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:	§ § § §	 No. 346, 2012
MARK D. SISK,	§	Board Case No. 2011-0163-B
	§	Board Case No. 2011-0164-B
Respondent.	§	Board Case No. 2011-0165-B
	§	Board Case No. 2011-0443-B

Submitted: September 5, 2012
Decided: September 25, 2012

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

ORDER

This 25th day of September 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 (ODC) filed objections to the Board's Report, and counsel for Respondent 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 approves the Board's Report as to the violations by Respondent but disagrees with the sanctions recommended therein.

NOW, THEREFORE, IT IS ORDERED that the Report filed by the Board on Professional Responsibility on June 26, 2012 (copy attached) is hereby APPROVED as to its findings of violations by Respondent, with the Court concluding that Respondent's violations were knowing and, while mitigating factors of personal illness, the death of a parent, and the dissolution of his law firm were considered, the appropriate sanction is suspension.

IT IS FURTHER ORDERED that:

1) The Respondent shall be prohibited and suspended from engaging in the practice of law for a period of six months and one day and receive a public reprimand;

2) During the suspension, the Respondent shall conduct no act directly or indirectly constituting the practice of law, including the sharing or receipt of any legal fees. The Respondent shall also be prohibited from having any contact with clients or prospective clients or witnesses or prospective witnesses when acting as a paralegal, legal assistant, or law clerk under the supervision of a member of the Delaware Bar, or otherwise;

3) The contents of the Board's report shall be made public:

4) The Respondent shall fully cooperate with the ODC in its efforts to monitor his compliance with this Order;

5) This Order shall be disseminated by the ODC in accordance with Rule 14 of the Delaware Lawyers' Rules of Disciplinary Procedure;

6) The ODC 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.

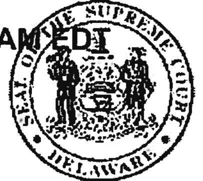
The matter is hereby **CLOSED.**

BY THE COURT:

/s/ Carolyn Berger
Justice

ATTACHMENT

EFiled: Jun 26 2012 10:19AM EDT
Filing ID 45010441
Case Number 346,2012



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

In the Matter of a Member of the Bar of the Supreme Court of Delaware	))))	**CONFIDENTIAL**
MARK D. SISK Respondent.	)	**Board Case No. 2011-0163-B**
	)	**Board Case No. 2011-0164-B**
	)	**Board Case No. 2001-0165-B**
	)	**Board Case No. 2011-0443-B**

REPORT OF THE BOARD ON
PETITION FOR DISCIPLINE

This is the report on proceedings instituted by a Petition for Discipline filed on January 5, 2012 (the "Petition") by the Office of Disciplinary Counsel ("ODC"). The ODC seeks sanctions against Mark D. Sisk ("Sisk" or "Respondent") in four different matters. A hearing was held on April 19, 2012 in the Supreme Court Hearing Room, 11th Floor, Carvel State Building, 820 North French Street, Wilmington, Delaware ("the Hearing"). The members of the panel for the Board were D. Benjamin Snyder, Esquire, Mr. John Stafford and Wayne J. Carey, Esquire as Chair (the "Panel"). Frederick W. Iobst, Esquire and Joelle E. Polesky, Esquire represented the ODC. Respondent was represented by Charles Slanina, Esquire.

I. The Claims Against Respondent[1]

Sisk was admitted to the Bar of the Supreme Court of Delaware in 1979. (AA¶ 1; Tr. 97). During the period covered by the Petition, Sisk was engaged in the private practice of law, and he was affiliated with two firms, most recently Curran & Sisk in Newark, Delaware. (AA¶ 2).

[1] Many of the facts set forth in the Petition are admitted in the Amended Answer to the Petition for Discipline filed by Respondent in which the allegations of the Petition are restated. Such facts are cited as AA¶ __.

During part of the relevant period, Respondent suffered some personal problems. In March 2010, he underwent surgery for cancer (Tr. 97), taking several months to recover to the point of being able to handle a full workload (Tr. 98). In August 2010, his law firm broke up due to a dispute between his two partners, causing Sisk added and severe stress (Tr. 98). Lastly, in February 2011, his father collapsed and died the following month, leaving Sisk with the grief of that loss and the responsibility of caring for his mother (Tr. 98).

The Petition alleges "18 violations of ten different rules of professional conduct." (Tr. 7).[2]

A. Board Case No. 2011-1064-B (Deborah A. Brennan)

a. Facts

On August 10, 2010, Deborah A. Brennan retained Sisk to file child custody and child support petitions (Tr. 16, 99). Ms. Brennan paid Sisk a retainer of $1500 at the time of his being hired. (AA¶ 3; Tr. 16, 99; JX Tab 5[3]). At that time, Sisk informed Ms. Brennan that it would take six to eight weeks for the Family Court to schedule an initial meeting on the petitions after they were filed. (AA¶ 4; Tr. 18, 99).

About six weeks went by with Ms. Brennan receiving no status report from Respondent. So, on September 21, 2010, she called him, seeking confirmation that the petitions had been filed (Tr. 19, 99). During that phone call, without checking his file, but believing that the filing had occurred, Sisk confirmed that the petitions had indeed been filed (AA¶5, Tr. 99). However, despite this unqualified assurance, the truth was

[2] Citations to Tr. __ are to the transcript of the April 19 Hearing.
[3] Citations to JX Tab __ are to the Joint Exhibit Book admitted at the April 19 Hearing. References to Rules are to the Delaware Lawyers' Rules of Professional Conduct.

that the petitions had not been filed (AA ¶6; Tr. 100). When Respondent checked his file in December 2010, he realized the petitions had not been filed (Tr. 123). Nevertheless, he neglected to notify Ms. Brennan that the filing had not been made (AA ¶7; Tr. 100).

On or about January 4, 2011, Ms. Brennan called Sisk and faxed him a letter terminating his representation because she had not received any copies of any petitions and because a group legal plan through her employer had become available (Tr. 20, 101; JX Tab 6). Sisk left Ms. Brennan a voicemail message informing her for the first time that he had not filed the petitions, offering his apologies. (AA ¶10, Tr. 123). Respondent testified that he gave the retainer check from Brennan to the firm's bookkeeper (Tr. 120). The retainer was deposited in the escrow account of the firm of Conaty Curran & Sisk, Respondent's firm at that time ("CC&S") (Tr. 100). One-half of the retainer was later taken erroneously as an earned fee.[4] However, when Respondent was terminated, he offered to refund Ms. Brennan's full retainer, paying the $750 taken out of the retainer from his own personal funds so Ms. Brennan would not have to wait for settlement of the receivership that CC&S had been put into. (AA ¶8; Tr. 122). Because of that receivership, Sisk still has not been reimbursed (Tr. 122).

Petitions were eventually filed on Ms. Brennan's behalf by new counsel in March 2011 (Tr. 25). Ms. Brennan claims she was damaged because had her petition for child support been filed in September 2010, when she first retained Sisk, she would have been eligible for support from that filing date (Tr. 24-25). Sisk disputes this, arguing that

[4] The record is unclear on how this happened given that no work had been done on Ms. Brennan's case. Sisk testified that he was unaware part of the retainer had been deposited to the firm's operating account and that he personally did not receive any portion of the $750 (Tr. 101, 103; 120-122).

if this was an original petition for child support, she would be entitled to support from the date of separation with her husband (Tr. 144).

At the time she terminated Sisk, Ms. Brennan requested an accounting of any funds from the retainer that he planned to keep (JX Tab 6; Tr. 101). She followed up with an email on February 18, 2011 (JX Tab 7). No such accounting was provided (AA ¶9); however, as noted, a full refund of the retainer was eventually tendered back to Ms. Brennan, which Ms. Brennan considered to be an accounting (Tr. 23, 27; JX Tab 9)[5].

Sisk wrote to the ODC on April 6, 2011, in response to its inquiry of March 16, 2011 (JX Tab 8). In his response, Sisk explained that, prior to December 2010, he genuinely believed that he had filed the child support petition. He clarified that the delay in returning her retainer was, at least in part, explained by the fact that his firm was in dissolution and the funds were "in the hands of a third party arbitrator" (Tr. 122). While noting his apology to Ms. Brennan, despite the dissolution of his firm, Sisk took full responsibility for any delay caused Ms. Brennan and his failure to file the petition in Family Court (Tr. 123).

b. Counts of the Petition

The Petition asserts eight counts against Sisk in the Brennan matter. Counts I-IV and VIII relate to Sisk's failure to file the custody and child support petitions and related representations.

Count I asserts that Sisk failed to provide competent representation in violation of Rule 1.1 which states an attorney "shall provide competent representation to a client.

[5] Ms. Brennan claims to have made several inquiries before the retainer was finally returned (Tr. 29).

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Count II alleges violation of Rule 1.2(a) requiring an attorney to abide by decisions of the client by failing to file the custody and support petitions as requested by the client. Count III states that Sisk violated Rule 1.3 by failing to act with reasonable diligence in failing to file the custody and child support petitions. Count IV claims that Respondent violated Rule 1.4(a)(3) by failing to inform the client that he had not filed the custody and child support petitions and by informing her that he had made the requisite filings when he had not done so. Finally, Count VIII accuses Sisk of violating Rule 8.4(c) when he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when he advised Ms. Brennan that he had filed the custody and child support petitions when he had not.

Counts V-VII relate to the handling of the $1500 retainer. Count V asserts that Sisk violated Rule 1.5(f) by failing to provide Ms. Brennan a written statement of fees earned. Counts VI and VII claim that Sisk violated Rule 1.15(b) and Rule 1.16(d) by failing to deliver a refund of the retainer promptly when requested. Sisk claims that he offered and made a full refund but that the process took 2 ½ months because the firm was in receivership (AA ¶ 24).

Respondent admits Counts I-IV, VII and VIII. He denies Counts V and VI. (AA ¶¶ 14, 16, 18, 20, 22, 24, 26 and 28; Tr. 104-105).

B. Board Case No. 2011-0165-B (David P. Higley)

a. Facts

David P. Higley retained Sisk in November of 2004 to represent him in connection with division of property in a divorce proceeding between Mr. Higley and Jeanne Higley. (AA ¶29; Tr. 106). A Stipulation of Settlement was approved by the Family Court in June of 2006 that required the preparation of two Qualified Domestic Relations Orders ("QDRO") in order to divide Jeanne Higley's two retirement accounts. (AA ¶30; Tr. 106).[6]

The first QDRO was completed on or about March 18, 2008. (AA¶31). The problem arose with the second QDRO, which Sisk admits took more than five years to complete. However, according to Sisk, "the second QDRO passed through a complex series of events and that the delay [in completion of the second QDRO] was in part the result of Mr. Higley's ex-wife moving the funds without notice to client or counsel." (AA ¶31).

Mr. Higley's complaint seems to be based on poor communications from Sisk about the status of the second QDRO and delay in its preparation and completion.[7] The ODC led Mr. Higley through numerous written communications to Sisk seeking status information, most of which were not responded to (Tr. 36-61; JX Tabs 10-38).

Over the five-year period, Mr. Higley complained, Sisk failed to keep him informed about the status of the second QDRO and failed to timely respond to his

[6] A QDRO is apparently a document that is approved by a judge for division of property in divorce proceedings for division of IRAs and such similar types of property in which the calculation of the value of the asset to each spouse is determined. Each type of account evidently requires its own QDRO. (Tr. 32-33).
[7] Mr. Higley admits that Sisk represented him satisfactorily in other matters relating to his divorce (Tr. 72).

inquiries. (Petition ¶31).[8] For example, on January 17, 2010, a Sunday, Mr. Higley was served at his home in Delaware with a rule to show cause filed by his ex-wife to show why he should not be held in contempt for failing to comply with a November 2009 stipulation regarding an obligation to pay attorneys' fees (Tr. 45; JX Tab 20). Mr. Higley claimed that he not only never saw the stipulation, but he also never agreed to pay attorneys' fees. To mollify Mr. Higley, Sisk paid the attorneys' fees of $1250.00 (AA ¶32) and the rule was dismissed (Tr. 64).

On June 15, 2011, Sisk recommended filing a rule to show cause against Jeanne Higley on the grounds that she delayed in providing calculations to settle the amount of the second QDRO, which filing Mr. Higley approved (Tr. 54; 107). On July 11, 2011, Mr. Higley sent Sisk an email requesting a copy of the rule filed against Jeanne Higley (Tr. 108). However, Sisk never made any such filing. (AA ¶33; Tr. 106). On September 27, 2011, Mr. Higley authorized Sisk to settle the second QDRO for "a sum specific" (AA ¶35). Given the intent to try to settle the amount of the second QDRO, Sisk testified that he felt a rule filed against Ms. Higley would be "counterproductive" (Tr. 129; 141). Sisk also testified that he and Mr. Higley had a conversation during which he explained to Mr. Higley why he did not file the rule (Tr. 143).

On October 5, 2011, and hoping the settlement offer had been conveyed, Mr. Higley requested that Sisk provide him a status report. (AA ¶36; Tr. 108). When no immediate response was forthcoming, Mr. Higley, on October 7, 2011 sent Sisk an email urging him to "avoid further delay". (AA ¶37). Sisk did not, in fact, convey the settlement offer to opposing counsel until after the ODC called Sisk on October 14,

[8] Sisk admitted that he failed to respond timely to Mr. Higley's inquiries (Tr. 107).

2011, admonishing him to do so. (AA ¶38; Tr. 109, 111). The second QDRO was evidently finally completed and sent to Morgan Stanley, the account holder of Jeanne Higley's retirement account on or about March 23, 2012.

The amount of the IRA to be distributed to Mr. Higley was finally resolved in late October of 2011 whereby Mr. Higley is to receive $45,600. That amount was fixed as of that time with Mr. Higley receiving no interest until the amount is formally tendered to him to an account he holds at Schwab (Tr. 61, 71, 73).

Sisk offered numerous apologies to Mr. Higley for the delays and lack of attention to his affairs (Tr. 64). He even stopped charging fees to Mr. Higley for at least the last two years (Tr. 64). Sisk initially explained the delay as being caused by a heavy trial schedule, a personal bout of kidney cancer, which took Mr. Sisk out of work for several months, and the loss of a parent. (Tr. 64 JX Tab 26).

Not all of the delay can be laid at Sisk's door. Some of the delay was caused by Mr. Higley's ex-wife, who had the IRA that was the subject of the second QDRO in a Vanguard account at the time of the divorce (Tr. 35, 68, 127-128). At some point, as Mr. Sisk, himself discovered, Mr. Higley's ex-wife moved the IRA from Vanguard to Morgan Stanley without Mr. Sisk's or Mr. Higley's knowledge or consent (Tr. 35, 41, 67). This transfer of funds complicated the settlement process because it was believed that the Vanguard funds had been "hopelessly commingled with the other money Mr. Higley's ex-wife had at Morgan Stanley" (Tr. 41; 127-128). In addition, in response to questioning from the Panel, Sisk explained difficulties apparently inherent with Morgan Stanley accounts (Tr. 145-146).

b. Counts of the Petition

The Higley matter takes up Counts IX-XIII. Count IX alleges Sisk violated Rule 1.1 by failing to provide competent legal representation by not completing the second QDRO during a five-year period. Count X asserts that Respondent violated Rule 1.2(a) by failing to abide by his client's decisions when he did not complete the second QDRO timely, failing to file the rule to show cause against his client's ex-wife and failing to convey his client's settlement offer for more than two weeks. Count XI claims that Sisk violated Rule 1.3 when he failed to act with reasonable diligence and promptness by failing to respond to Mr. Higley's inquiries, by failing to complete the second QDRO and by failing to convey his client's settlement offer for more than two weeks. Count XII charges Sisk violated Rule 1.4(a)(3) for failing to keep his client reasonably informed generally over the years and specifically for failing to advise Mr. Higley about the November 2009 stipulation. Sisk admits that he generally did not keep Mr. Higley reasonably informed. (AA ¶47). Finally, Count XIII asserts that Sisk violated Rule 1.4(a) (4) by failing to respond promptly to his client's requests for information about the second QDRO.

Sisk admits Counts (IX, XI, XII and XIII) (Tr. 109-110). He admits in part and denies in part Count X. (AA ¶¶41, 43, 44, 47 and 49).

C. <u>Board Case No. 2011-0443-B (Margaret Lindsey)</u>

a. Facts

Margaret Lindsey retained Sisk in or around March 2011 to handle the settlement of a condominium she and her mother were planning to purchase together (TR. 76; Tr.

111).[9] There apparently is a dispute about the scope of Sisk's representation. Ms. Lindsey claims that she and her mother were looking for advice as to how to title the condominium. She claims she inquired, but Sisk, "Never explained to Ms. Lindsey the different ways in which she and her mother could jointly own the condominium and the legal implications of the different forms of ownership." (Petition ¶51). Sisk denies that his representation was to be anything other than to perform the settlement and not to give estate planning advice. (AA ¶51). Ms. Lindsey conceded at the Hearing that Sisk was not hired to provide any estate planning advice (Tr. 92).

Ms. Lindsey wanted the condominium titled in her mother's name even though both she and her mother would live in the unit (Tr. 77). The son of the condominium's seller purportedly advised Sisk of Ms. Lindsey's desire (JX Tab 39). Through his own due diligence, Sisk discovered, however, that the condominium had to be titled in the name of anyone occupying it (Tr. 78, 113-114). Therefore, titling the condominium solely in the name of Ms. Lindsey's mother would not work if both Ms. Lindsey and her mother were both to occupy that condominium.

The original settlement on the condominium was scheduled in Sisk's office for May 5, 2011. Ms. Lindsey arrived at the appointed time only to find Sisk was not there, not having the settlement on his calendar due to a scheduling error for which he apologized profusely. (AA ¶52; Tr. 78-79; 91, 114-115).

The settlement was rescheduled for May 12, 2011. However, because of the problem with the settlement documents complying with the condominium regulations, Sisk needed more time to research the title issue and see if something could be worked

[9] The Petition alleges the representation occurred in May 2011 (Petition ¶50). However, this conflicts with the original settlement date of May 5, 2011 as alleged in the Petition (Petition ¶52)

out. (AA ¶53; Tr. 80). Therefore, the settlement was postponed again. The condominium council was not willing to waive the requirement that the property be titled in the name of all who were to occupy the condominium (Tr. 90). So Ms. Lindsey directed Sisk to settle the matter and proceed to settlement (Tr. 91). In Sisk's view, the best way to settle was to prepare the deed with both Ms. Lindsey and her mother being listed as joint owners (Tr. 150).

Ms. Lindsey sent Sisk hand written faxes asking about alternatives to the title issue (JX Tabs 41, 42). According the Ms. Lindsey, Sisk never responded to those inquiries (Tr. 83).

The settlement finally did occur on May 25, 2011 (Tr. 80). Ms. Lindsey and her mother ultimately agreed to have both of their names on the deed, with a preference that Ms. Lindsey's ownership percentage be quite small if possible (Tr. 81; 82). Sisk testified that he believed the condominium council would have viewed such an arrangement as an end-run around the condominium document requirements and they would not have received the sanction of the council for such titling (Tr. 149).[10]

There was subsequently some delay in recording the original deed with Ms. Lindsey making several calls to Sisk's office to inquire about the status of that filing. (Petition ¶¶57-59). It was not until September 2011 that she got a copy of the recorded deed that had been recorded in August, three months after the settlement (Tr. 86). Sisk explained the delay in completing the recording as being caused by delay in obtaining an original of the power of attorney needed for the seller's son to sign the deed

[10] Ms. Lindsey claims she never got a copy of the settlement documents, except for the settlement sheet (Tr. 84). She testified that she called repeatedly requesting copies of the settlement documents. (Petition ¶55, Tr. 84-85). Sisk testified that it was his belief that his paralegal had handled Ms. Lindsey's inquiry (Tr. 116). On June 10, 2011, Ms. Lindsey was sent a copy of the settlement documents. (AA ¶56).

conveying the property on her behalf (Tr. 130). The ODC offers no rebuttal to that testimony.

Ms. Lindsey filed her complaint with the ODC on July 25, 2011. Despite her apparent dissatisfaction with Mr. Sisk's services, Ms. Lindsey did say in a handwritten fax to Sisk, "Thank you for working so hard to get the 2210 Independence Way purchase set up the way we want" (JX Tab 42; Tr. 91).

b. Counts of the Petition

Counts XIV-XVII of the Petition apply to the Lindsey matter. Count XIV alleges failure to provide competent representation as required by Rule 1.1 by not explaining the different forms of joint ownership and their legal implications and by not appearing at the originally scheduled settlement. Count XV charges Sisk with violating Rule 1.3 for failing to exercise reasonable diligence and promptness for not responding to Ms. Lindsey's inquiries both before and after settlement, for not appearing at the originally scheduled settlement and for not timely recording the deed on Ms. Lindsey's condominium. Count XVI asserts violation of Rule 1.4(a)(3) for failing to keep his client reasonably informed by not discussing the different forms of joint ownership and their legal implications and by not responding to Ms. Lindsey's pre and post settlement inquiries. Finally, Count XVII claims Respondent violated Rule 1.4(a)(4) by failing to comply with requests for information when he did not explain the different forms of joint ownership and their legal implications and by not responding to Ms. Lindsey's pre and post settlement inquiries.

Sisk denies all of the allegations against him in the Lindsey matter (AA ¶¶61, 63, 65 and 67).

D. Board Case No. 2011-0163-B (Carla Schurga)

a. Facts

In August 2010, Carla Schurga retained Sisk to represent her son, Roman, in connection with criminal proceedings. (AA ¶68; Tr. 117). Ms. Schurga complained to the ODC that during his six-month representation of her son, Sisk's communications with both her and her son were infrequent. Ms. Schurga further alleged that Sisk was unprepared for scheduled case reviews relating to her son's case. According the Ms. Schurga, after Roman was sentenced in February 2011, Sisk stopped communication altogether with her and her son and delayed for over a month in sending a copy of the sentencing order. (Petition ¶69).

In response to Mr. Sisk's alleged lack of communication with the Schurgas, Ms. Schurga filed a complaint with the ODC. The ODC forwarded the complaint to Sisk and requested a response by May 13, 2011. (Petition ¶70). The ODC followed up in writing both on May 25, 2011 and again on June 24, 2011 requesting Sisk's response. (JX Tabs 48, 49).

b. Count of the Petition

The thrust of the allegation against Sisk in the Schurga matter is that he failed to cooperate with the ODC in its investigation. (Petition ¶75). Specifically, Count XVIII, the last count of the Petition, asserts Sisk violated Rule 8.1(b) by failing to respond to inquiries from the ODC regarding the Schurga matter. Apparently, the ODC gave Sisk several extensions of time. Yet he took "almost eight months after the response was due, even receiving the extensions of time," before submitting his response (Tr. 118).

Sisk blamed part of the delay on IT problems at his firm and having to respond to the ODC on other matters (Tr. 132).

II. STANDARD OF PROOF

Allegations of professional misconduct must be established by the ODC by clear and convincing evidence.[11] That burden is satisfied as to Counts I, II, III, IV, VII, VIII, IX, X in part, XI, XII, and XIII, which are admitted. As to the remaining counts, we must make our own findings as to whether the ODC met its burden of proof by clear and convincing evidence.

III. FINDINGS OF THE BOARD

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").[12]

A. Board Case No. 2011-1064-B (Deborah A. Brennan)

As noted, Respondent admits violations of Counts I-IV, VII and VIII. Therefore, as to the Brennan matter, we are required to address only Counts V and VI.

Count V alleges that Sisk violated Rule 1.5(f) requiring that an attorney shall give a statement of account for fees earned whenever funds advanced are transferred from a trust account to an operating account. Paragraph 22 of the Petition alleges that this rule was violated when Sisk "failed to provide Ms. Brennan a written statement of the fees earned at the time he deposited the retainer". Given the factual record, this allegation lacks foundation. The record indicates that the retainer was deposited originally into CC&S's trust account and not into the operating account. Therefore, no

[11] *In Matter of Tos*, 576 A. 2d 607 (Del. 1990); Delaware Lawyers' Rule of Disciplinary Procedure ("DLRFDP") 15(c)
[12] *In re Agostini*, 632 A.2d 80 (Del. 1993).

fees were claimed to have been earned at the time the retainer was deposited. Given that handling of the $1500 was consistent with Rule 1.5(f), it cannot be said that Sisk violated that rule.

The only time Rule 1.5(f) may have been violated was when the $750 was transferred out of the CC&S trust account and into the CC&S operating accounting. Sisk insists, and the ODC does not contradict, that he knew nothing about such a transaction (Tr. 120). Accordingly, to hold Sisk personally responsible for that withdrawal would be unfair. If anyone is responsible, it is CC&S or its receivership. However, neither CC&S, nor its receivership, is a party to this action.

Count VI states that Rule 1.15(b) requires that an "attorney shall promptly deliver to the client [any] funds or other property that the client [is] entitled to receive and, upon request by the client [,] shall promptly render a full accounting regarding such property." (Petition ¶23). Count VI alleges violation of this rule because Respondent failed to "(1) promptly refund Ms. Brennan the full amount of her retainer, and (2) provide a full accounting of her retainer" (Petition ¶24).

Not only is this allegation contrary to the record, it is counterintuitive. First, the record is undisputed that Sisk not only refunded the entire retainer of $1500, but he used $750 of his personal funds to reimburse Ms. Brennan so that she would not have to await the outcome of the CC&S receivership. Instead, Sisk undertook the burden of awaiting the outcome of the CC&S receivership himself and still awaits reimbursement.

Second, it makes no sense to say that there should be an accounting of a retainer that is refunded in full. Full reimbursement is in itself an accounting, full and complete. Ms. Brennan, herself, admitted the reimbursement was equivalent to an

account (Tr. 23, 27). The length of time that it took to complete the refund ideally should have been shorter. However, given that the CC&S trust account from which the refund was made was in receivership, the delay is understandable.

B. Board Case No. 2011-0165-B (David P. Higley)

As noted, this matter encompasses Counts IX-XIII. Sisk admits violations of Counts IX and XI-XIII so we need not address those counts. As to Count X, Sisk admits it in part and denies it in part.

Count X alleges violation of Rule 1.2(a), which requires an attorney to "abide by a client's decisions concerning the objectives of representation". (Petition ¶42). More specifically, the Petition states that Rule 1.2(a) was violated (i) when it took five (5) years to finish the second QDRO, (ii) by failing to convey his client's settlement offer for more than two weeks to his ex-wife's counsel, and (iii) by not filing the rule to show cause against his ex-wife (Petition ¶43). Sisk admits the violation with respect to the five (5) year delay in completing the QDRO but not in conveying the settlement offer or not filing the rule to show cause.

The record indicates that on September 27, 2011, Mr. Higley authorized that the settlement offer be conveyed. Mr. Higley followed up on October 5, 2011 and again two days later on October 7, 2011, asking Sisk for a status report on the settlement offer. It was not until October 14, 2011, when the ODC called Sisk admonishing him to extend the settlement offer that Sisk did so, eighteen (18) days after being authorized. Given these facts, we find the ODC has met is burden of showing by clear and convincing evidence that Sisk violated Rule 1.2(a) in delaying to communicate the settlement offer. Settlement offers should be communicated promptly after authorization, absent extreme

exigent circumstances not present here. An eighteen (18) day delay does not satisfy that requirement.

As to not filing the rule to show cause against Mr. Higley's ex-wife, we find no violation of Rule 1.2(a). Sisk testified that when he was advised that Mr. Higley and his ex-wife were going to discuss settling the second QDRO, he, Sisk, felt that filing a rule would only have a negative effect on the settlement process. In Sisk's words, such a filing would be "counterproductive" (Tr. 129).

We agree with Respondent's approach. His decision not to file the rule against Higley's ex-wife was in Higley's best interest. Moreover, Sisk testified that he discussed this decision with his client (Tr. 129).[13] Accordingly, we find no violation of Rule 1.2(a) with respect to not filing the rule to show cause.

Board Case No. 2011-0443-B (Margaret Lindsey)

The Lindsey matter involves Counts XIV-XVII, all of which Sisk denies. Count XIV alleges violation of Rule 1.1, failing to provide competent representation to a client through legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation, by (1) failing to explain to Ms. Lindsey the various forms of joint ownership available and their legal implications and (2) not appearing at the originally scheduled settlement. Rule 1.1, at least as we read it and cases interpreting that rule, does not apply to either of the alleged actions. To the contrary, Rule 1.1 has application where a lawyer fails to perform the functions for which a lawyer is normally retained, and the corollaries thereto, with skill, thoroughness and reasonably necessary

[13] Notably, Mr. Sisk continued to represent Higley at least as of the time of the Hearing. (Tr. 63).

preparation.[14] Not taking time to explain various forms of ownership available and their legal implications or failing to attend a settlement are not encompassed under the rubrics of Rule 1.1. Accordingly, Sisk cannot be said to have violated Rule 1.1 as to Ms. Lindsey and as alleged in Count XIV.

This conclusion is further supported by the fact that Sisk was not retained to give estate planning advice, which Ms. Lindsey conceded (Tr. 92). Sisk was retained by Ms. Lindsey and her mother to take the condominium purchase to settlement. And he did just that—representation for which Ms. Lindsey was appreciative when she said, "Thank you for working so hard to get the 2210 Independence Way purchase set up the way we want". (Tr. 91; JX Tab 42).

Count XV asserts violation of Rule 1.3, requiring an attorney "act with reasonable diligence and promptness in representing a client", when Sisk (1) failed to "respond to Ms. Lindsey's inquiries both before and after the settlement", (2) failed to appear at the original settlement and (3) failed to timely record the deed on the condominium purchased by Ms. Lindsey and her mother. Rule 1.3 seems to be applicable in situations where the attorney is required to act or perform legal services on behalf of the client. In such cases, the attorney must do so with "reasonable diligence and promptness". Examples would be (1) failure to file a child support petition which Sisk admits in the Brennan matter; (2) missing a statute of limitations;[15] (3) failure to comply with Court requests or orders;[16] or (3) failing to advise clients about a filing deadline

[14] See, e.g., *In Matter of Tos*, 576 A. 2d 607 (Del. 1990) (failure to comply with Court rules or Court order violated Rule 1.1, but no violation where court would not accept name change petition when one party changed mind and decided not to change name); *In Matter of Mekler*, 689 A, 2d 1171 (Del. 1996) (Rule 1.1 violated where attorney failed to run conflicts check before accepting new representation); *In re Katz*, 981 A. 2d 1133 (Del. 2009) and *In re Goldstein*, 990 A. 2d 440 (Del. 2010) (Rule 1.1 violated where loan documents prepared in violation of applicable law).
[15] Comment 3 to Rule 1.3.
[16] *In Matter of Tos*, 576 A. 2d 607 (Del. 1990).

such that client was subject to sanctions.[17] Failing to respond to client inquiries or not appearing at the originally scheduled settlement due to a scheduling error are not within the language of Rule 1.3. Accordingly, Sisk did not violate Rule 1.3 when he did not respond to Ms. Lindsey's inquiries or when he failed to appear at the settlement.

Not recording the deed promptly is another matter. If the record showed by clear and convincing evidence that it was Sisk's procrastination that caused the delay in recording the deed, we would have to find a violation.[18] However, we are not persuaded that Sisk violated Rule 1.3 with respect to the delay in recording the deed. Sisk testified that he was faced with the choice of preparing the deed in compliance with the condominium council requirements or not settle on the purchase. His client advised to settle so Sisk went forward by putting both Ms. Lindsey and her mother on the deed as joint owners. It seems to us that on this issue, Sisk acted in what he thought was the best interests of his client and not in violation of Rule 1.3.

Sisk testified that the delay in recording the deed was occasioned by the delay in obtaining the original of the power of attorney authorizing the seller's son to sign the deed conveying the condominium on behalf of his elderly mother. As Sisk explained, the Recorder of Deeds will not accept a deed signed under authority of the power of attorney without the original power of attorney being presented (Tr. 130). Given this requirement, the ODC did not meet its burden of proving a violation by clear and convincing evidence.[19]

[17] *In re Benge*, 754 A. 2d 871 (Del. 2000).
[18] Comment 3 to Rule 1.3.
[19] In reaching our conclusion, we do not condone the late recording of the deed. It is critical to the proper maintenance of our property records that they be current and complete. We simply find that the delay was not Sisk's fault.

Count XVI claims violation of Rule 1.4(a)(3), requiring that clients be kept reasonably informed about the status of a matter, when Sisk (1) failed to "respond to Ms. Lindsey's inquiries both before and after the settlement" and (2) failed to explain to Ms. Lindsey the various forms of joint ownership available and their legal implications. Rule 1.4(a) (3) does not have application to failing to respond to client inquiries or the failure to explain title alternatives.[20] The clear language of the Rule is a focus on keeping a client informed about a matter's status. There is no clear and convincing evidence that Sisk did not do this.

Finally, Count XVII charges Mr. Sisk with violating Rule 1.4(a)(4), requiring prompt compliance with requests for information, when he (1) failed to "respond to Ms. Lindsey's inquiries both before and after the settlement" and (2) failed to explain to Ms. Lindsey the various forms of joint ownership available and their legal implications. Rule 1.4(a) (4) is the rule applicable to Sisk's failure to respond to his client's inquiries. This is apparent from the very wording of the Rule. Perhaps nothing can be more annoying to a client than an unresponsive lawyer. Sisk has been practicing long enough to know better. We find he did violate Rule 1.4(a) (4) by failing to respond to Ms. Lindsey's inquiries and by failing to explain the various forms of joint ownership.

However, we do not find a violation of Rule 1.4(a) (4) for failing to explain the forms of ownership. Sisk was simply not retained to do any more than take the matter to closing, which required compliance with condominium council titling requirements. Sisk, in fact, discovered the condominium council's titling requirements through his own

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[20] *In Matter of Tos*. 576 A. 2d (Del. 1990).

due diligence and acted in accordance with those requirements and therefore in the best interest of his clients.

Board Case No. 2011-0163-B (Carla Schurga)

The Schurga matter is dealt with in Count XVIII and is denied by Sisk. Count XVIII alleges violation of Rule 8.1(b) for failing to respond to the ODC's request for information.

In this matter, the ODC is seeking sanctions because it claims Sisk took too long in which to respond to an inquiry about the complaint from Ms. Schurga. Sisk represented Ms. Schurga's son, Roman, in criminal proceedings. (AA ¶68). Ms. Schurga filed a complaint with the ODC on April 4, 2011. For reasons unexplained, that complaint was not forwarded to Respondent until several weeks later. The petition alleges that the Schurga complaint was sent on May 13, 2011, about five (5) weeks after it was filed with the ODC (AA ¶70). However, the record reflects a letter dated April 29, 2011, purporting to be a cover letter enclosing the Schurga complaint (JX Tab 46).

Hearing nothing from Sisk, the ODC wrote to Respondent on May 25, 2011, requesting a response to the Schurga complaint by June 3, 2011 (JX Tab 47). On June 10, 2011, Sisk sent an email to ODC confirming a telephone conversation, during which he explained that his office had suffered IT problems with a hard drive failure. He requested until June 15, 2011 to respond to the Schurga complaint. The series of emails continued on June 16, 2011 when Sisk advised ODC that his firm's computer tech was still trying to recover the hard drive information. Finally, Sisk and the ODC agreed on an extension to June 23, 2011 (JX Tab 48).

A second series of emails was sent on June 23, 2011 when Sisk advised the ODC that the IT problems were not yet resolved so he could not provide a complete response. He, therefore, requested until June 28, 2011. The ODC responded on June 24, 2011, by saying that he should submit a response, which could be supplemented if the hard drive recovery produced more information, by "next week" (JX Tab 49; AA ¶ 72).

The record is void of any further communications between Sisk and the ODC regarding the Schurga matter until January 3, 2012 when Sisk sent a letter fully responding to the Schurga complaint (JX Tab 50). Sisk testified that he should not have taken so long to respond to the ODC. He admitted that the matter did not get the priority it should have because he was, in part, busy with responding to the Lindsey matter, the Brennan matter and the Higley matter (Tr. 132). He was also faced with the hard drive problem. Nevertheless, Sisk should have sought further extension of time or responded sooner.

While we are forced to find against Mr. Sisk on Count XVIII, given the more than six-month delay,[21] we wonder why, since the ODC and Sisk were apparently communicating regularly on other matters, the ODC did not inquire sometime between July 2011 and the end of December 2011 as to the status of Sisk's response in the Schurga matter. Based on the ODC's apparent silence on the Schurga matter, Sisk would not have been entirely unjustified to think that the matter did not have a pressing priority. Nevertheless, the burden of responding to the Schurga complaint was on Sisk.

[21] ODC seeks to put the delay at eight months (Tr. 187).

The ODC reported at the Hearing that it was taking no further action with respect to the Schurga complaint (Tr.214). Therefore, in determining sanctions, we do not attribute much weight to Sisk's violation of Rule 8.1(b) in this matter.

VI. SANCTIONS

A. 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."[22] 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.[23]

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.[24]

1. The Ethical Duties Violated

Based on his own admissions and the findings of the Panel, Sisk has violated fourteen different duties. The findings of the Panel, coupled with Sisk's admissions are summarized on the following chart:

[22] *In re McCann*, 894 A.2d at 1088; *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).
[23] *In re Katz*, 981 A.2d 1133, 1149 (Del. 2009); *In re Garrett*, 835 A. 2d 514, 515 (Del. 2003).
[24] *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).

Summary of Counts And Resolution

Count	Rule Violated	Text of Rule	Factual Basis	Resolution
I	1.1	An attorney shall provide competent representation which requires legal knowledge, skill, thoroughness and preparation	Failure to file child support and custody petitions	Admitted
II	1.2(a)	An attorney shall abide by clients decisions concerning objectives of representation	Failure to file child support and custody petitions	Admitted
III	1.3	An attorney shall act with reasonable diligence and promptness	Failure to file child support and custody petitions Failure to file child support petitions	Admitted
IV	1.4(a)(3)	An attorney shall keep client reasonably informed about the status of a matter	Informing client that petitions had been filed and not informing her no filing was made	Admitted
V	1.5(f)	An attorney shall give a statement accounting for fees taken from trust acct.	Failing to send client statement of fees earned	Not guilty
VI	1.15(b)	An attorney shall promptly deliver funds to client to which client is entitled	Failing to provide accounting of retainer and full refund promptly	Not guilty
VII	1.16(d)	An attorney shall refund any advance not used upon termination of representation	Failing to refund retainer upon termination of representation	Admitted
VIII	8.4(c)	It is professional misconduct for an attorney to engage in conduct involving dishonesty	Advising petitions had been filed when they had not	Admitted
IX	1.1	An attorney shall provide competent representation which requires legal knowledge, skill, thoroughness and preparation	Failing to complete QDRO	Admitted
X	1.2(a)	An attorney shall abide by clients decisions concerning objectives of representation	Failing to complete QDRO, failing to file rule and failing to convey settlement offer	Admitted as to QDRO, Not guilty as to rule, guilty as to failure to convey settlement offer
XI	1.3	An attorney shall act with reasonable diligence and promptness	Failing to respond to client, failing to convey settlement offer and failing to complete QDRO	Admitted
XII	1.4(a)(3)	An attorney shall keep client reasonably informed about the status of a matter	Failing to respond to client and to inform of stipulation	Admitted
XIII	1.4(a)(4)	An attorney shall promptly comply with reasonable requests for information	Failing to respond to client	Admitted
XIV	1.1	An attorney shall provide competent representation which requires legal knowledge, skill, thoroughness and preparation	Failure to inform about title options and appear at originally scheduled settlement	Not guilty
XV	1.3	An attorney shall act with reasonable diligence and promptness	Failure to respond to inquiries, appear at originally scheduled settlement and record deed	Not guilty

Count	Rule Violated	Text of Rule	Factual Basis	Resolution
XVI	1.4(a)(3)	An attorney shall keep client reasonably informed about the status of a matter	Failure to explain title ownership options and to respond to inquiries	Not guilty
XVII	1.4(a)(4)	An attorney shall promptly comply with reasonable requests for information	Failure to explain title ownership options and to respond to inquiries	Guilty as to failure to respond to status inquiries; not guilty as to failure to discuss title options
XVIII	8.1(b)	An attorney shall not knowingly fail to respond to a lawful demand for information from disciplinary authority	Failure to respond timely to ODC	Guilty

2. 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. Respondent did testify that during the period at issue he was under severe stress due to (i) the breakup of his firm and the ongoing litigation, (ii) his bout with cancer and the related treatment, (iii) the death of his father and subsequent care of his mother and handling the settlement of his father's affairs, and (iv) the care of his wife who has been ill (Tr. 134). However, we view these matters to be relevant to mitigation, which we understand is what Sisk intends by raising the matters (Tr. 205-206)[25].

3. Actual or Potential Injury

The Panel finds that there is limited harm to any of the complainants. Sisk testified that under Family Court practice, because hers was an original petition, Ms. Brennan could get child support back to the date of separation. This assertion is unrebutted on the record by any credible evidence. Therefore, although a delay in her obtaining support in itself constitutes some degree of harm, it should be curable by a

[25] See *In Matter of Higgins*, 565 A.2d 901, 905 (Del. 1989).

proper application to Family Court. Such retroactive support should help reimburse Ms. Brennan for having to sell personal belongings. Ms. Brennan also received her entire retainer back with Sisk paying half out of his own pocket so that Ms. Brennan would not be forced to become a creditor in the CC&S receivership.

Mr. Higley has reached a settlement from his wife on the second QDRO. That settlement was reached about five (5) months ago, but has not been consummated yet, in part because of Sisk's delay. Therefore, it can be said, Mr. Higley has lost, or possibly lost, depending on the type of investment he would have made, the time value of his share of the second QDRO since the time of the settlement. However, Sisk testified, and Mr. Higley agreed, that Sisk has not charged Mr. Higley any fees for any of the work done on his divorce and property settlement for some time. Whether this is a complete offset to the loss of potential profit on his share of the second QDRO, we cannot say, but we do believe it is a mitigating factor to any injury to Mr. Higley, real or potential. Finally, with respect to the rule against Mr. Higley, Sisk, himself, paid the cost of the attorneys' fees. As such, Mr. Higley suffered no personal loss from the attorneys' fee assessment.

As to Ms. Lindsey, her settlement was completed and in accordance with the requirements of the condominium council. Had Sisk not taken the matter to settlement when and in the manner that he did, there may never have been any settlement and therein was the potential injury to Ms. Lindsey and her mother, i.e., loss of the condominium, which did not occur.

Finally, there are no damages in the Schurga matter actual or potential because the only claim is delay in responding to the ODC.

4. Aggravating and Mitigating Circumstances

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanctions to impose.[26] "Aggravation or aggravating circumstances are any consideration of factors that may justify an increase in the degree of discipline to be imposed."[27]

The Panel finds that there are three aggravating factors as set forth in ABA Standard 9.22: (1) a pattern of misconduct.[28] Mr. Sisk, at least in recent years, seems to have developed a procrastination habit. This is evident from the repeated refrain of Ms. Brennan and Mr. Higley; (2) multiple offenses.[29] The gravamen of the Petition against Sisk is that he delayed in dealing with client matters and was unresponsive to client inquiries. He admits these transgressions in the Brennan and Higley complaints, and we find such an aggravating factor in his violation of Rule 1.4(a) (4) in failing to respond to Ms. Lindsey's inquiries; (3) substantial experience in the practice of law.[30] Mr. Sisk was admitted to the Delaware Bar more than thirty (30) years ago.

Mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed."[31] We find that the mitigating factors are as follows:

(1) absence of prior disciplinary record.[32] The ODC concedes that Mr. Sisk has not been disciplined before this case (Tr. 188); (2) absence of dishonest or selfish

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[26] *In re Bailey*, 821 A.2d 851 (Del. 2003), *Goldstein*, 990 A. 2d at 408.
[27] ABA Standard 9.21.
[28] ABA Standard 9.22 (c).
[29] ABA Standard 9.22 (d).
[30] ABA Standard 9.22(i).
[31] ABA Standard 9.31.
[32] ABA Standard 9.32(a).

motive.[33] The existence of this factor is self-evident by Sisk's returning Ms. Brennan's retainer using his own personal funds and his continuing to work with Mr. Higley without billing fees; (3) personal or emotional problems.[34] Sisk testified about his own diagnosis with cancer and its treatment, his father's death and the stress of having to take care of his elderly mother, the very stressful breakup of CC&S and the subsequent receivership and litigation and his wife's continuing illness; (4) effort to make restitution or rectify consequence of misconduct.[35] This factor is evidenced by his use of personal funds to reimburse Ms. Brennan her retainer and his opting not to bill Mr. Higley for fees and paying the attorneys' fees assessed against Mr. Higley in the rule to show cause; (5) cooperative attitude toward proceedings.[36] By all indication, Sisk was professional and cooperative throughout these proceedings (Tr. 206); (6) character or reputation.[37] The unrebutted testimony of Mr. Ferry was offered to establish this factor (Tr. 164-167); (7) expression of remorse and cooperation.[38] Not only has Mr. Sisk convincingly stated his remorse on the record, he has apologized to his clients. In addition, he has undertaken, on his own, to seek professional assistance through the Delaware Lawyers Assistance Program and has been working with that organization for around a year (Tr. 155). [39]

The Board finds that the aggravating factors are significantly outweighed by the mitigating factors. Nevertheless, a public sanction is justified in order to satisfy the requirement of protecting the public.

[33] ABA Standard 9.32(b).
[34] ABA Standard 9.32(c).
[35] ABA Standard 9.32(d).
[36] ABA Standard 9.32(e).
[37] ABA Standard 9.32(g).
[38] ABA Standard 9.32(m).
[39] While not cited in the ABA Standards as a mitigating factor, we note that Sisk has been involved in civic and charitable endeavors for some time (Tr. 152).

VII. BOARD'S RECOMMENDED DISCIPLINE.

The Board's recommendation of an appropriate sanction assists the Court, but it is not binding.[40] 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."[41] Accordingly, the Board must carefully examine prior disciplinary precedent to the extent possible in recommending sanctions.

The ODC cites to Respondent's multiple violations and advocates that Sisk be given a suspension of at least one year (Tr. 188, 190). The ODC relies on the following decisions:

1) In re Tyler.[42] The sanction imposed was an eighteen (18) month suspension for professional misconduct in four client matters over a two year period. The Board recommended a public reprimand and two years of probation. This was primarily a books and records case, and Tyler had two prior disciplinary sanctions. Sisk has no prior disciplinary sanctions in over thirty (30) years of practice. As such, this case provides no good guidance to us in recommending a sanction based on the violations, aggravating and mitigating factors that we have found to exist.

2) In re Feuerhake.[43] The Court ordered a sanction of a two-year suspension with the right to seek readmission in eighteen (18) months. The clients in *Feuerhake* were far more seriously harmed than in the

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

[41] *Id.*; *In re Tonwe*, 929 A.2d at 777 *In re Steiner*, 817 A.2d at 796.

[42] 941 A. 2d 1019 (Del. 2007) (unpublished disposition).

[43] 998 A. 2d 860 (Del. 2010) (unpublished disposition).

present case. Six client cases were dismissed with prejudice because of the attorney's failure to prosecute, thereby depriving those clients of the right to pursue their causes, which serious injury supported a suspension of the attorney. No such injury occurred with any of the complainants in the present case.

3) *In the Matter of Hull*.[44] The sanction imposed was a two-year probation. Four client matters were involved in which Hull failed to make timely filings in certain bankruptcy proceeds causing his clients serious injury, missed a statute of limitations and provided inadequate representation causing the client's secured creditors to foreclose on the client's home. As in Feuerhake, but unlike in the present case, clients lost their rights to pursue their cases. These injuries were of such a severe nature so as to justify suspension. Such severity of injury does not exist in the present case.

4) *In the Matter of Higgins*.[45] The charges against Higgins related to six different client matters. The violations included (i) failure to file a name change petition and not informing the client that the petition had not been filed, (ii) failing to respond to Disciplinary Counsel, (iii) inaction in a matter on the Court of Chancery resulted in the matter being dismissed (again a loss of a client's right to pursue his cause of action), (iv) failure to file an appeal in a Family Court order and then failed to cooperate with substituting counsel, (v) mishandled a matter

[44] 767 A. 2d 197 (Del. 2001).
[45] 565 A. 2d 901 (Del. 1989).

such that default judgment was not vacated and a levy of sale was not quashed and failed to advise client of the result, and (vi) mishandled a conflict of interest in a real estate matter. The Court imposed a one year suspension. A shorter suspension from other cases was imposed due to the weight of mitigating circumstances. Here the weight of mitigating circumstances warrants a probation, not a suspension.

Respondent's counsel, not surprisingly, advocates for probation. In support of that position, Respondent cites to *In Matter of Elgart*.[46] The respondent in *Elgart* mishandled a personal injury case to the financial detriment of his client and was given a public reprimand and probation with conditions. As the ODC is quick to point out, *Elgart* involved only one client matter (Tr. 213).

The one common theme that we discern from the cases cited to us is that the sanction is to be more severe as the severity of the injury to clients increases. Here, the clients suffered little injury. By saying this, we do not mean to diminish any harm that was suffered by the claimants. In other words, we do not equate comparatively small harm to no harm. No client should have to suffer the inattention of which Sisk is guilty.

The ODC argues that Sisk'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.

Respondent insists the misconduct is negligent. 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

[46] 999 A. 2d 853 (Del. 2010).

> is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The reason for the different definitions is that a under "knowledge" standard, under ABA Standard 4.42, suspension is called for. Whereas, under a "negligence" test, under ABA Standard 4.43, reprimand is proposed.

Section 4.42 provides: Suspension is generally appropriate when:

> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Section 4.43 states:

> Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

After careful study of those ABA Standards, we believe "negligence" is the definition properly applied to Sisk's misconduct. As the ODC stated, he has been subject to a certain "paralysis in action and communication" (Tr. 176). It was that paralysis that caused Respondent not to heed the circumstances surrounding his failure to respond.

With respect to the application of ABA Standards 4.42 and 4.43, we find that 4.43 best fits the circumstances present in this case. Specifically, Sisk was negligent and did "not act with reasonable diligence in representing" his clients. Given the lack of injury to the clients, to impose a suspension based on the present admissions and findings, as well as the aggravating and mitigating factors, would be to cross the line and impose a punitive sanction, contrary to the dictates of the Delaware Supreme Court.[47]

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[47] *In re Katz*, 981 A.2d at 1149; *In re Garrett*, 835 A. 2d at 515.

As such, and balancing the violations admitted and found by the Panel, along with the aggravating and mitigating circumstances existing in Mr. Sisk's situation, we believe a public admonition and a two year probation is the proper sanction to be imposed.[48] Such a time period should be ample to determine if Sisk has overcome his paralysis of action.

As additional conditions, during the period of his probation, Sisk is to continue his work with the Delaware Lawyers Assistance Program and is to undertake any recommended counseling to deal with his procrastination problems. Next, Sisk is to have a practice monitor, satisfactory to the ODC, who shall meet with Sisk regularly and report any problems with how Sisk handles client matters. 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".[49]

Conclusion and Signature Pages Follow

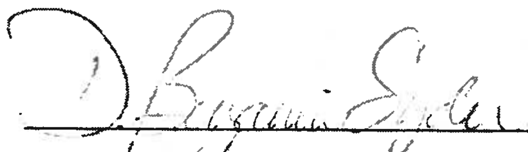
[48] *Compare* ABA Standard 4.62 , which provides, "Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client" with ABA Standard 4.63 that states, "Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client." If this candor rule were violated, it was negligent, thereby calling for reprimand under 4.63, not suspension under 4 62.
[49] *In re McCann*, 894 A.2d at 1088.

CONCLUSION

For the reasons stated herein, we recommend that the sanctions of public reprimand, two years' probation and the stated conditions be imposed.

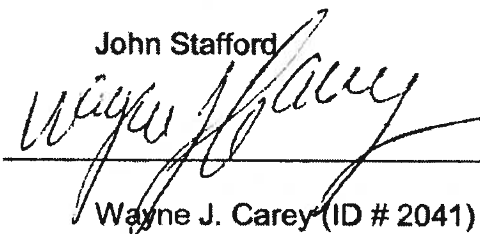
Respectfully submitted,

Dated: 6/25/12



D. Benjamin Snyder (ID #4038)

John Stafford



Wayne J. Carey (ID # 2041)

CONCLUSION

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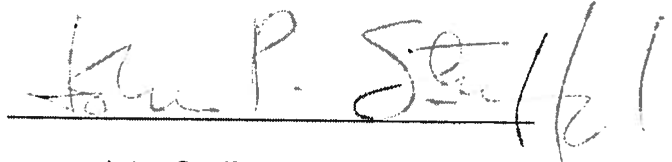

John Stafford

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