.

VI. BOARD'S RECOMMENDED SANCTION.

The Board's recommendation of an appropriate sanction assists the Court, but it is not binding.[39] The Court "has wide latitude in determining the form of discipline, and [it] will review the recommended sanction to ensure that it is appropriate, fair and consistent with . . . prior disciplinary decisions."[40] Accordingly, the Board must carefully examine prior disciplinary precedent to the extent possible in recommending sanctions.

Neither the ODC or Respondent cites us to any Delaware case on point, and our independent research has not revealed any.[41] The ODC cites primarily to the ABA Standards[42]. In doing so, the ODC typically chooses a shotgun approach, citing to numerous sections of the ABA Standards. However, we find the applicable sections to be 4.2, *Failure to Preserve the Client's Confidence*, 4.3, *Failure to Avoid Conflicts of Interest* and 6.2, *Abuse of the Legal Process.* Each of those sections differentiates between

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[38] In re Lassen, 672 A.2d 988, 1000 fn. 13 (Del. 1996) ("The Court is not unmoved by consideration of Respondent's family...The Court may not temper its treatment of Respondent to protect the interests of those peripherally affected if to do so would undermine the interests of the lawyer discipline system.").

[39] In re McCann, 894 A.2d at 1088; In re Bailey, 821 A.2d at 877.

[40] Id.; In re Tonwe, 929 A.2d 774, 777 (Del. 2007). In re Steiner, 817 A.2d at 796.

[41] *But see*, Postorivo v. AG Paintball Holdings, Inc., 2008 WL 3786199 (Del. Ch.)(discussing disqualification of counsel in conflict situations).

[42] It is the ABA Standards that are the guidelines adopted by the Delaware Supreme Court. In re Fountain, 878 A. 2d 1167 (Del. 2005). Therefore, in the absence of Delaware case law, we rely solely on the ABA Standards. *But see*, In re Winkler, 834 N. E. 2d 85 (Ind. 2005) (imposing suspension for improperly violating privilege by taking confidential document from opposing counsel's notes.)

knowing conduct and negligent conduct. If the conduct is knowing, suspension is called for.[43] If the conduct is negligent, reprimand is recommended.[44]

The ODC argues that Lyle's actions or misconduct must be found to be knowing within the meaning of the ABA Standards. Under those ABA Standards,

> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

The alternative is negligence. Under the ABA Standards,

> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

After careful study of those ABA Standards, we believe "knowledge" is the definition properly applied to Lyle's misconduct. Respondent argues that he acted solely focusing on what he could do for his client, Roundtree. He states that he never thought his actions would violate any rules of professional conduct.

We find Lyle's position to be unsupported by the record. He knew the conflict procedures of the OPD involving multiple clients. He knew he should not review the files or interview reports of co-defendants. He became conflicted out at the very moment he reviewed Milton's file. Yet he went on to exacerbate the situation when he told Roundtree what Milton said to the OPD investigator. That is acting with knowledge.

We are particularly troubled by Lyle's statement twice in his Amended Answer where he states, "At the time, I felt my duty to represent Roundtree overrode any duty to co-defendant(s), not represented by the Office of the Public Defender".[45] That he did not

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[43] ABA Standards 4.22, 4.32 and 6.22.
[44] ABA Standards 4.23, 4.33 and 6.23.
[45] AA ¶¶ 19 and 21.

appreciate the nature of his misconduct, is belied by that statement. Clearly, no attorney can violate one defendant's privilege to the detriment of another co-defendant.

As such, and balancing the violations admitted and found by the Panel, along with the aggravating and mitigating circumstances existing in Mr. Lyle's situation, we believe a public admonition and a six-month suspension is the proper sanction to be imposed[46]. Such a suspension should send a message to the public and to the subjects of the criminal justice system that Delaware takes the attorney/client privilege seriously and violations of that privilege will be dealt with severely.

As additional conditions, Lyle is to reimburse the $2880 incurred by Mr. Liquori' s representation, and is to continue his work with the Delaware Lawyers Assistance Program. Next, Respondent shall take three hours of CLE directly dealing with conflicts of interest. Finally, Respondent is to reimburse the ODC for the costs of prosecuting this matter. We believe these sanctions satisfy the stated objections of the lawyer discipline system "to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct".[47]

Conclusion and Signature Page Follow

[46] Note we do not intend the suspension to be six months and a day requiring application for readmission. We do not believe any showing of rehabilitation is necessary. *See*, In re Figliola, 652 A.2d 1071, 1078 fn. 13 (Del. 1994). But for the Supreme Court's admonition against suspensions of less than six months, we might have been inclined to recommend a shorter suspension. Id. at 1077; *compare* In re Winkler, 834 N.E.2d 85, 89-90 (Ind, 2005) (sixty (60) day and one hundred twenty (120) day suspensions given for violating attorney/client privilege) .

[47] In re McCann, 894 A.2d at 1088.

CONCLUSION

For the reasons stated herein, we recommend that the sanctions of public reprimand, six-month suspension, the indicated CLE requirement and costs be imposed.

Respectfully submitted,

Dated:

4/24/13 Carey C. McDaniel
Carey C. McDaniel

Daniel F. Wolcott, Jr. (ID 284)

5/4/13 Wayne J. Carey
Wayne J. Carey (ID # 2041)