IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE: JOHN M. WILLARD, Respondent.	No. 60, 2003 Board Case Nos. 25 and 27, 2002

Submitted: February 25, 2003
Decided: March 12, 2003

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

ORDER

This 12th day of March 2003,a panel of the Board on Professional Responsibility having filed on February 5, 2003, a Report and Approval of Stipulation and Joint Recommendation of Sanction, pursuant to Rule 9(d) of the Rules of the Delaware Lawyers' Rules of Disciplinary Procedure; and the Respondent and the Office of Disciplinary Counsel having filed no objections to the Board's Report; and the Court having reviewed the matter pursuant to Rule 9(e) of the Rules of the Delaware Lawyers' Rules of Disciplinary Procedure;

NOW, THEREFORE, IT IS ORDERED that the Report and Approval of Stipulation and Joint Recommendation of Sanction filed by the Board on Professional Responsibility on February 5, 2003 (copy attached) is hereby APPROVED. The Court

hereby imposes a public reprimand and a public two-year period of probation, subject to terms and conditions. The Office of Disciplinary Counsel is directed to file within 10 days of the date of this Order the costs of the disciplinary proceedings, as well as the costs of the audits. Thereafter, the respondent is directed to have all costs paid within 30 days. The matter is hereby CLOSED.

BY THE COURT:

/s/ Randy J. Holland
Justice

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of Delaware:	:	**CONSOLIDATED**
JOHN M. WILLARD, Respondent.	:	Board Case Nos. 25 and 27, 2002

REPORT AND APPROVAL OF STIPULATION AND JOINT RECOMMENDATION OF SANCTION

A hearing by the undersigned panel of the Board on Professional Responsibility (the "Board") was held on January 15, 2003. At the hearing, the Board considered the Pre-Hearing Stipulation and Joint Recommendation of Sanction (the "Stipulation") (attached as Exhibit A), previously forwarded to the panel members, and received the Respondent's Certification of Admissions and Consent to Pre-Hearing Stipulation and Joint Recommendation of Sanction (attached as Exhibit B). The Board also heard testimony from the Respondent, as well as from the Honorable Vincent Bifferato (who has agreed to serve as the Respondent's Practice Monitor) and John M. Heiks, CPA (the accountant for Respondent).

The Respondent was admitted to the Bar in 1975 and has a background of service as a prosecutor, public defender, and presently as a criminal defense attorney. He has been in private practice approximately fifteen years and his

practice is limited to criminal matters, primarily DUI matters. He has no prior disciplinary record, and willingly approved the Consent to the Stipulation.

The Respondent provided extensive background with respect to each of the matters described in the Stipulation and offered his perspective as to what had occurred. He was forthcoming in his presentation of the facts, and expressed genuine remorse and concern about the events which caused the admitted violations. He also addressed the corrective actions which he has taken, and his intent to take all steps necessary to avoid any future violations. He testified that he is prepared to abide by each of the conditions described in the Stipulation and will work actively with his practice monitor.

Judge Bifferato testified that he has agreed to serve as practice monitor and mentor to the Respondent, whom he has known over the past twenty-five years. He has further agreed to assist the Respondent in complying with the Law Office Management Guidelines prepared by the Office of Disciplinary Counsel ("ODC").

Mr. Heiks testified that he has known the Respondent for approximately sixteen years and has been employed by the Respondent to deal with tax and payroll matters, although he has not in the past monitored the Respondent's compliance with Rule 1.15. He has assisted the Respondent in bringing his books and records into compliance with the appropriate rules and has been retained by the

Respondent to do so on an ongoing basis. Mr. Heiks also provided background and insight into the various record keeping problems described in the Stipulation.

At the conclusion of the evidence, counsel presented oral argument with respect to the type of sanction which should be recommended, consistent with the ABA Standards for Imposing Lawyer Sanctions. Although counsel for the ODC admitted that no actual harm of any sort occurred or was asserted here, he emphasized that there was potential harm to clients as a result of Respondent's actions.

The predominant authorities to which the panel's attention was directed were In the Matter of a Member of the Bar of the Supreme Court of Delaware: Peter E. Hess, No. 39, 2002 (Del. Supr. July 24, 2002) and In Re Benson, 774 A.2d 258 (Del. Supr. 2001) (and cases cited therein). Counsel for the ODC argued that these precedents suggested that a public reprimand was mandated as a result of the erroneous certificate of compliance and the escrow account violations admitted here. The panel has reviewed these authorities and has concluded that they are supportive of the Stipulation and the recommendation of sanction contained therein.

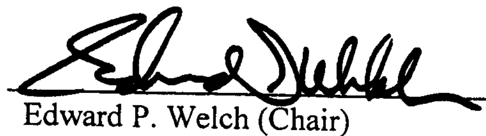
The Stipulation also expresses the agreement of the Respondent and the ODC with respect to the impact of the aggravating and mitigating circumstances. The panel has reviewed and is in agreement with the views expressed in the Stipulation. The panel is also particularly mindful that the Respondent has accepted full responsibility for his actions and for resolving, addressing and preventing the

repetition of these problems in the future. No harm was caused to any client or other member of the public. In addition, the Respondent has an extensive record of service as an attorney, both in the public and private sector, without any prior disciplinary problems of any type.

After deliberation, and consideration of the Stipulation, the testimony presented at the hearing, the argument of counsel, and the authorities presented, the panel concluded that the Stipulation, including the Joint Recommendation of the Sanction, should be approved as submitted. The Joint Recommendation of Sanction is supported by the decisions of the Delaware Supreme Court and the ABA standards cited in the Joint Recommendation.

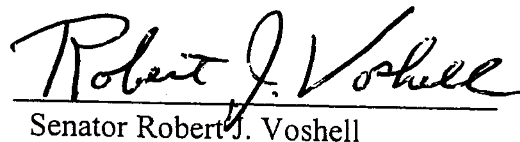
CONCLUSION

For the foregoing reasons, the panel recommends approval of the Stipulation, as well as the sanctions provided for in the Stipulation.



Edward P. Welch (Chair)

Anne C. Foster



Senator Robert J. Voshell

Dated: February 5, 2003

CERTIFICATE OF SERVICE

I, Edward P. Welch, certify that two copies of the Report and Approval of Stipulation and Joint Recommendation of Sanction in Board Case Nos. 25 and 27, 2002 were served by hand this 5th day of February, 2003 upon:

Michael S. McGinniss, Esquire
Office of Disciplinary Counsel
200 West Ninth Street
Suite 300-A
Wilmington, Delaware 19801

Charles Slanina, Esquire
Tybout, Redfearn & Pell
300 Delaware Avenue
Suite 1100
Wilmington, Delaware 19801

Mr. Stephen D. Taylor
Court Administrator
Supreme Court of Delaware
Elbert N. Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801

Edward P. Welch

197371.03-Wilmington S1A

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	)	**CONFIDENTIAL**
	)	**CONSOLIDATED**
JOHN M. WILLARD, Respondent.	)	Board Case No. 25 and 27, 2002

PREHEARING STIPULATION AND JOINT RECOMMENDATION OF SANCTION

The Office of Disciplinary Counsel ("ODC") and the Respondent, John M. Willard, Esquire, by and through his counsel, hereby jointly propose that the Board recommend to the Supreme Court of Delaware (the "Court") that the Court impose the agreed-upon sanction of a public reprimand and two-year period of probation, with conditions. In support of this proposal, the ODC and the Respondent also jointly submit to the Board the following stipulation of facts and violations of the Delaware Lawyers' Rules of Professional Conduct (the "Rules") unconditionally admitted by the Respondent, and stipulated aggravating and mitigating factors.

I. ADMITTED FACTS

1. The Respondent is a member of the Bar of the Supreme Court of Delaware. He was admitted to the Bar in 1975. At all times relevant to this Petition for Discipline, the Respondent was engaged in the private practice of law as a solo practitioner in the State of Delaware, with an office located in Wilmington, Delaware.

Board Case No. 27, 2002 (Parris)

2. On December 29, 2001, Mr. Jon M. Parris was arrested and criminally charged with second-offense driving under the influence ("DUI"), as well as other related traffic offenses.

3. Parris spoke with the Respondent on the telephone about representing him in the criminal case and in the administrative hearing before the Delaware Department of Motor Vehicles ("DMV"). On or about January 4, 2002, the Respondent and Parris agreed that for $2,500, the Respondent would represent Parris in both the criminal matter (through and including trial) and in the DMV proceeding, with $1,250 due immediately and $1,250 to be provided prior to trial.

4. In the course of discussing the retention arrangements, the Respondent and Parris discussed the facts underlying the criminal charges (including witnesses), legal issues relating to the proceedings (including potential sentences and loss of driving privileges), and potential defenses to the charges.

5. After these discussions, the Respondent sent a "New Matter Report" to Parris, which Parris signed and returned, along with payment of $1,250. The "New Matter Report" did not state that the advance fee was refundable if not earned. At the same time, the Respondent also sent Parris a letter, dated January 8, 2002, which explained the fee arrangement in further detail, but which, like the "New Matter Report," did not state that the advance fee was refundable if not earned. **Copies of the Respondent's "New Matter Report," the January 8, 2002 letter, and the transmittal letter for those documents are attached hereto as Stipulation Exhibit 1 and incorporated herein**. The Respondent also sent Parris an "Arraignment by Pleading" form for his signature, and it was returned to the Respondent by Parris. By filing this document with the

Justice of the Peace Court, the Respondent entered his appearance on behalf of Parris. The matter was transferred to the Court of Common Pleas in and for Sussex County for further proceedings.

6. Thereafter in January 2002, the Respondent filed a request for a probable cause hearing before the DMV; a motion to suppress in the Court of Common Pleas; and a discovery request with the Delaware Attorney General's Office (hereinafter the "State"). The Respondent did not send copies of any of these documents to Parris.

7. Notices of trial dates in the Court of Common Pleas in criminal matters are generally sent to the criminal defendant directly, as well as to the defendant's counsel of record. By notice dated February 21, 2002, the trial in the Court of Common Pleas was scheduled for March 19, 2002 at 8:35 a.m. Although the Respondent received this trial notice from the Court of Common Pleas, Parris did not receive his written notice from the Court. Parris did receive notice from the DMV that he had a probable cause hearing before that agency at 1:30 p.m. on March 19, 2002. (A copy of the DMV notice was also received by the Respondent.)

8. On or about March 5, 2002, the State served the Respondent with its responses to the January 2002 discovery requests. The Respondent did not send copies of the discovery responses to Parris. The Respondent made no efforts to contact Parris, either by telephone or in writing, to discuss the discovery responses or to notify him of the upcoming trial (having had no contact from Parris since January 2002), or take any further steps to prepare Parris for the March 19 trial or DMV hearing.

9. On March 19, 2002, the Respondent appeared at the Court of Common Pleas for Parris' trial. Parris, having received no notice of the trial date, did not appear. The Court issued a capias for Parris. The Respondent contacted Parris by telephone from the courthouse in

Georgetown, and advised him to come to the courthouse immediately (and to bring $1,250 in order to pay the Respondent the remaining attorneys' fees owed to him).

10. Parris arrived at the Court later that day, along with $1,250.00 to pay the Respondent. The Respondent conferred with Parris and with the prosecuting attorney for the State. By statute, conviction for second-offense DUI involves mandatory incarceration, fines, and loss of driving privileges. After Parris arrived at the Court, the Respondent informed Parris, for the first time, about the availability of an ignition interlocking device ("IID") for second-offense DUI. The Respondent advised Parris that by agreeing to use the IID, Parris could reduce the loss of driving privileges that would otherwise be imposed in the administrative proceeding before the DMV from one year to 60 days. No witnesses were available to testify at trial that day in Parris' defense.

11. Parris entered a plea of guilty to second-offense DUI. Pursuant to the plea agreement entered into by Parris, the sentenced imposed by the Court included 18 months incarceration (all but 60 days suspended), commencing on April 11, 2002, followed by 16 months probation, and also substantial fines.

12. In April 2002, at the request of Parris' father, the Court of Common Pleas entered a modified sentencing order with postponement of Parris' reporting date for incarceration, so as to allow Parris sufficient time to seek new counsel and make an application regarding his sentence.

13. On May 9, 2002, Eric G. Mooney, Esquire filed a motion to withdraw guilty plea on behalf of Parris. On May 14, 2002, the Court stayed the modified sentencing order pending a hearing and decision on the motion to withdraw guilty plea. On June 17, 2002, having received no opposition to the motion from the State, the Court granted the motion to withdraw guilty plea,

and subsequently scheduled the case for trial. Mooney filed a motion to suppress on June 27, 2002, asserting that there was no probable cause for the DUI arrest.

14. On August 13, 2002, before trial, the State presented testimony by the arresting police officer in connection with the motion to suppress. After the officer's testimony, the State and the Respondent stipulated that the State had not proven that probable cause existed for Parris' arrest on the second-offense DUI charge. The State offered (and Parris accepted) a plea of guilty to one count of "Reckless Driving, Alcohol-Related." The Court concurred and entered an order to that effect on August 14, 2002. Parris was sentenced to pay a small fine and take a course of instruction regarding alcohol.

Board Case No. 25, 2002 (Lawyers' Fund for Client Protection)

15. Delaware lawyers are obligated to file an annual registration statement with the Supreme Court of Delaware (the "Court"). Said registration statement includes a Certificate of Compliance, by which the lawyer certifies to the Court that the lawyer is properly maintaining books and records in compliance with the specific requirements of the Rules and is timely filing and paying taxes. The Court expects that lawyers completing the Certificate of Compliance will undertake the appropriate review and inquiry into matters involving their law practice books and records and their tax obligations, so as to enable them accurately to answer all of the items identified on the Certificate.

16. In the course of evaluating the Respondent's conduct in the Parris matter, the information received by the ODC raised concerns about the Respondent's processes for the handling of retainers (i.e., "advance fees"). Moreover, the Respondent's Certificate of Compliance for 2002 failed to provide required information pertaining to the Respondent's escrow

and operating accounts. In explaining the omission of the account information, the Respondent's counsel informed the ODC that certain financial accounting records for his law practice had been lost as a result of water damage in the place where the records were stored. The ODC then requested that Joseph F. McCullough, an Auditor for the Lawyers' Fund for Client Protection ("LFCP"), conduct an investigative audit of the Respondent's financial books and records.

17. On July 2, 2002, McCullough conducted an audit at the office of the Respondent's accountant, Jack Heiks, and subsequently provided the ODC with a Report of his findings, dated July 18, 2002. **A copy of the July 18, 2002 Audit Report, without its attachments, is attached hereto as Stipulation Exhibit 2 and incorporated herein.** The July 18 Audit Report pertains to McCullough's review of the Respondent's financial books and records from January 2000 to present.

Overview in July 18 Audit Report/Accountant's Role

18. The Respondent used a manual system to record his business activities. In particular, the Respondent was using spreadsheets listing his disbursements and columns for the deposit memo information. See **Stipulation Exhibit 2**.

19. Heiks handled the Respondent's tax preparation for the past 10 years. As part of the annual tax preparation, Heiks reviewed the operating account and performed a spreadsheet analysis for the entire year, which would reconcile the operating bank account balances. In effect, the cash was reconciled to the spreadsheet by line items (with disbursements classified) for the entire year. See **Stipulation Exhibit 2**.

20. The escrow account was maintained by the Respondent, and was not generally a part of the annual review process performed by Heiks. Heiks informed McCullough that he

recently prepared the required monthly escrow account reconciliations for January 2000 to the present, along with the required monthly listings of client balances for the same time period. Heiks also informed McCullough that the Respondent had "talked about doing a monthly reconciliation of the escrow account but never really did it until this recent problem came to light." See **Stipulation Exhibit 2**.

Operating Account (January 2000 to May 2002)

21. In reviewing the operating account (Wilmington Trust Account No. 2516-8674) for the period January 2000 through May 2002, McCullough found that Heiks had been performing a yearly spreadsheet analysis, listing each line item disbursement along with a monthly reconciliation of the bank account. The bank statement balances were in agreement with the book balances. For year 2000, the first six months did not have a monthly schedule of the outstanding checks, but only a monthly total. Heiks indicated that those checks were not available for review in order for him to prepare a monthly schedule. From July through December 2000, there was a monthly outstanding check listing which Heiks had prepared for the audit. There were no deposit tickets or canceled checks for the year 2000 available for McCullough to review. For year 2001, there was an end-of-year spreadsheet analysis showing the monthly reconciliation of the bank account. The bank balances were in agreement with the book balances. There were no canceled checks or deposit tickets available for year 2001. For year 2002, there was a cash receipts journal showing date, payee, amount, classification and monthly totals. The previous years 2000 and 2001 did not have monthly totals or separate schedules showing the details. See **Stipulation Exhibit 2**.

Escrow Account (January 2000 to May 2002)

22. In reviewing the escrow account (Wilmington Trust Account No. 2516-8666), McCullough found that the Respondent's manual system consisted of spreadsheets showing the daily activities. There was very little activity in the escrow account. As Heiks indicated, the monthly reconciliations and individual monthly client balances were completed recently, in preparation for the audit. The client balance as of May 31, 2002 was $8,392.07. There were no deposit tickets or canceled checks available for years 2000 and 2001. Heiks also informed McCullough that he had not updated the records prior to year 2000. **See Stipulation Exhibit 2.**

Missing Account Records (Escrow and Operating)

23. In connection with the missing deposit tickets and canceled checks for both the escrow and operating accounts, Heiks indicated to McCullough that these records may have been lost or destroyed during two water damage incidents at the Respondent's home. **See Stipulation Exhibit 2.**

Improper Transfers of Earned Fees from Escrow Account (2000 and 2001)

24. In preparing for the July 2, 2002 audit, Heiks discovered that on two occasions (in July 2001), the Respondent withdrew funds from the escrow account as earned fees and did not deposit them into the operating account. Heiks indicated that the checks were made payable to Wilmington Trust Company as payment on personal debts. The amounts of the checks were $3,000 and $4,336.43. The checks pertained to a criminal matter in which the Respondent represented client Michael Allen. Because the funds were not deposited into the operating account, they were not included as fee income for the year 2001 federal and state income tax

returns. Heiks stated that amended tax returns would be prepared and filed to reflect the fee income. McCullough reviewed the Respondent's federal and state income tax returns for 2000 and 2001. The 2001 returns reflected that the Respondent had reported $7,435 in income for a cancellation of debt. See **Stipulation Exhibit 2.**

25. In addition to the two checks noted by Heiks in year 2001, McCullough discovered a check written on July 22, 2000 directly from the escrow account to First Union Bank in the amount of $2,000. Like the 2001 checks, this check was not deposited into the operating account and not reported as fee income on the Respondent's year 2000 federal and state income tax returns. The $2,000 check was identified in the Respondent's books as consisting of fees earned in the representation of client Kenneth DeRouche in a criminal matter. **See Stipulation Exhibit 2. A copy of the Respondent's client ledger card for DeRouche (included with Attachment D to the July 18, 2002 Report) is attached hereto as Stipulation Exhibit 3 and incorporated herein.**

Follow-Up Audit and Report

26. On August 15, 2002, McCullough conducted a follow-up audit at Heiks' office. Upon review of the escrow account and operating account from July 1997 through December 1999, McCullough found that during that period the operating account had not been reconciled in a timely manner (i.e., it was reconciled annually rather than monthly); the escrow account had not been reconciled either monthly or annually; there had been no monthly listings of outstanding checks for either the escrow account or the operating account; and there had been no monthly listings of client balances prepared for the escrow account. In short, the same pattern of non-compliance with record keeping requirements as existed between January 2000 and June 2002,

also existed during the period July 1997 through December 1999. As an exception, however, McCullough did not discover any additional incidents between July 1997 and December 1999 in which the Respondent transferred earned fees out of his client escrow account without first depositing them in the operating account. McCullough subsequently provided the ODC with a Report of his findings, dated October 3, 2002. **A copy of the October 3, 2002 Audit Report, without its attachments, is attached hereto as Stipulation Exhibit 4 and incorporated herein.**

Escrow Account (January 1997 to December 1999)

27. In preparation for the follow-up audit, Heiks prepared monthly client balance listings and monthly bank reconciliations for the escrow account for the period June 1997 through December 1999. The escrow balance as of July 1, 1997 was $5,441.50, and the individual client balances were in agreement with the bank statement. As of December 31, 1998, there were 11 individual client balances totaling $2,728.50. There were four (4) negative client balances that were part of that $2,728.50 total. See **Stipulation Exhibit 4**.

28. There was no escrow activity in year 1999. As of December 31, 1999, the bank balance and the client balance was the same figure, $2,728.50. McCullough's review of the individual client balances revealed that there were only three (3) client names listed that totaled $2,728.50. There was no explanation as to why the other eight clients (who had been listed as of December 31, 1998) were not listed in the December 31, 1999 client balances.

29. Heiks indicated that there were numerous incorrect postings to the individual client names and amounts over the past few years. A further detailed review was needed in order to sort out these apparent discrepancies from one year to the next. Subsequent to the August 15 audit, Heiks obtained the client files and prepared a narrative outline showing the numerous incorrect

postings to each individual client's account over the past few years, and attempted to sort out the discrepancies. <u>See</u> **Stipulation Exhibit 4. A copy of the ledger card showing client balances as of January 1, 2000 and Heiks' explanation for the numerous differences (Attachment 1 to the October 3 Audit Report), is attached hereto as Stipulation Exhibit 5 and incorporated herein.**

<u>Operating Account (July 1997 to December 1999)</u>

30. For the operating account, McCullough reviewed the period from July 1997 through December 1999. The same pattern existed in these years as noted in the July 18 Audit Report for the subsequent years. That is, the bank account was reconciled and analyzed on a yearly basis as opposed to the required monthly basis, and a spreadsheet was used to perform the year-end analysis. There was no monthly listing of outstanding checks. There were no bank statements or canceled checks available for McCullough to review. Heiks indicated that these records may have been destroyed or lost during the Respondent's two water damage incidents. <u>See</u> **Stipulation Exhibit 4.**

31. McCullough also reviewed the Respondent's recently filed amended federal and state income tax returns for years 2000 and 2001. The amended returns reported as additional earned fee income the amounts which had been paid directly out of the escrow account for personal debt purposes (i.e., $2,000.00 in year 2000, and $7,336.43 in 2001). <u>See</u> **Stipulation Exhibit 4.**

<u>Improper Deposits of Client's Advance Fee into Respondent's Non-Fiduciary Accounts</u>

32. On September 17, 2002, a meeting with held with the Respondent, his attorney Charles Slanina, Esquire, and Heiks.

33. It had previously been reported to McCullough that in April 2000, for a criminal matter in which he represented client Kenneth DeRouche, a $15,000 retainer had been paid by DeRouche and deposited into the escrow account. Upon review and discussion of documents in the client file obtained from the Respondent, it was determined that the $15,000 retainer check had in fact been paid and deposited into the Respondent's operating account two months earlier, in February 2000. A portion of those funds ($5,000) was then deposited into a "tax account" maintained by the Respondent, for the purpose of paying taxes due on the Respondent's income. See **Stipulation Exhibit 4**.

34. The Respondent failed to provide DeRouche with a written explanation that complied with the requirements of Rule 1.5(f) for advance fees (i.e., stating that the fee was refundable if not earned, and stating the basis under which the fees would be considered to have been earned, whether in whole or in part). According to the written statement that was provided, the nature of the matter was "Rape 4th," and the "[e]stimated" fee was $15,000. No further detail or explanation with regard to the nature of the fee arrangement (including the manner in which it would be deemed earned) was included in the agreement. **A copy of the Respondent's "New Matter Report" and fee agreement for the DeRouche matter, signed by DeRouche's spouse and dated February 16, 2000, is attached hereto as Stipulation Exhibit 6 and incorporated herein.**

35. On or about April 12, 2000, DeRouche informed the Respondent in writing that he was terminating the representation, and requested an accounting and refund of the unearned portion of the retainer. The Respondent then proceeded to deposit $15,000 into his client escrow

account. Specifically, the Respondent withdrew $10,000 from his operating account and deposited $5,000 in personal funds into the escrow account. <u>See</u> **Stipulation Exhibit 4**.

36. On April 25, 2000, the Respondent sent DeRouche a detailed letter explaining the work that he had performed, and asserted at the conclusion of the letter that $9,600 was a fair estimate of the fees which had been earned. The Respondent's file reflects that he had performed substantial pretrial work on DeRouche's criminal matter. For instance, the Respondent had appeared and represented DeRouche at a preliminary hearing and two bail hearings; filed for and reviewed discovery; and conferred with the prosecutor, the client, and others about the case.

37. Ultimately, the Respondent refunded $13,000 of the $15,000 retainer (by making a $7,400 payment in May 2000, and a $9,600 payment in July 2000), and then used the $2,000 balance (constituting earned fees) in July 2000 to pay a personal debt owed to First Union Bank. <u>See</u> **Stipulation Exhibit 4**.

<u>Improper Transfers of Earned Fees From Escrow Account</u>

38. In connection with his October 3 Audit Report, McCullough also reviewed the documents provided by the Respondent relating to the payments of personal debts through the escrow account checks, and the cancellation of debt noted on the 2001 income tax returns. At the September 17, 2002 meeting with ODC and McCullough, the Respondent acknowledged that the three (3) escrow checks were withdrawn directly from the escrow account for the purpose of paying personal debts relating to credit card charges. According to the Respondent, the checks represented earned fees. <u>See</u> **Stipulation Exhibit 4**.

39. With regard to client Michael Allen, the two checks withdrawn from the escrow account in the year 2001 were made payable to Wilmington Trust for the purchase of certified

checks. The $3,000 payment was used to settle a $8,963.82 credit card debt with First USA. Alegis Group, LP collection agency handled that settlement offer. The $4,336.43 payment was used to settle a credit card debt with MBNA, with the settlement offer being handled by Great Lakes Bureau. Although the documents provided by the Respondent did not disclose the total amount of the debt to MBNA, the documents suggest that the total was greater than the amount that was paid by the Respondent to settle the debt. See **Stipulation Exhibit 4**.

40. With regard to client Kenneth DeRouche, as previously noted, the $2,000 payment in the year 2000 related to a loan obligation to First Union Bank. With regard to the $7,435 cancellation of debt in year 2001, the Respondent paid $2,877 to Bank of America as a settlement of a $9,078.69 credit card debt. See **Stipulation Exhibit 4**.

Certificates of Compliance

41. The Certificates of Compliance filed by the Respondent in 1998, 1999, 2000, 2001 and 2002 state that he has been in compliance with financial record keeping requirements. **Copies of the Respondent's Certificates of Compliance for 1998 through 2002 are attached hereto as Stipulation Exhibit 7 and incorporated herein.**

42. The deficiencies in the Respondent's law office books and records which were noted in McCullough's July 18 and October 3 Audit Reports, demonstrate that:

(a) In the 1998 Certificate of Compliance, the Respondent answered "YES" when it would have been correct to answer "NO" to items 4, 5, 6(a), 6(b), and 6(d).

(b) In the 1999 Certificate of Compliance, the Respondent answered "YES" when it would have been correct to answer "NO" to items 4, 5, 6(a), 6(b), and 6(d).

(c) In the 2000 Certificate of Compliance, the Respondent answered "YES" when it would have been correct to answer "NO" to items 4, 5, 6(a), 6(b), and 6(d).

(d) In the 2001 Certificate of Compliance, the Respondent answered "YES" when it would have been correct to answer "NO" to items 4, 5, 6(a), 6(b), 6(d) and 6(h).

(e) In the 2002 Certificate of Compliance, the Respondent answered "YES" when it would have been correct to answer "NO" to items 4, 5, 6(a), 6(b), 6(d), and 6(h).

II. ADMITTED VIOLATIONS

1. **Rule 1.3** states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." By failing to exercise reasonable diligence on behalf of Parris, including by failing to prepare Parris' DUI case in a reasonable manner prior to the March 19, 2002 trial date, Respondent violated **Rule 1.3 (Count One)**.

2. **Rule 1.4(a)** requires that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." By failing to keep Parris reasonably informed about the status of his DUI matter, including by (1) failing to confirm that Parris was aware of the March 19, 2002 trial date, in light of the absence of any communication from him or to him since the initial telephone consultation and correspondence in early January 2002; (2) failing to provide Parris with copies of the motion to suppress and requests for discovery filed on his behalf; and (3) failing, in advance of the trial date, to provide copies of or discuss with Parris the discovery responses received from the State in early March 2002, the Respondent violated **Rule 1.4(a) (Count Two)**.

3. **Rule 1.15(a)** requires, in pertinent part, that a lawyer "shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from

the lawyer's own property," and that property of clients or third persons must be appropriately safeguarded. By depositing the $15,000 in advanced fees paid by client Kenneth DeRouche in February 2000 into the Respondent's operating account and "tax account" rather than into the client escrow account, the Respondent violated **Rule 1.15(a).(Count Three)**.

4. **Rule 1.5(f)** states that a lawyer "may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that: (1) [t]he lawyer shall provide the client with a written statement that the fee is refundable if it is not earned, (2) [t]he written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and (3) [a]ll unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account." By (1) failing to provide client Kenneth DeRouche with a written statement which informed him that the $15,000 advance fee was refundable if it was not earned, (2) failing to include in his fee agreement an adequate statement of the basis under which the $15,000 advance fee would be considered to have been earned, in whole or in part, and (3) failing to retain the unearned fees in his client escrow account, or to provide DeRouche with notice that the funds were not retained in the escrow account, the Respondent violated **Rule 1.5(f) (Count Four)**.

5. **Rule 1.15(d)** sets forth detailed and specific requirements for the maintenance of attorneys' books and records and handling of practice-related funds. Prior to January 1, 1999, Rule 1.15(d) required that "a lawyer shall adhere to the provisions of Interpretive Guideline No. 2," which set forth detailed and specific requirements for the maintenance of attorneys' books and records and handling of practice-related funds.

As set forth in this Petition and in the July 18 and October 3 Audit Reports, the Respondent failed properly to maintain his law practice books and records for his escrow account and his operating account from July 1997 through May 2002, as follows:

(1) During the period from July 1997 through May 2002, the Respondent failed to prepare timely monthly reconciliations for the escrow or operating account; failed to prepare monthly listings of client balances for the escrow account; failed to preserve various bank statements, deposit tickets and canceled checks; on various occasions disbursed funds in excess of those received from a client (i.e., negative client balances) and failed promptly to resolve the errors; and on various occasions failed to disburse earned fees from his escrow account to his operating account on a prompt and timely basis.

(2) Rule 1.15(d)(9)(E) states that "[n]o funds which should have been disbursed shall remain in the [fiduciary/escrow] account, including, but not limited to, earned legal fees, which must be transferred to the attorney's non-fiduciary account on a prompt and timely basis when earned." (Emphasis added). On one occasion in 2000 and on two occasions in 2001, the Respondent improperly transferred funds constituting earned legal fees from the escrow account to third parties, without first transferring the funds to a non-fiduciary law practice account.

By engaging in this conduct, the Respondent violated **Rule 1.15(d) and former Interpretive Guideline No. 2 (Count Five).**

6. **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 Certificates of Compliance in 1998, 1999, 2000, 2001 and 2002 which contained incorrect responses relating to the Respondent's maintenance of his law office books and records (as set

forth in paragraph 42 of the Admitted Facts in this Stipulation), the Respondent violated **Rule 8.4(c) (Count Six)**.

7. **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 the representations made by attorneys in the Certifications of Compliance filed with their Annual Registration Statements each year in the administration of justice governing the practice of law in Delaware. By filing with the Supreme Court Certificates of Compliance in 1998, 1999, 2000, 2001 and 2002 which contained incorrect responses relating to the Respondent's maintenance of his law office books and records (as set forth in paragraph 42 of the Admitted Facts in this Stipulation), the Respondent violated **Rule 8.4(d) (Count Seven)**.

III. AGREED WITNESSES

Joseph F. McCullough; Jack Heiks, CPA; John M. Willard, Esquire.

IV. AGGRAVATING AND MITIGATING FACTORS

Aggravating Factors[1]

The ODC and the Respondent stipulate that the following aggravating factors exist in this disciplinary matter:

(1) The Respondent has engaged in a pattern of violating the Delaware Lawyers' Rules of Professional Conduct over an extended period of time, involving his obligations relating to lawyer record keeping and Certificates of Compliance [Standard § 9.22(c)]; and

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[1] The aggravating and mitigating factors addressed in this Stipulation are derived from the ABA Standards for Imposing Lawyer Sanctions §§ 9.2 and 9.3 (1991) (as amended Feb. 1992) (the "Standards").

(2) The Respondent has substantial experience in the practice of law, having been admitted to the Delaware Bar in 1975 [Standard § 9.22(i)].

Mitigating Factors

The ODC and the Respondent stipulate that the following mitigating factors exist in this disciplinary matter:

(1) The Respondent has no prior disciplinary record [Standard § 9.32(a)];

(2) The Respondent has made efforts to rectify the consequences of his misconduct, including by taking remedial measures to correct the deficiencies in his law practice books and records, with the assistance of a certified public accountant [Standard § 9.32(d)];

(3) The Respondent has cooperated with the ODC, and in the proceedings before the Board [Standard § 9.32(e)]; and

(4) The Respondent has recognized the wrongfulness of his conduct, as evidenced by his admissions to all of the allegations made and the violations charged in the Petition for Discipline [Standard § 9.32(l)].

V. STIPULATION EXHIBITS

The documents attached hereto as Stipulation Exhibits 1 through 7 are authentic and admissible in evidence in this disciplinary matter.

VI. JOINT RECOMMENDATION OF SANCTION

The ODC and the Respondent jointly propose that the Board recommend to the Court the following sanctions:

1. Public reprimand. The Respondent should be publicly reprimanded for his violations of Rule 1.3 (one count), Rule 1.4(a) (one count), Rule 1.15(a) (one count), Rule 1.5(f) (one count), Rule 1.15(d) and former Interpretive Guideline No. 2 (one count), Rule 8.4(c) (one count), and Rule 8.4(d) (one count).

2. Terms of Probation. The Respondent should be subject to a public two-year probation, commencing upon the Court's conclusion of its review of this matter, subject to the following terms:

   (1) During the first year of the probationary period, on or before the 20th of each month, the Respondent shall cause to be filed with the ODC a report by a licensed certified public accountant, certifying under oath that the Respondent has maintained his law practice financial accounts, books and records during the preceding month in full compliance with Rule 1.15(d). If there are any exceptions regarding the Respondent's compliance during the preceding month, the report shall explain such exception(s) and the expected date of resolution, and shall be followed by a supplemental report confirming the resolution of the exception;

   (2) During the second year of the probationary period, on or before the 20th of the first month of the following quarter, the Respondent shall cause to be filed with the ODC a report by a licensed certified public accountant, certifying under oath that the Respondent has maintained his law practice financial accounts, books and

records during the preceding month in full compliance with Rule 1.15(d). If there are any exceptions regarding the Respondent's compliance during the preceding month, the report shall explain such exception(s) and the expected date of resolution, and shall be followed by a supplemental report confirming the resolution of the exception;

(3) During the probationary period, the Respondent shall maintain a relationship with a member of the Professional Guidance Committee of the Delaware State Bar Association. The Respondent shall meet in person at least monthly with a Professional Guidance Committee member during the first year of the probationary period, and at least once per quarter during the second year. The Respondent authorizes any Professional Guidance Committee member with whom he consults to disclose to and/or discuss with the ODC the Respondent's compliance with this term of his probation; and

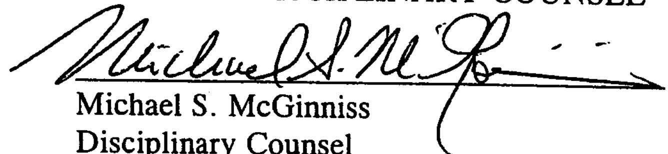
(4) The Respondent shall cooperate promptly and fully with the ODC in its efforts to monitor compliance with his probation, including but not limited to (a) promptly responding to the ODC's correspondence by the due date and (2) cooperating with any audit performed by the Lawyers' Fund for Client Protection ("LFCP") at the request of the ODC, including but not limited to an audit on at least an annual basis, at the Respondent's expense, for the duration of the probationary period. The Respondent shall cooperate with the ODC's investigation of any allegations of unprofessional conduct which may come to the attention of the ODC during the period of probation. The Respondent agrees to the expedited handling of new

complaints received by the ODC. Upon request of the ODC, the Respondent shall provide authorization for release of information and documentation to verify compliance with the terms of his probation. If the ODC concludes, after giving the Respondent an opportunity to respond, that the Respondent has violated any of the terms of his probation, the ODC may file a petition directly with the Delaware Supreme Court requesting that the Court suspend the Respondent.

3. Conditions. Pursuant to Procedural Rule 27, the Respondent shall pay the ODC's costs in this disciplinary matter promptly upon the presentation of a statement of costs by the ODC. The Respondent shall also pay the costs of the audits performed by Mr. Joseph F. McCullough, Auditor for the LFCP, promptly upon the presentation of a statement of such costs.

Dated this 9th day of January, 2003.

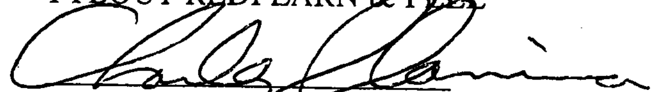
OFFICE OF DISCIPLINARY COUNSEL



Michael S. McGinniss
Disciplinary Counsel
200 W. Ninth Street, #300-A
Wilmington, DE 19801
(302) 577-7042

Dated this 9th day of January, 2003.

TYBOUT REDFEARN & PELL



Charles Slanina, Esquire
300 Delaware Avenue, Suite 1100
P.O. Box 2092
Wilmington, DE 19899
(302) 658-6901
Attorney for Respondent