

**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. 477, 2005
	§	
A. GARY WILSON, ESQUIRE,	§	Board Case Nos. 1 and 2, 2005
	§	
Respondent.	§	

Submitted:	October 27, 2005
Decided:	November 9, 2005

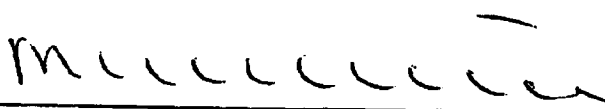
Before **STEELE**, Chief Justice, **BERGER**, and **RIDGELY**, Justices.

**ORDER**

This 9<sup>th</sup> day of November 2005, it appears to the Court that the Board on Professional Responsibility has filed its Report in this matter pursuant to Rule 9(d) of the Delaware Lawyers' Rules of Disciplinary Procedure. Neither the Respondent nor the Office of Disciplinary Counsel has filed objections to the Board's Report. The Court has reviewed the matter pursuant to Rule 9(e) and concludes that the Board's Report should be approved.

NOW, THEREFORE, IT IS ORDERED, that the Report of the Board on Professional Responsibility, filed on October 4, 2005 (copy attached) is hereby APPROVED. The matter is hereby CLOSED.

BY THE COURT:


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 Chief Justice

BOARD ON PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF DELAWARE

DELAWARE SUPREME COURT  
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477,2005

IN THE MATTER OF A  
MEMBER OF THE BAR OF  
THE SUPREME COURT OF  
DELAWARE:

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CONFIDENTIAL

Board Case Nos. 1 and 2, 2005  
Consolidated

A. GARY WILSON,  
RESPONDENT.

REPORT OF THE BOARD OF PROFESSIONAL RESPONSIBILITY

This is the report of the findings and recommendations of the Board of Professional Responsibility of the Supreme Court in the above captioned matter. A Hearing was commenced on June 22, 2005 in the Supreme Court Hearing Room, 11<sup>th</sup> Floor, Carvel State Building, 820 North French Street, Wilmington, Delaware. A Petition for Discipline was filed by the Office of Disciplinary Counsel on May 4, 2005. Pursuant to Rule 9(d)(2) of the Delaware Rules of Disciplinary Procedure, the alleged misconduct was deemed admitted due Respondent's failure to timely respond. The Hearing was conducted for purposes of determining the appropriate sanction.

The Panel of the Board of Professional Responsibility consisted of Kelly Dunn Gelof, Esquire, Donald A. Blakey, Ph.D., and Mark L. Reardon, Esquire (Chair). The Office of Disciplinary Counsel ("ODC") was represented by Michael S. McGinniss, Esquire. Respondent A. Gary Wilson, Esquire appeared *pro se*.

I. Procedural History

The Office of Disciplinary Council ("ODC") filed a Petition for Discipline with the Board on Professional Responsibility of the Supreme Court of the State of Delaware ("the Board") on May 4, 2005. As set forth in more detail below, the ODC asserted that A. Gary Wilson, Esquire ("Respondent") violated the Delaware Rules of Professional Conduct ("the

Rules"). The Respondent failed to timely file a response to ODC's petition for discipline. On May 27, 2005, the Board of Professional Responsibility Panel granted ODC's request to have the May 4, 2005 Petition deemed admitted pursuant to Rule 9(d)(2). A Hearing was conducted on June 22, 2005 solely on the issue of the appropriate sanction.

## **II. The Alleged Violations of Professional Conduct**

As set forth in more detail below, the ODC petition alleges that Respondent violated the Delaware Rules of Professional Conduct in a variety of ways. As an overview, the ODC alleges Respondent violated Rule 1.3 (diligence and promptness); Rule 1.15(b) (prompt delivery to beneficiaries); Rule 3.4(c) (disobeying rules of a tribunal); Rule 8.4(d) (conduct prejudicial to the administration of justice; and, Rule 8.1(b) (response to demand for information from ODC).

## **III. Factual Findings of The Board**

1. The Respondent is a member of the Bar of the Supreme Court of Delaware. He was admitted to the Bar in 1973.

2. At all times relevant to this Petition for Discipline, the Respondent has been engaged in the private practice of law in Delaware as a solo practitioner, with an office in Wilmington, Delaware.

### **A. Failure to comply with conditions of prior private admonition**

3. Board Case No. 1, 2005 concerns the Respondent's conduct in connection with the fulfillment of the conditions of a private admonition that was offered by the Preliminary Review Committee ("PRC") and accepted by the Respondent on October 1, 2003, for violations of Rules 3.4(c), 8.4(d), and 1.15(d) in a matter involving the Respondent's working on the estate of Ms. Ruth Slavin (the "Slavin Estate").

4. The private admonition approved by the PRC, and accepted by the Respondent, set forth three (3) conditions with which the Respondent was required to comply:

(a) The Respondent was required to pay the ODC's investigative costs and the Lawyers' Fund for Client Protection ("LFCP") audit costs;

(b) The Respondent was required to maintain a mentor relationship with a member of the Professional Guidance Committee of the Delaware State Bar Association ("PGC") for at least one year, with a requirement of reports to be filed monthly by the Respondent, and quarterly by the PGC mentor. The letter also suggested that the Respondent "make full use of the [PGC's] help to put [his] practice in proper order," including, for example, (1) by preparing and maintaining a complete list of all legal matters, including a notation as to deadlines, due dates and obligations, and (2) consulting with Carol Tavani, M.D., who is a member of the PGC; and,

(c) The Respondent was required to complete the probate and administration of the estate of Ms. Virginia Otis ("the Otis Estate") no later than December 10, 2003. Ms. Otis died on May 17, 2002. The Respondent was the executor<sup>1</sup> of the Otis Estate, but he did not notify the residuary beneficiaries of their interests in the Otis Estate until more than one year after Ms. Otis died. The Otis Estate was not probated in a timely manner, nor were distributions made in a timely manner.

5. As of January 29, 2004, the Respondent had not provided any information to the ODC reflecting that he had complied with the condition of the private admonition requiring that the probate and administration of the Otis Estate be completed by December 10, 2003.

6. The ODC sent a letter to the Respondent, dated January 29, 2004, setting forth these concerns and requesting confirmation in writing by the Respondent that the Otis Estate was completed.

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<sup>1</sup> Respondent testified that he was not the original executor for the Otis estate. He assumed the role of executor only when the original designee declined to served. (T-12). The Board acknowledges this fact as a matter of chronology. However, it remains that service as a "replacement" executor does not alter the fundamental responsibility of diligence.

7. The Respondent replied to the ODC in a letter dated February 12, 2004, explaining that "[t]he Otis estate remains open because I could not prepare the estate's 2003 income tax returns without the 1099 forms showing interest/investment income earned in 2003, the last of which appears to have arrived in the mail received on February 6, 2004. I request an extension until March 10, 2004 for closing the estate."
8. The Respondent provided no PGC report to the ODC in March 2004.
9. The Respondent's next PGC report, dated April 13, 2004, made no reference to the status of the Otis Estate.
10. By letter dated April 19, 2004, the ODC responded to the Respondent's report, and included a request for information on the current status of the Otis Estate.
11. The Respondent provided the ODC with a written report, dated April 30, 2004, concerning his telephone consultation with his PGC mentor. The report made no reference to the status of the Otis Estate.
12. On May 5, 2004, the ODC wrote to the Respondent and requested that his May report include the status of the Otis Estate.
13. On June 2, 2004, the Respondent provided a written report to the ODC. The Respondent stated that for the Otis Estate, each of the specific bequests had been paid to the named heirs, and that the "humane, charitable residuary heirs" had also been paid. He also stated that "[t]he remaining residuary heir is a trust for the care of the decedent's dogs," and that he "expect[ed] to make distribution to that heir and close out the estate *within the next week or so*" (emphasis added), and would "notify [the ODC] when that is done."
14. On June 30, 2004, the Respondent provided a written PGC report to the ODC. The report made no reference to the status of the Otis Estate.

15. On July 14, 2004, the ODC wrote to the Respondent and his PGC mentor, confirming a meeting to be held in September 2004 at the ODC to review the Respondent's progress in complying with the conditions of his private admonition.

16. At the meeting with the ODC on September 16, 2004, the Respondent stated that he had recently filed the first and final accounting with the Register of Wills for the Otis Estate. The Respondent also agreed to meet with Dr. Tavani. The Respondent agreed that he would provide the ODC with a written report by October 1, 2004, including confirmation that the Otis Estate had been closed, and a list of his active client matters.

17. Having received no written report, by letter dated October 27, 2004, the ODC informed the Respondent that if the report was not received by November 3, 2004, the ODC would return to the Preliminary Review Committee for consideration of a Petition for Discipline, based upon violations of the terms and conditions of his private admonition.

18. By facsimile on November 1, 2004, the Respondent made a written report to the ODC, including information concerning the Otis Estate. He indicated that he had thought no report was required until after the time for filing objections to the accounting for the Otis Estate had expired (i.e., three months from September 2004). With regard to the active client list, he said he thought the list was a suggestion, not a requirement. He agreed that he would develop a list and inform the ODC of the same.

19. On December 8, 2004, the ODC informed the Respondent that it had opened a new matter for evaluation of his professional conduct in connection with the conditions of the private admonitions. The letter summarized the outstanding items, and requested written reports and documents on these items by no later than January 10, 2005. These items included (1) copies of all filings with the Register of Wills and correspondence with the beneficiaries of the Otis Estate, and a written statement of its status; (2) a request that Dr. Tavani be asked to report to the ODC in writing regarding any conclusions reached and/or assessments made as a result of her

October 2004 conference with the Respondent and the subsequent November 2004 testing; and (3) a list of the status of each and every open/active matter for which the Respondent was responsible, including a notation as to whether he was holding funds in escrow in connection with that matter.

20. As of the end of the day on January 10, 2005, the Respondent had neither written to nor called the ODC in response to the December 8, 2004 letter concerning the Otis Estate and other issues relating to the conditions of his private admonition in Board Case No. 24, 2003.

**B. Kling Estate**

21. Board Case No. 2, 2005 concerns the Respondent's conduct in connection with the Estate of Helen W. Kling ("the Kling Estate"). The will was filed with the Register of Wills on April 7, 1998, and letters testamentary issued to the executor, Gary W. Kling, with the Respondent as the attorney of record for the Kling Estate. The inventory was due July 7, 1998 and the accounting due April 7, 1999.

22. By letter dated November 10, 2003, the ODC requested the Respondent to provide specified information and relevant documents concerning the Kling Estate by November 24, 2003. The letter also informed the Respondent that after receipt of the requested information, the ODC would determine the need for an investigative audit of the Respondent's books and records.

23. The Respondent failed to respond to the ODC's November 10, 2003 letter. On December 2, 2003, the ODC contacted the Respondent by telephone. He stated that he would call the ODC after reviewing the file for the Kling Estate. On December 8, 2003, the ODC called the Respondent again, and left a message. He returned that call on December 9, 2003, stating that he was holding no funds for the Estate, but no action had been taken on the Estate since 1999.

24. Subsequent to the telephone call on December 9, 2003, the Respondent made no further report to the ODC concerning the Kling Estate.

25. Over one year later, on December 22, 2004, the ODC wrote to the Respondent, and requested that by no later than January 10, 2005, he provide the ODC with copies of all filings with the Register of Wills for the Kling Estate, as well as correspondence with the beneficiaries, and state in writing the status of probate of the Estate.

26. As of the close of business on January 10, 2005, the Respondent had neither written to nor called the ODC in response to the December 8, 2004 letter concerning the Kling Estate.

C. LFCP Audit

27. Joseph McCullough, Auditor for the LFCP, conducted investigative audits of the Otis and Kling Estates and a general audit of the Respondent's law practice books and records for compliance with Rule 1.15. Previously, in connection with the ODC investigation ultimately leading to the Respondent's private admonition, Mr. McCullough had prepared a report which included information regarding the Otis Estate. Mr. McCullough also prepared an report summarizing the findings of his January 2005 audits.

1. LFCP Audit/Otis Estate

28. The Respondent prepared the will for Virginia Otis in 1999, and became the executor for the Estate after her death on May 17, 2002. Letters testamentary were granted on June 26, 2002. The Respondent opened a money market account for the Otis Estate. The value of the Otis Estate was approximately \$515,000. The Respondent was required to file the inventory for the Otis Estate within three (3) months of the granting of letters (i.e., by September 26, 2002), but failed to do so. It was not filed until September 2004.

29. The audit of the Slavin Estate took place on March 14, 2003.

30. Beginning on March 17, 2003 and through August 2003, the Respondent issued checks from the Otis Estate account in equal amounts of \$23,000 to each of eight (8) charitable beneficiaries. For example, the Respondent issued a check for \$23,000 to "Best Friends," with an



accompanying letter stating that he anticipated that the Estate's final accounting would be submitted "within the next several weeks" and that there might be an additional small balance in the residuary account for distribution to the beneficiaries.

31. In September 2003, the Respondent applied for an IRS employer identification number for the Otis Estate.

32. The Respondent accepted a private admonition in Board Case No. 24, 2003 on October 1, 2003.

33. Mr. McCullough found no further activity in the Otis Estate account until September 30, 2004, when \$15,000 was transferred by the Otis Estate account to the Respondent's general escrow account to pay for Register of Wills closing costs and the Respondent's additional fees (\$3,000). The Respondent had filed an accounting with the Register of Wills in September 2004, which was provisionally approved. The accounting identified "Commissions Allowed" as \$16,632.00. The Respondent explained to Mr. McCullough that final distribution could not be made until the expiration of three (3) months after the Register of Wills mailed notice to the beneficiaries.

34. On December 31, 2004, the Respondent closed the Otis Estate account and transferred funds in the amount of \$273,722.97 to his pooled client escrow account. Mr. McCullough noted that as of January 17, 2005, the Otis Estate client balance was \$279,055.44.

35. On February 18, 2005, the Respondent wrote to ODC, confirming that he had made final distribution of funds for the Otis Estate. Upon Mr. McCullough's request for documentation of the distributions, the Respondent provided a chart entitled "Distribution of Otis Estate."

36. Mr. McCullough's January 31, 2005 report reflected that the eight (8) charitable beneficiaries each were to receive an additional \$6,571.42 (total additional amount of \$52,571.32), and the remaining balance (\$231,901.32) was to go to Ms. Girmy Elliott, who is the

trustee for Virginia Otis' testamentary trust. The chart provided to Mr. McCullough by the Respondent reflected that the net amount to be paid to the testamentary trust was \$219,677.47. Therefore, the combined distributions made to the beneficiaries in February 2005, almost three years after the granting of letters testamentary to the Respondent, was approximately \$272,000.

37. During his January 21, 2005 visit to the Respondent's law office, Mr. McCullough requested an explanation of the large gap of time between the July 2003 distributions and the then pending final distribution which was planned for January/February 2005. The Respondent was unable to explain the reasons for the long delay in closing the Otis Estate.

38. Mr. McCullough prepared a Supplemental Report, dated March 28, 2005. The Supplemental Report reflects that the Respondent provided Mr. McCullough with copies of canceled checks, return receipts and correspondence relating to the closing of the Otis Estate. He also forwarded a letter and release form from the various charitable beneficiaries. Although as of March 28, 2005, the check to Ms. Carrie V. Bagnatori (formerly Ms. Ginny Elliot) had not cleared the Respondent's escrow account, she informed the Respondent that she would be depositing those funds within the next few days.

## 2. LFCP Audit/Kling Estate

39. During the January 21, 2005 audit meeting with Mr. McCullough, the Respondent informed him that he had moved his office about one year ago and was unable to locate the Kling Estate file. The Respondent explained that he was not holding any estate funds and is not the executor for the Kling Estate. He provided Mr. McCullough with his client estate ledger card for review. The first activity reflected in the ledger card was in April 1998. To date, the Respondent had charged approximately \$1,000 in legal fees. The last entry was in December 1998.

40. The Respondent informed Mr. McCullough that there was a dispute between the executor, Gary Kling, and Mr. Kling's sister, as to various estate expenses incurred by the son in

traveling from Indiana to Delaware, and that the Respondent had been unable to resolve the matter.

41. On February 10, 2005, the Respondent wrote to Mr. Kling. The Respondent stated that "[s]ince I never heard whether you and your sister resolved your differences regarding allocation of estate assets and expenses, and since I have not heard from you in several years, be advised that I intend to file an application to withdraw as your counsel with the Register of Wills, unless you notify me in writing that you oppose my withdrawal."

42. The content of the Respondent's February 10, 2005 letter suggests that the Respondent failed to take any steps to contact Mr. Kling about the Estate in response to the ODC's inquiry in 2003 about the delay in probate.

43. By letter dated February 18, 2005, the Respondent informed the ODC that he had not received a reply to his recent letter to Mr. Kling, and that "[i]f no reply is received by February 28, 2005, I will file a request to withdraw with the Register of Wills."

44. The ODC contacted the Office of the Register of Wills for New Castle County ("ORW") for information concerning the Kling Estate. The ORW records reflected that Mr. Kling's sister, Ms. Monica D. Kling Vane, was the co-executor for the Kling Estate. In response to the ODC inquiry, the ORW also determined that of the two Delaware real properties identified on the petition filed by the Respondent in 1998, one had been sold approximately five months after the decedent's death.

45. Ms. Patricia A. Olesky, legal assistant in the ORW, sent a letter to the Respondent, dated March 26, 2002, concerning the Kling Estate. Ms. Olesky wrote that "[w]hile reviewing files, [she] found that this 1998 estate remains open. This office would appreciate if you would review your file and file an inventory and a first account, if not a first and final accounting, as soon as possible." The letter concluded by stating that "[i]f [the Respondent's]

personal representatives are uncooperative, please let me know and we can discuss the option of sending them a Rule to Show Cause Summons."

46. The ORW file showed no activity in the Kling Estate subsequent to the letter to the Respondent dated March 26, 2002. In particular, notwithstanding the assurances given to the ODC in his February 18, 2005 letter, as of April 26, 2005, the Respondent had not filed with the ORW a request to withdraw from representation of the Kling Estate.

**3. LFCP Audit/General Compliance with Rule 1.15**

47. With regard to the Respondent's general compliance with Rule 1.15, Mr. McCullough found that the Respondent manually prepared his monthly bank reconciliations. In his April 2003 audit in Board Case No. 24, 2003, the Respondent had informed Mr. McCullough that he was considering switching to the computer software known as QuickBooks to maintain his books and records. Mr. McCullough reviewed the monthly reconciliations and client balances for the past six (6) months, and found them to be in agreement and in compliance with Rule 1.15. However, the money market account which the Respondent had been maintaining for the Otis Estate through the end of December 2004 was not designated as a Rule 1.15A Attorney's Trust Account, as required by Rule 1.15A on overdraft notification. Mr. McCullough reminded the Respondent that this issue had been addressed at the prior audit in March/April 2003 in Board Case No. 24, 2003.

48. On his 2004 Certificate of Compliance, signed by the Respondent on February 2, 2004 and filed with the Delaware Supreme Court with his annual registration statement on that same date, the Respondent responded "YES" to item two (2), which stated, in part, as follows: "[E]ach attorney trust or escrow account has been designated as 'Rule 1.15A Attorney Trust Account' or 'Rule 1.15A Attorney Escrow Account.'" Because the Respondent had not in fact designated the Otis Estate account as a "Rule 1.15A Attorney Trust Account" or "Rule 1.15A Attorney Escrow Account," despite the guidance given to him by Mr. McCullough at the

March/April 2003 LFCP audit, the Respondent's answer to item two (2) of the 2004 Certificate of Compliance was false.

**IV. Standard of Proof**

Allegations of professional misconduct set forth in the Office of Disciplinary Counsel's Petitions for Discipline must be proven by clear and convincing evidence. Rule 15, Disciplinary Procedure Rules.

**V. Discussion and Analysis**

Respondent concedes he acted with a lack of diligence in handling estate matters. During the Disciplinary Hearing in this matter, Respondent testified as follows:

Chair: I want to make sure that you are prepared to say in front of the Panel on the record that you are accepting, as the Petition alleges, that you acted with a lack of reasonable diligence in handling estates?

Respondent: I think that is true. To the extent that there may be some meaning in lack of diligence that I am not aware of, then maybe I am opening myself up for a problem. It wasn't a deliberate refusal to handle the thing in a timely manner. It was failing to give the time and attention to it that my obligations as an attorney required me to do and in my view that is negligence, as well as lack of diligence.

June 22, 2005 Hearing Transcript at 16. [Emphasis added].

With respect to the charges in the Petition regarding lack of diligence in handling estate matters, the Panel accepts the uncontroverted evidence presented by ODC and further acknowledges the critical self-assessment offered by Respondent. In view of Respondent's admitted fault with respect to handling certain estates, the Board finds clear and convincing evidence of the violations set forth in Counts I through X:

Count I: Procedural Rule 7(c) states that it shall be grounds for discipline for a lawyer to "violate the terms of any private or public disciplinary or disability disposition". By failing to comply with the condition of his private admonition in Board Case No. 24, 2003 which

required him to complete the probate and administration of the Otis Estate by December 10, 2003, the Respondent violated Procedural Rule 7(c).

Count II: Rule 1.3 requires that a "lawyer shall act with reasonable diligence and promptness in representing a client." By failing to act with reasonable diligence and promptness in the probate of the Otis Estate, the Respondent violated Rule 1.3.

Count III: Rule 1.3 requires that a "lawyer shall act with reasonable diligence and promptness in representing a client." By failing to act with reasonable diligence and promptness in the probate of the Kling Estate, the Respondent violated Rule 1.3.

Count IV: Rule 1.15(b) states that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property." By failing to distribute over \$272,000 in funds from the Otis Estate account to beneficiaries and other third persons for almost three (3) years after the death of Virginia Otis, the Respondent violated Rule 1.15(b).

Count V: Rule 3.4(c) states that "a lawyer shall not knowingly disobey an obligation under the Rules of a Tribunal except for an open refusal based on an assertion that no valid obligation exists." By failing to probate the Otis Estate in a timely manner consistent with the applicable rules of the Court of Chancery, the Respondent violated Rule 3.4(c).

Count VI: Rule 3.4(c) states that "a lawyer shall not knowingly disobey any obligation under the Rules of a Tribunal except for an open refusal based on an assertion that no valid obligation exists." By failing to probate the Kling Estate in a timely manner consistent with the applicable rules of the Court of Chancery, the Respondent violated Rule 3.4(c).

Count VII: Rule 8.4(d) states that "it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." By failing to probate the Otis Estate in a timely manner, the Respondent violated Rule 8.4(d).

Count VIII: Rule 8.4(d) states that "it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." By failing to probate the Kling Estate in a timely manner, the Respondent violated Rule 8.4(d).

Count IX: Rule 8.1(b) states, in part, that "a lawyer...in connection with a disciplinary matter, shall not...knowingly fail to respond to a lawful demand for information from a...disciplinary authority." By failing to provide information and documents in a timely manner in response to the ODC's reasonable request in connection with the Otis Estate, the Respondent violated Rule 8.1(b).

Count X: Rule 8.1(b) states, in part, that "a lawyer...in connection with a disciplinary matter, shall not...knowingly fail to respond to a lawful demand for information from a...disciplinary authority." By failing to provide information and documents in a timely manner in response to the ODC's reasonable request in connection with the Kling Estate, the Respondent violated Rule 8.1(b).

With respect to Counts XI, XII and XIII, principally dealing with a lawyer's duty to properly disclose attorney's escrow accounts, Respondent acknowledges fault in failing to make certain escrow account disclosures and related misrepresentations. In this regard, Respondent specifically denies allegations of intentional dishonesty, fraud, or deceit. However, in this instance, the Board finds the distinction in Respondent's mental state is meaningless. "Negligent misrepresentation" may also form the basis for a charge of misconduct under the literal terms of 8.4(c). In Re: Doughty, 832 A.2d 724 (Del. Supr. 2003). Given the foregoing, the Board concludes as follows:

Count XI: Rule 1.15A states, in part, that "every attorney practicing or admitted to practice in this jurisdiction shall designate every account into which attorney trust or escrow funds are deposited...as a 1.15A account". By failing to designate the Otis Estate account as a

1.15A account with his financial institution, thereby reducing the likelihood that the ODC would receive notice of any overdraft balances in this account, the Respondent violated Rule 1.15A.

Count XII: Rule 8.4(c) provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” By filing with the Supreme Court a certificate of compliance for 2004, which falsely represented that each attorney trust or escrow account has been designated as a Rule 1.15A attorney trust account, or Rule 1.15A attorney escrow account, when in fact the Otis Estate account had not been so designated, the Respondent violated Rule 8.4(c).

Count XIII: Rule 8.4(d) provides that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” The Delaware Supreme Court relies upon representations made by attorneys in the Certificates filed with their annual statements each year in the administration of justice governing the practice of law in Delaware. In *RE: Bailey, De. Supr.*, 821 A.2d 851 (2003). By filing with the Supreme Court a Certificate of Compliance for 2004, which falsely represented that each attorney trust account had been designated as a Rule 1.15A attorney trust account, when in fact the Otis Estate had not been so designated, the Respondent violated Rule 8.4(d).

## **VI. Conclusion and Recommended Sanctions**

Case No. 1 and 2 involve, in the aggregate, a series of recurring violations of Delaware Lawyers Rules of Professional Conduct. The Respondent’s pattern of misconduct has been proven by clear and convincing evidence.

### **A. Aggravating and Mitigating Factors**

In considering the appropriate sanction, the Board looked to the four-factor test established by the ABA standards for imposing lawyer sanctions and recognized by the Delaware Supreme Court. (See *In Re: Bailey*, 821 A.2d. 851 (Del. Supr. 2003)). The Board finds the following aggravating factors exist in this disciplinary matter:



1. Significant prior disciplinary record. The Respondent has a private admonition in 2003 involving the Slavin Estate and previous rules violations similar to the ones involved here;

2. Multiple offenses. The record reflects that the Respondent has committed thirteen (13) violations of the Rules of Professional Conduct. These matters involve mishandling of two (2) estates, failure to cooperate with the ODC, and a failure to comply with obligations under the conditions of the prior disciplinary sanction;

3. Substantial experience in the practice of law. Respondent has been practicing continuously in Delaware since admission to the bar in 1973. For 32 years, Respondent's practice included, to a greater or lesser degree, the probate of estates. The obligations and responsibilities of an attorney involved in the probate of an estate are well known to Respondent.

With respect to mitigating factors, the Board recognizes the Respondent's lack of a selfish or dishonest motive. There is no evidence Respondent "profited" from his misconduct. Moreover, in his appearance before the Board, the Respondent acknowledged the wrongfulness of his conduct, expressed his regret and remorse, and expressed a commitment to prevent a recurrence of this misconduct.

**B. Board's Recommended Discipline**

The Board on Professional Responsibility recommends a three-fold sanction:

1. A public reprimand (Procedural Rule 8(a)(5));
2. Limitation by the Supreme Court on the nature and/or extent of the Respondent's future practice (Procedural Rule 8(a)(9)), in the form of a permanent practice limitation precluding the Respondent from acting as counsel for personal representatives in estate matters, and from accepting appointment as a personal representative of an estate. In connection with this practice limitation, the Respondent should also be required to withdraw

from representations and appointments in any and all open estate matters no later than 120 days from the date of the Court's disciplinary order; and,

3. Conditions (Procedural Rule 8(b)), including

(a) the Respondent's prompt and full cooperation with the ODC in its efforts to monitor compliance with the Court's sanctions in this matter;

(b) the Respondent's full cooperation with the ODC's investigation of any allegations of unprofessional conduct that may come or have already come to the attention of the ODC, including but not limited to responding to the ODC's correspondence by the due date and cooperating with any Lawyers Fund for Client Protection ("LFCP") audit requested by the ODC; and,

(c) the payment of the costs incurred by the ODC and the LFCP in these matters, including the costs of Mr. McCullough's audits.

In support of this recommended sanction, the Board acknowledges, first and foremost, that ODC and the Respondent agreed to the appropriateness of the foregoing recommended sanction. Second, the Board views the stipulated sanction as appropriate for the circumstances presented here and consistent with prior disciplinary matters in Delaware. See In Re: John Benge, 754 A.2d 871, 880 (Del. Supr. 2000) (Delaware's disciplinary system includes a progressive series of increasingly severe sanctions); In Re: W. Lee Autman, 750 A. 2d 520 (Del. Supr. 2000) (issuing a public reprimand for attorney misconduct in handling an estate probate matter); and In Re: Dennis A. Reardon, 759 A. 2d 568 (Del. Supr. 2000) (a permanent practice limitation is warranted where an attorney's pattern of misconduct is shown to occur in a specific area of practice.).

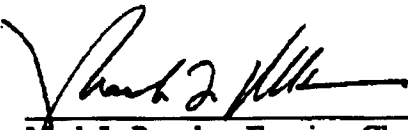
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P. 02

Panel of the Board of Professional Responsibility

BY:   
Mark L. Reardon, Esquire, Chairman

BY:   
Kelly Dumm Gelof, Esquire

BY: \_\_\_\_\_  
Donald A. Blakey, Ph.D.

Dated: Oct. 4, 2005

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**Panel of the Board of Professional Responsibility**

BY: \_\_\_\_\_  
Mark L. Reardon, Esquire, Chairman

BY: \_\_\_\_\_  
Kelly Dunn Gelf, Esquire

BY: \_\_\_\_\_  
Donald A. Blake, Ph.D. *10/4/05*

Date: 10/4/05