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. 556, 2007
RICHARD D. BECKER, Respondent,	§ § §	Board Case Nos. 39, 48, and 49, 2006

Submitted: December 13, 2007
Decided: January 15, 2008

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

ORDER

This 15th day of January 2008, on consideration of the submissions of the parties, it appears to the Court that:

(1) This is a lawyer disciplinary matter. On October 18, 2007, the Board on Professional Responsibility filed a Report (copy attached) finding professional misconduct and recommending that Respondent be prohibited and suspended from the practice of law, with conditions, for a three-year period. The Respondent filed an objection to the Board's recommendation, seeking instead a two-year suspension, with conditions. The ODC supports the Report and recommendation of the Board.

(2) Respondent is a member of the Bar of the Supreme Court of Delaware. He was admitted to the Bar in 1983. By order dated July 31, 2001, this Court imposed upon the Respondent the disciplinary sanctions of a public reprimand and

three-year public probation, with conditions, based upon the finding that the Respondent had engaged in professional misconduct in violation of Rules 1.2(a), 1.4(a), 1.5(f), 3.2, and 8.1(b). Respondent has admitted that he failed to comply with the conditions imposed by this Court during the three-year period of probation. Following a hearing on August 10, 2007, and based on the admissions by Respondent, the Board found multiple violations of Rules 1.1, 1.2(a), 1.4(a), 1.4(b), 1.15(a), 1.15(d), 8.1, 8.1(b), 8.4(c), and 8.4(d). The Board also found that Respondent violated Rule 7(c) of the Delaware Lawyers' Rules of Disciplinary Procedure.

(3) The Board determined that Respondent knowingly failed to comply with his obligations under the terms of his 2001 probation[1] and that he knowingly made a false statement of material fact in the course of the ODC investigation of his mishandled client trust funds. The violation of Respondent's ethical duties to a client he represented in a Bankruptcy Court case resulted in a substantial loss to the client.

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[1] These included his failure to complete the mental health evaluation and recommended treatment; failure to properly respond to ODC; failure to provide competent representation, abide by client objectives, exercise reasonable diligence in communicating with the client (and the Bank of Delmarva); failure to maintain books and records properly, thereby allowing negative balances to occur; failure to reconcile accounts; and falsely making representations in his Delaware Supreme Court Certificate of Compliance for 2004, 2005, and 2006, regarding the status of corporate and other tax returns.

(4) Both the ODC and counsel for Respondent agreed that suspension is appropriate; however, they disagree on its length. The Board considered aggravating circumstances, including his record of prior disciplinary offenses, a ten-year pattern of repeated and similar charges resulting in various sanctions, and deceptive practices during the disciplinary process. The Board also considered mitigating circumstances, including the absence of a dishonest or selfish motive, Respondent's remorse, and his recognition of the wrongful nature of his conduct. The Board also examined cases involving other attorneys where two-year and three-year sanctions were given.

(5) In reaching its conclusion that a three year suspension was appropriate, the Board noted that "Respondent's problems appear to be getting worse, and include: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records, which remains unresolved; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for three years; failure to file corporate tax returns for three years." The Board also noted that no professional psychiatric testimony was presented by Respondent that may have helped to explain any personal difficulties he may have been experiencing during the time of the violation.

(6) The Board has recommended that Respondent be suspended from the practice of law for three years. It concluded its report by stating: "This Board believes the persistent and significant pattern of wrongdoing, and the prior efforts at sanctions, make this case more akin to cases where a three-year suspension was ordered."[2] Respondent submits that the appropriate period of suspension should be two years. The ODC supports the Board's recommendation, emphasizing Respondent's "continued pattern of serious professional misconduct."

(7) This Court has the inherent and exclusive authority for disciplining members of our Bar.[3] While "the Board's recommendations on the appropriate sanction to be imposed are helpful, they are not binding on this Court."[4] After carefully considering Respondent's violations, the findings of the Board, and our prior precedents, we conclude that a three-year suspension is the appropriate sanction.[5]

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[2] In support of its position, the Board cited *In re Ayers*, 802 A.2d 266 (Del. 2002); *In re Garrett*, 835 A.2d 514 (Del. 2003); *In re Thompson*, 911 A.2d 373 (Del. 2006); and *In re Wilson*, 2006 WL 1291349 (Del. Supr.).

[3] *In re Shamers*, 873 A.2d 1089, 1096 (Del. 2005); *In re Fountain*, 878 A.2d 1167, 1173 (Del. 2005).

[4] *Fountain*, 878 A.2d at 1173.

[5] See Response of the Office of Disciplinary Counsel to the Respondent's Objections to the Board Report, which sets forth the rationale and authorities in support of the conclusion that a suspension is warranted.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

(1) The Respondent shall be prohibited and suspended from engaging in the practice of law for a period of three years, beginning January 25, 2008 and ending upon his reinstatement, for which application may be made after January 25, 2011.

(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 Office of Disciplinary Counsel ("ODC") shall file a petition in the Court of Chancery for the appointment of a receiver for the Respondent's law practice.

(4) The Respondent shall assist the Receiver in following the directives of Rules 21 and 23 of the Delaware Lawyers' Rules of Disciplinary Procedure.

(5) The Receiver shall make such arrangements as may be necessary to protect the interests of any of the Respondent's clients.

(6) The Respondent shall pay the costs of these disciplinary proceedings, pursuant to Rule 27 of the Delaware Lawyers' Rules of Disciplinary Procedure, promptly upon presentation of a statement of costs by the ODC.

(7) The Respondent shall fully cooperate with the ODC in its efforts to monitor his compliance with this Order.

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

BY THE COURT:

/s/Henry duPont Ridgely

Justice

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**
RICHARD D. BECKER,	)	Board Case Nos. 39, 48, and 49, 2006
Respondent.	)	

REPORT OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY
AND RECOMMENDATION OF SANCTIONS

I. **Procedural Background.**

Pending before the Board on Professional Responsibility (the "Board") is a Petition for Discipline filed May 2, 2007, in Board Case Nos. 39, 48, and 49, 2006 (the "Petition"), involving Richard D. Becker, Esquire (the "Respondent"), a member of the Bar of the Supreme Court of the State of Delaware, asserting sixteen Counts of Violations of The Delaware Lawyers' Rules of Professional Conduct (the "Rules"), and one count of Delaware Lawyers' Rules of Disciplinary Procedure (the "Procedural Rules"). It appears Respondent was personally served with a consolidated Petition for Discipline on May 2, 2007. Accordingly, pursuant to Rule 9(d)(2) of the Procedural Rules, the Answer to the Petition for Discipline was to be filed with the Administrative Assistant to the Board within twenty days of service. Respondent's answer to the Petition was therefore due to be filed no later than Tuesday, May 22, 2007. Respondent did not file an Answer to the Petition within that time period.

By letter dated May 24, 2007, counsel for the Office of Disciplinary Counsel (the "ODC") notified the Panel Chair that Respondent failed to timely file an Answer to the Petition; and, to the best of ODC's knowledge there was no timely request made by Respondent, for an extension of time

to file an Answer. The ODC accordingly requested, pursuant to Procedural Rule 9(d)(2) that the allegations and charges set forth in the Petition be deemed admitted.

A telephone conference was conducted on June 1, 2007, with the Respondent, the ODC, and the Panel Chair, regarding the ODC's request that the allegations and charges in the Petition be deemed admitted. During that telephone conference, Respondent agreed the facts in the Petition "...are basically accurate. So there's no contest." (Transcript, p. 3) It was the ruling of the Board that the allegations and charges in the Petition are deemed admitted, pursuant to Procedural Rule 9(d)(2). Procedural Rule 9(d)(2) requires that the allegations and charges in the Petition "shall" be admitted. The Board has no discretion to do otherwise. In Re Shearin, 765 A.2d 930, 934 (Del. 2000); In Re Fountain, 913 A.2d 1180 (Del. 2006). Respondent has not challenged that finding of the Board.

Since the allegations and charges of the Petition are deemed to be admitted, the Board convened a hearing on Friday, August 10, 2007 (the "Hearing"), for the limited purpose of determining the appropriate recommendation of sanctions.

II. Allegations, Charges, and Findings of the Board.

Since the allegations and charges of the Petition are deemed admitted, the Board simply restates the charges verbatim, as contained in the 78 numbered paragraphs of the Petition, without reference to the exhibits of the Petition, as follows:

[Beginning of quotation.]

1. The Respondent is a member of the Bar of the Supreme Court of Delaware. He was admitted to the Bar in 1983.

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

office in Wilmington, Delaware until June, 2006, and subsequently with an office in Newark, Delaware.

Board Case No. 39, 2006

3. By order of the Delaware Supreme Court dated July 31, 2001, the Delaware Supreme Court imposed on the Respondent the disciplinary sanctions of a public reprimand and three-year public probation, based upon its finding that the Respondent had engaged in professional misconduct in violation of Rules 1.2(a), 1.4(a), 1.5(f), 3.2, and 8.1(b). *In re Becker*, Del. Supr., No. 235, 2001, Holland, J. (July 31, 2001). **(Reference to exhibit omitted.)**

4. One of the conditions of the Respondent's public probation was that he was required to "undergo a mental health evaluation with a mental health practitioner of his choosing subject to the approval of the ODC," and "comply with any recommendations made by the mental health practitioner insofar as those recommendations are designed to assist Respondent in dealing with the multiple demands and stresses placed upon him as a small office legal practitioner." **(Reference to exhibit omitted.)**

5. Another condition of the Respondent's public probation ordered by the Delaware Supreme Court was that he "shall cooperate fully with the ODC in its efforts to monitor compliance with the terms of his probation and promptly respond to the ODC's correspondence by the due date," and "shall cooperate with the ODC's investigation of any allegations of unprofessional conduct which may come to the attention of the ODC." **(Reference to exhibit omitted.)**

6. By letter dated August 31, 2001, the Respondent asked the ODC to provide him with a list of "3 or 5 acceptable professionals" in connection with the required mental health evaluation. By letter dated September 5, 2001, the ODC provided the Respondent with the requested list, including three psychiatrists and three psychologists.

7. In June 2006, the ODC requested proof and verification from the Respondent regarding his compliance with the terms of his public probation. In

response, the Respondent informed the ODC that he had not undergone the required mental health evaluation. The Respondent then made arrangements for an appointment on July 18, 2006 with psychologist Harris Finkelstein, Ph.D., who was one of the practitioners identified on the ODC's September 2001 list.

8. By letter dated August 15, 2006, Dr. Finkelstein submitted to the ODC a written complaint concerning the Respondent's conduct. In his complaint, Dr. Finkelstein confirmed that he had met with the Respondent on July 18. However, he also stated that the Respondent had failed to make the agreed upon payment for Dr. Finkelstein's services, and had failed to respond to multiple telephone messages regarding the outstanding bill.

9. The ODC called the Respondent's law office on August 22 and 24, 2006, and left messages requesting that the Respondent return the call as soon as possible. He failed to respond to those messages. By facsimile letter dated August 25, 2006, the ODC documented these efforts to obtain a return telephone call from the Respondent, requested a call from him upon receipt of the letter, and requested a written response by September 1, 2006. The Respondent did not provide any response to the August 25 letter.

10. On September 11, 2006, the ODC requested the assistance of the Respondent's practice monitor regarding the Respondent's lack of response and cooperation.

11. By letter dated October 23, 2006, the Respondent provided the ODC with a written response regarding Dr. Finkelstein's complaint.

COUNT ONE: RESPONDENT VIOLATED THE TERMS OF THE DISCIPLINARY DISPOSITION OF CASE NO. 235, 2001

12. **Procedural Rule 7(c)** states that it shall be grounds for discipline for a lawyer to "[v]iolate the terms of any private or public disciplinary or disability disposition."

13. The terms and conditions of his public reprimand and three-year public probation in Case No. 235, 2001 included, without limitation, the

following requirements: (1) the "Respondent shall undergo a mental health evaluation with a mental health practitioner of his choosing subject to approval of the ODC and comply with any recommendations made by the mental health practitioner insofar as those recommendations are designed to assist Respondent in dealing with the multiple demands and stresses placed upon him as a small office legal practitioner"; and (2) the Respondent "shall cooperate fully with the ODC in its efforts to monitor compliance with the terms of his probation and promptly respond to the ODC's correspondence by the due date," and "shall cooperate with the ODC's investigation of any allegations of unprofessional conduct which may come to the attention of the ODC."

14. By (1) failing to undergo the required mental health evaluation during the three-year period of his probation and (2) failing to respond to the ODC by telephone or in writing as requested by the ODC in connection with his probation and with respect to the complaint submitted by Dr. Finkelstein, the Respondent violated **Procedural Rule 7(c)**.

COUNT TWO: RESPONDENT FAILED TO RESPOND TO ODC'S REQUESTS FOR INFORMATION

15. **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."

16. By failing to respond to the ODC by telephone or in writing as requested in connection with his probation and with respect to the complaint submitted by Dr. Finkelstein, the Respondent violated Rule 8.1(b).

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17. A default judgment in excess of $1.15 million was entered against the Respondent and his law firm, Becker & Becker, P.A., on June 16, 2005, in connection with the Superior Court legal malpractice case captioned *Bank of Delmarva v. Richard D. Becker, Esquire et al.*, C. A. No. 04C-08-036J.

18. The ODC requested Mr. Joseph F. McCullough, Auditor for the Lawyers' Fund for Client Protection ("LFCP"), to conduct an investigative audit with regard to the default judgment entered against the Respondent in the *Bank of Delmarva* case. Mr. McCullough interviewed the Respondent, reviewed documents relating to the case, and prepared a report of his findings. **(Reference to exhibit omitted.)**

19. In July 2002, during the term of the three-year disciplinary probation imposed by the Delaware Supreme Court, Bank of Delmarva retained the Respondent for representation in a bankruptcy case in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court"), in which the Bank was a creditor. The objective of the representation was to locate and recover funds which may have been fraudulently transferred by the bankruptcy debtor. **(Reference to exhibit omitted.)**

20. In November 2002, the Respondent conducted a Rule 204 examination of the debtor. His investigation revealed that the debt may have arisen out of fraud. **(Reference to exhibit omitted.)**

21. The Respondent failed to timely file a complaint objecting to the discharge of the remaining indebtedness owed by the debtor to Bank of Delmarva, the deadline for which was February 8, 2003. The Respondent also did not return telephone calls made to him by Bank of Delmarva and its attorneys about the matter. **(Reference to exhibit omitted.)**

22. In 2004, Bank of Delmarva filed a legal malpractice action against the Respondent and his firm. When the Respondent did not file an answer to the civil complaint, the Superior Court entered a default judgment. The Respondent did not appear at the hearing in the Superior Court held for the purpose of calculating the damages incurred by the Bank of Delmarva. The total amount of the judgment entered on June 16, 2005 against the Respondent and his law firm was $1,151,814.65.

COUNT THREE: RESPONDENT FAILED TO PROVIDE COMPETENT REPRESENTATION TO A CLIENT

23. **Rule 1.1** requires that a "lawyer shall provide competent representation to a client."

24. By failing to provide competent representation to Bank of Delmarva in the legal matter for which he had been retained, including by failing to file in a timely manner a complaint in the Bankruptcy Court case objecting to the discharge of a debt owed to Bank of Delmarva, the Respondent violated **Rule 1.1**.

COUNT FOUR: RESPONDENT FAILED TO ABIDE BY HIS CLIENT'S OBJECTIVES FOR THE REPRESENTATION

25. **Rule 1.2(a)** provides that a lawyer "shall abide by a client's decisions concerning the objectives of the representation...."

26. By failing to file on behalf of Bank of Delmarva a complaint in the Bankruptcy Court case objecting to the discharge of debt, the Respondent violated **Rule 1.2(a).**

COUNT FIVE: RESPONDENT FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT

27. **Rule 1.3** requires that a "lawyer shall act with reasonable diligence and promptness in representing a client."

28. By failing to act with reasonable diligence and promptness in representing Bank of Delmarva, including by failing to file in the Bankruptcy Court case a timely complaint objecting to the discharge of debt, the Respondent violated **Rule 1.3.**

COUNT SIX: RESPONDENT FAILED TO KEEP HIS CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND PROMPTLY COMPLY WITH REASONABLE REQUESTS FOR INFORMATION

29. **Rule 1.4(a)** requires, in pertinent part, that a "lawyer shall ... (3) keep the client reasonably informed about the status of the matter; [and] (4) promptly comply with reasonable requests for information...."

30. By failing to keep Bank of Delmarva informed about the status of the requested filing of a complaint in the Bankruptcy Court case objecting to the discharge of debt, and failing promptly to comply with reasonable requests for information made by Bank of Delmarva, both prior to and after the filing deadline had passed, the Respondent violated **Rule 1.4(a).**

COUNT SEVEN: RESPONDENT FAILED TO EXPLAIN MATTERS TO THE EXTENT REASONABLY NECESSARY TO PERMIT HIS CLIENT TO MAKE INFORMED DECISIONS

31. **Rule 1.4(b)** requires that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

32. By failing to explain to Bank of Delmarva his failure to file the complaint in the Bankruptcy Court case objecting to the discharge of debt, and the consequences thereof, the Respondent violated **Rule 1.4(b).**

Board Case No. 49, 2006

33. The ODC requested Mr. McCullough to perform a compliance audit of the Respondent's law practice financial books and records to determine if the Respondent was in compliance with Rule 1.15.

34. At the initial audit on November 9, 2006, Mr. McCullough and the Respondent reviewed the firm's books and records.

35. The Respondent had several law practice bank accounts at Wilmington Trust Company ("Wilmington Trust"), namely:

(a) Wilmington Trust # 2388-2566 – general escrow account;

(b) Wilmington Trust # 2375-4118 – real estate escrow account;

(c) Wilmington Trust # 2375-3790 – attorney business account.

36. Mr. McCullough reviewed the two escrow bank accounts and the Respondent's attorney business account (also described in Mr. McCullough's report as the Respondent's "operating account"). The general escrow bank account reflected approximately $2,200,000 in deposits for the period January 2006 through September 2006. The Respondent's attorney business account showed negative daily balances during the months of May and July 2006. **(Reference to exhibit omitted.)**

37. The audit revealed that from 2003 through the date of the November 2006 audit, the Respondent failed to prepare monthly bank reconciliations, client balance listings, or client sub-ledger reconciliations for his two law practice escrow accounts. The Respondent acknowledged to Mr. McCullough that he had failed to comply with the law practice financial recordkeeping requirements of Rule 1.15. **(Reference to exhibit omitted.)**

38. The Respondent failed to file any corporate income tax returns for the tax years 2003, 2004 and 2005. **(Reference to exhibit omitted.)**

39. The Respondent filed 2004, 2005 and 2006 Certificates of Compliance with his annual Supreme Court registration statements containing inaccurate responses. Specifically, the Respondent answered "YES" when he should have answered "NO," to items 4, 6, 7a, 7b, 7c, 7d, 7e, 7f, 8a, 8b, 9, and 10 on the 2004 Certificate, and to items 1, 6 7, 8, 9, 10, 12, and 15 on the 2005 and 2006 Certificates. **(Reference to exhibit omitted.)**

Incorrect Deposit Leads to Loss of Client Trust Funds

40. In 1994, the Respondent's law firm, Becker & Becker, P.A., obtained a line of credit from Wilmington Trust. **(Reference to exhibit omitted.)**

41. On or about June 17, 2005, the Respondent deposited client trust funds totaling $35,101.67 into his attorney business account instead of the general escrow bank account. The Respondent informed Mr. McCullough that this deposit of client trust funds into the attorney business account occurred by mistake. **(Reference to exhibit omitted.)**

42. On July 5, 2005, Wilmington Trust withdrew $31,821.91 from the Respondent's attorney business account in order to satisfy the Respondent's payment obligations on the line of credit, which had become delinquent. **(Reference to exhibit omitted.)** These withdrawn funds came from client trust funds deposited by the Respondent into the attorney business account on June 17, 2005.

43. The Respondent informed Mr. McCullough that he did not become aware of the loss of the client trust funds until in or about May 2006. He also informed Mr. McCullough that when he discovered the erroneous deposit, he arranged to borrow funds in order to replace the funds withdrawn by Wilmington Trust. **(Reference to exhibit omitted.)**

44. On May 11, 2006, the Respondent deposited the borrowed funds into his attorney business account, and then wrote check no. 9378 from that account, made payable to "B&B Escrow" (i.e., his general escrow bank account) in the amount of $35,101.67, in order to replenish the missing funds. **(Reference to exhibit omitted.)**

Follow-Up Audit

45. On January 15, 2007, Mr. McCullough performed a follow-up audit and provided a supplemental report to the ODC. **(Reference to exhibit omitted.)** At the follow-up audit, Mr. McCullough and the Respondent reviewed the steps taken to resolve problems identified in the prior audit.

46. The Respondent provided Mr. McCullough with monthly bank reconciliations he had recently prepared for his two escrow bank accounts for October 2003 through November 2006. However, there were still unresolved issues with outstanding stale checks and numerous negative client balances. The reconciliations reflected that, as of December 2003, there were outstanding checks in the Respondent's escrow accounts totaling approximately $56,676.58, and as of November 30, 2006, there were outstanding checks totaling $28,976.87, about 75 of which (totaling $20,000) would be considered stale. There were also 15

negative client balances in the escrow accounts, totaling $4,000. **(Reference to exhibit omitted.)**

47. As of January 15, 2007, the Respondent had still not filed corporate income tax returns for 2003, 2004, or 2005. **(Reference to exhibit omitted.)**

ODC Investigation Reveals More Information about the Loss of Client Trust Funds

48. At the request of the ODC, Mr. McCullough conducted additional investigation of the circumstances involved with the July 5, 2005 payoff of the Respondent's line of credit with Wilmington Trust, and prepared a Memorandum summarizing his findings. **(Reference to exhibit omitted.)** This further investigation revealed that despite the Respondent's statements to Mr. McCullough at the November 2006 audit, the Respondent had notice of the loss (or risk of loss) of client trust funds by no later than August 2005.

49. In December 2003, Wilmington Trust set up an automatic debit process for the Respondent's attorney business account, in order to collect interest payments each month on the line of credit. In February and May 2004, Wilmington Trust notified the Respondent in writing that his interest-only payments were no longer acceptable, and that he must contact the bank to discuss amortizing the loan and setting up a new payment arrangement. **(Reference to exhibit omitted.)**

50. In June 2004, Christopher J. Lamb, Esquire, outside counsel for Wilmington Trust, informed the Respondent in writing that his client would demand full and immediate payment of the loan unless the Respondent and Wilmington Trust could reach an acceptable payment arrangement. **(Reference to exhibit omitted.)**

51. In July 2004, Wilmington Trust, through its counsel Mr. Lamb, filed a lawsuit in the Superior Court to collect the delinquent loan. The Court

entered judgment on behalf of Wilmington Trust against the Respondent and his law firm on September 7, 2004. **(Reference to exhibit omitted.)**

52. On April 13, 2005, the New Castle County Sheriff's office prepared an inventory of goods and chattels at the Respondent's law office. On May 20, 2005, the Superior Court directed the Sheriff to sell the personal property identified in the inventory, and a Sheriff's Sale was scheduled for August 12, 2005.

53. On August 11, 2005, the Respondent forwarded a letter to Mr. Lamb, asking that the Sheriff's Sale be stayed. The Respondent explained the financial difficulties he had been experiencing in his law practice, and stated that he had "roughly $1,000 in the bank today beyond [his] need for making [his] staffs [*sic*] payroll tomorrow." The Respondent enclosed with his letter to Mr. Lamb a check for $1,000 as a payment toward the delinquent amount due on the loan. **(Reference to exhibit omitted.)**

54. At the time he sent Mr. Lamb the August 11th letter, the Respondent's delinquent business loan had already been satisfied by Wilmington Trust through its July 5, 2005 debit withdrawal of $31,821.91 from the Respondent's attorney business account. This is the same Wilmington Trust bank account into which, on or about June 17, 2005, the Respondent had deposited client trust funds in the amount of $35,101.67. **(Reference to exhibit omitted.)**

55. On August 17, 2005, Mr. Lamb provided a letter to the Respondent, informing him that the "referenced loan has been paid in full by setting off against account(s) you have with Wilmington Trust" (emphasis added), and returned the Respondent's $1,000 check. **(Reference to exhibit omitted.)**

56. Wilmington Trust and its counsel subsequently provided the Respondent with additional written notices reflecting the satisfaction of the loan obligation to Wilmington Trust, by letters dated November 30, 2005 (enclosing a copy of the Power of Attorney to Satisfy Judgment) and January 23, 2006

(enclosing a copy of the Respondent's paid note). **(Reference to exhibit omitted.)**

57. It was not until May 2006 that the Respondent replaced the client trust funds missing from his general escrow account since June 2005. **(Reference to exhibit omitted.)**

COUNT EIGHT: RESPONDENT COMMINGLED CLIENT TRUST FUNDS WITH HIS OWN PROPERTY AND FAILED TO SAFEGUARD THOSE FUNDS

58. **Rule 1.15(a)** requires, in 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.

59. In June 2005, the Respondent deposited client trust funds totaling $35,101.67 into the firm's attorney business account instead of the general escrow bank account.

60. By failing to keep his client funds separate from his attorney business account funds, which was improper but also led to the seizure of those funds by his creditor Wilmington Trust to pay his a delinquent business loan, the Respondent violated **Rule 1.15(a).**

COUNT NINE: RESPONDENT FAILED TO SAFEGUARD CLIENT FUNDS BY ACCUMULATING NEGATIVE ESCROW ACCOUNT BALANCES

61. **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.

62. By disbursing funds from his escrow account in an amount greater than the amount being held for clients and third parties, thereby creating negative client balances, the Respondent violated **Rule 1.15(a)**.

COUNT TEN: RESPONDENT FAILED TO MAINTAIN REQUIRED BOOKS AND RECORDS

63. **Rule 1.15(d)** sets forth detailed and specific requirements for the maintenance of attorneys' books and records.

64. The Respondent failed to prepare monthly bank reconciliations, client balance listings, and client sub-ledger reconciliations for his two law practice escrow accounts from 2003 until November 2006.

65. By failing in 2003, 2004, 2005 and 2006 to maintain his law practice books and records in the required manner, as reflected in the findings made in the LFCP audit, the Respondent violated **Rule 1.15(d).**

COUNT ELEVEN: RESPONDENT KNOWINGLY MADE A FALSE STATEMENT OF MATERIAL FACT TO THE OFFICE OF DISCIPLINARY COUNSEL

66. **Rule 8.1(a)** provides that a lawyer shall not "knowingly make a false statement of material fact" in connection with a disciplinary matter.

67. By representing to Mr. McCullough, the investigative agent for the ODC, that it was not until in or about May 2006 that the Respondent became aware that client trust funds in excess of $35,000 were missing from his general escrow account, the Respondent violated **Rule 8.1(a).**

COUNT TWELVE: RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION

68. **Rule 8.4(c)** provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

69. By filing with the Supreme Court Certificates of Compliance for 2004, 2005 and 2006, which falsely represented that the Respondent's law practice books and records were maintained in compliance with the requirements of Rule 1.15, the Respondent violated **Rule 8.4(c).**

COUNT THIRTEEN: RESPONDENT ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

70. **Rule 8.4(d)** states that "it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice."

71. The Delaware Supreme Court relies upon the representations made by attorneys in the Certificates of Compliance filed with their Annual Registration Statements each year in the administration of justice governing the practice of law in Delaware.

72. By filing with the Supreme Court Certificates of Compliance for 2004, 2005 and 2006, which falsely represented that the Respondent's law practice books and records were maintained in compliance with the requirements of Rule 1.15, the Respondent violated **Rule 8.4(d).**

COUNT FOURTEEN: RESPONDENT ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

73. **Rule 8.4(d)** states that "it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice."

74. By failing to file corporate income tax returns for tax years 2003, 2004 and 2005, the Respondent violated **Rule 8.4(d).**

COUNT FIFTEEN: RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION

75. **Rule 8.4(c)** provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

76. By filing with the Supreme Court Certificates of Compliance for 2005 and 2006, which falsely represented that the Respondent had filed all of his income tax returns in a timely manner, the Respondent violated **Rule 8.4(c).**

COUNT SIXTEEN: RESPONDENT ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

77. **Rule 8.4(d)** states that "it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice."

78. By filing with the Supreme Court Certificates of Compliance for 2005 and 2006, which falsely represented that the Respondent had filed all of his income tax returns in a timely manner, the Respondent violated **Rule 8.4(d)**.

[End of quotation.]

As a result of Respondent's failure to respond to the Petition, all of the above allegations and charges set forth in this section and in the Petition, as set forth above, are deemed to be admitted.

III. Respondent's Testimony and Further Board Findings

Although the charges are deemed admitted as a matter of law, Respondent did testify at the Hearing.

A. Board Case No. 39, 2006

The charges in this case may be summarized as asserting Respondent's failure to comply with his probationary term imposed as a sanction in 2001, requiring Respondent to undergo a mental health evaluation, and to comply with those recommendations of the medical personnel, and to cooperate with ODC's efforts to monitor Respondent's probation. Respondent agrees that he did nothing to obtain a mental health evaluation, until it was again pointed out to him in 2006 that he had failed to do so. He then underwent an initial two days of testing, but was unable to obtain and pay the $1,800.00 to $2,000.00, required for the evaluation and report of the psychologist. (Transcript, p. 34). Respondent did not testify regarding his failure to respond to inquiries by ODS regarding the evaluation. Respondent offered no justification for his failure to meet with this initial probationary term for more than five years, until 2006, when the ODC again made inquires.

B. **Board Case No. 48, 2006**

This case relates to the five violations surrounding Respondent's failure, on behalf of a client, to object to a debtor's discharge in Bankruptcy, and the resulting suit and judgment against Respondent. Respondent testifies he mistakenly set his calendar for a 120-day deadline, instead of the appropriate 90-day deadline. Respondent acknowledged his error, but Respondent noted further that, when he recognized his error, he basically put his head in the sand and ignored the mistake and subsequent lawsuit. Respondent testified he did not think the claim was worth as much as is now claimed, but offered no evidence to dispute the calculations set forth in the judgment, where the Court arrives at a figure of $1,151,814.65, in entering a default judgment. Respondent thought the claim was only for a $600,000.00 floor plan, but failed to discuss that the judgment was apparently for additional floor plans of $200,000.00 and $75,000.00, plus interest, late charges, counsel fees, and other charges. Respondent further testified the client wanted him to pursue a non-dischargibility action, which Respondent said was not a real strong case; but Respondent offered no basis for his contention.

The Board finds that, while Respondent's actions may have initially been due to neglect or mistake, the offered explanation has no impact on Counts 1 through 5 of that case, since intent to deceive or injure a client are not required. Counts 6 and 7 of Case No. 48, 2006 deal with Respondent's failure to keep his client reasonably informed, and the Board cannot accept Respondent's assertion that he simply was putting his "head in the sand." Clearly, Respondent took no steps to inform the client regarding what had occurred. Respondent did not take any steps to inform the client, and ignored telephone calls from the client and its attorneys. (Petition, §21, Ex. G, p. 3).

C. **Board Case No. 49, 2006**

The allegations that are deemed admitted with respect to Case No. 49, 2006 concern the 16 charges of violations relating to the improper deposit by Respondent of client trust funds into Respondent's attorney business account, failure to maintain proper books, making false statements of material fact to ODC, failure to file corporate tax returns, and improperly completing Supreme Court Certificates of Compliance for 2004, 2005, and 2006.

Respondent testified a client's funds were improperly deposited in his attorney/office account on June 17, 2005. Respondent testified the improper deposit was a bookkeeping error only – having nothing to do with the need for such funds and the scheduled Sheriff's sale of Respondent's assets, scheduled for August 12, 2005. Respondent points to Exhibit K, which is Respondent's letter on the eve of the Sheriff's Sale, forwarding $1,000.00, in an effort to stay the Sheriff's Sale, as an indication that Respondent did not know the improper deposit of client funds had been made into his attorney/office account, and did not know the bank had taken the funds out of his account already, to pay the loan in full. Respondent also notes that apparently the sale was not cancelled until the last minute, and even the bank's attorney was not aware the bank had taken the funds out of the attorney account.

The Board finds that, while the circumstances surrounding the pending Sheriff's Sale and the wrongful deposit of the client's fund are certainly suspicious, the Board concludes the wrongful deposit was not make intentionally or knowingly. The telling inquiry is to review what happened thereafter. Respondent testified that, from approximately June, 2005 to May, 2006, he was not aware the funds had been improperly deposited into his attorney account. The Board finds this contention by Respondent to be an effort by Respondent to continue to put his head in the sand. The Board

believes that, at some point after the error, Respondent must have determined, or should have determined, his mistake, and failed to do anything about it; or, due to financial constraints, Respondent was not financially able to correct the error and re-deposit the funds to the trust account. The Board finds it incredulous that Respondent would not at some point have discovered the mistake, since:

(1) Respondent certainly would have noticed that interest payments on the Wilmington Trust loan were no longer being deducted from his account on a monthly basis;

(2) Sudden cancellation of the Sheriff's Sale, without explanation, and no effort by the bank to make a collection thereafter;

(3) Counsel for the bank sent a letter to Respondent, dated August 17, 2005, returning Respondent's $1,000.00 check and advising the loan had been paid in full. (Exhibit L);

(4) Counsel for the bank sent Respondent a letter enclosing a Power of Attorney to Satisfy Judgment. (Exhibit M); and

(5) The letter from counsel for the bank, dated January 23, 2006, returning the Note and referring to it as "paid." (Exhibit N).

(6) The initial improper deposit and subsequent bank withdrawal on July 5, 2005, are clear from the bank statements. (Exhibit H).

Respondent testified that any materials that came to him in regard to this issue or the malpractice suit against him were simply put in a pile on his desk, and ignored thereafter. The Board finds it difficult to believe Respondent, who professed to be "cash strapped," would leave a check in the amount of $1,000.00 on his desk, without further inquiry.

Respondent testified he did not in any way mislead Mr. McCullough, in regard to the Wilmington Trust bank withdrawal. Paragraphs 66 and 67 of the Petition charge that Respondent knowingly made a false statement of material fact when he told Mr. McCullough it was not until May, 2006 that Respondent became aware of the improper deposit of client funds. Despite Respondent's continued contentions to the contrary, that charge is deemed admitted, and the Board so finds. The Board finds Respondent knowingly withheld information from Mr. McCullough that was clearly relevant, which information would have provided a more complete picture of events.

Respondent testified he had not filed corporate income tax returns for 2002, 2004, and 2005; but, because of losses in the office, he did not anticipate any taxes would actually be due. He further testified he had not completed the corporate tax returns because he did not have the funds to pay the accountant, but he hoped to do so now that another year had passed, and further returns needed to be filed for 2006. Respondent testified he believed he was current in all of his personal income tax return filings, and all quarterly tax withholdings for his office. However, Respondent offered no explanation for his failure to correctly complete the Certificates of Compliance for 2004, 2005, and 2006, by failing to report that his books and records were not in compliance, and that the corporate tax returns had not been filed. Respondent offered no explanation for Count 15, deemed admitted, that he failed to file all of his income tax returns in a timely manner and falsely represented the status of those returns on his Certificate of Compliance for 2005 and 2006.

IV. Recommendation for Sanctions.

Rule 9(d)(4) of the Procedural Rules provide in part that: "If the Board initially finds that the Respondent has engaged in professional misconduct, the Board may make a separate finding as to the appropriate disciplinary sanction."

The Board is given specific guidance in its determination of the appropriate sanction:

> 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. To further these objectives and to promote consistency and predictability in the imposition of disciplinary sanctions, the Court looks to the ABA Standards for Imposing Lawyer Sanctions as a model for determining the appropriate discipline warranted under the circumstances of each case. 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 extent of the actual or potential injury caused by the lawyer's misconduct; and (d) aggravating and mitigating factors." In re Bailey, 821 A.2d 851, 866 (Citations omitted); see also In re Fountain, 878 A.2d 1167, 1173 (Del. 2005).

The Board now considers those four enumerated factors. After reviewing the first three factors, and making a preliminary determination of the appropriate sanction, the Board will then review the aggravating and mitigating circumstances to determine if an increase or decrease in the sanction is warranted. In re Steiner, 817 A.2d 793, 796 (Del. 2003).

The Board is also guided by the apparent agreement of counsel for ODC and for Respondent, that suspension is an appropriate remedy, with the real issue being the duration of such suspension. Nonetheless, the Board reviews the appropriate factors in order to make its recommendation.

1. **Ethical Duties Violated.**

Due to the deemed admission by Respondent, there must be a finding of multiple violations of the Rules, as follows: 1.1, 1.2(a), 1.3, 1.4(a)1.4(b), 1.15(a) [2 counts], 1.15(d), 8.1, 8.1(b), 8.4(c) [2 counts], and 8.4(d) [3 counts]. In addition, Respondent violated Rule 7(c) of the Delaware Lawyers' Rules of Disciplinary Procedure.

As a result of these deemed and apparent violations, numerous ABA Standards for Imposing Lawyer Sanction (the "ABA Standards") suggest suspension is the appropriate sanction: 4.12 (Lawyer knows or should know he is dealing improperly with a client's property) (Counts 8 and 9); 4.42 (Lack of diligence) (Counts 3, 4, 5, 6 and 7); 8.2 (Further similar violations after earlier reprimand) (Count 1); 7.0 (Knowingly engages in conduct that is a violation of duty owed as a professional, causing or has potential to cause injuries to a client, the public, or the legal system)(Counts 2, 11, 12, 13, 14, 15, and 16).

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

No expert evidence was presented with respect to the state of mind of Respondent. After review of the evidence, the Board believes and finds that Respondent knowingly failed to comply with his obligations under the terms of his 2001 probation, by his failure to complete the mental health evaluation and recommended treatment; failure to properly respond to ODC; failure to provide competent representation, abide by client objectives, exercise reasonable diligence in communicating with the client (and the Bank of Delmarva); failure to maintain books and records properly, thereby allowing negative balances to occur; failure to reconcile accounts; and falsely making representations in his Delaware Supreme Court Certificate of Compliance for 2004, 2005, and 2006, regarding the status of corporate and other tax returns. As previously stated, the Board does not find Respondent

intentionally commingled client funds into his attorney account. However, in Paragraphs 66 and 67 of the Petition, it is admitted Respondent knowingly made false statements when he told Mr. McCullough he did not learn of the depositing error until May, 2006. At a minimum, the Board further finds Respondent "... either knew or should have known he was withholding information..." when he failed to notify the ODC of the complete sequence of the events regarding the Wilmington Trust debt, Sheriff's Sale, and the withdrawal of client funds from Respondent's attorney account [See In re Wilson, 2006 WL 1291349 (Del.)].

3. **The Expense of the Actual or Potential Injury Caused by the Lawyer's Misconduct.**

The Board finds Respondent's conduct clearly caused serious or potential harm to Delmarva. Respondent attempted to minimize his conduct by asserting the claim of the Bank of Delaware was not a good one, or worth no more than $600,000.00. Whether the loan was $600,000.00 or $1,151,814.00 is really not the issue. The issue is that significant actual or potential harm occurred. The Rules of Professional Conduct are formed to protect not only potential injury to the client, but also the public, and the legal system or profession. The Board finds Respondent's conduct to be injurious to both the public and the legal system or profession.

4. **Initial Assessment of Sanctions.**

As an initial matter, considering the rules violated, and Respondent's mental state, and the actual or potential injury suffered, suspension is clearly appropriate, and only the length of such suspension, or other sanctions, appear to be at issue. Both ODC and counsel for Respondent have agreed that suspension is appropriate. The ODC argues that a three-year suspension is appropriate. Counsel for Respondent argues the Board should consider a two-year suspension, with some ability

to return in a controlled atmosphere, where Respondent will not just have a practice monitor, but will also have no responsibility for bookkeeping and records.

5. **Aggravating and Mitigating Factors.**

- **Aggravating factors:**

ABA Standard §9.21 provides that aggravating and mitigating circumstances should also be considered, to increase or decrease the degree of discipline to be imposed.

The aggravating factors that exist in this matter include:

A. ABA Standard Section 9.22(a) – "Prior Disciplinary Offenses"

There are clearly aggravating factors here. In Board Case No. 87, 1996, Respondent was given a private admonition, with private probation of one year, with specific terms and conditions, for 9 charges of breaches of the Rules for failure to properly represent and communicate with clients, and repeated failures to respond to ODC. A private admonition and a one- year probation followed Board Case Nos. 115, 1997; 128, 1997; and 70, 1998, for 6 violations of Rules 1.1, 1.3, 1.15, 1.4(a), and 1.1(b), primarily dealing with failure to maintain proper books and records, control of client funds, and failure to respond to clients requests for information. Further sanctions were imposed, in Board Case Nos. 27, 31, 32, and 33, 2000, where a three-year probation term was imposed for multiple violations of Rules 1.4(a), 1.5(f), 8.1(b), 1.2(a), 1.4(a), and 3.2. These charges were primarily concerned with failure to: respond to clients, provide information on fees, cooperate with ODC, abide by client's decisions, and keep clients informed.

B. ABA Standard Section 9.22(b) – "Dishonest or Selfish Motive"

As previously indicated, the Board is not able to conclude Respondent's initial wrongful deposit of client funds into his office account was done intentionally. However, the Board is of the

opinion that, at some point thereafter, Respondent discovered the problem and was unable or unwilling to totally reimburse the client's trust account. The Board is unable to determine when that occurred, but the Board believes it was, or should have been, before May, 2006.

C. ABA Standard Section 9.22(c) – "Pattern of Misconduct"

This aggravating factor is found to exist, not only with current charges, but in regard to the repeated and similar charges, resulting in various sanctions, over a course of almost ten years.

D. ABA Standard Section 9.22(d) - "Multiple Offenses"

This factor is clearly met with the sixteen counts of this current series of charges.

E. ABA Standard Section 9.22(e) – "Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Agency"

The Board does not believe Respondent acted in bad faith in his obstruction of the disciplinary proceeding or failure to comply with rules or orders of the disciplinary agency. Respondent was to undergo psychiatric evaluation and care, but was unable to do so, due to the significant cost of same. The Board does not find Respondent's failure to comply with those earlier probationary requirements to be in bad faith due to Respondent's financial restraints. The Board also finds Respondent could have done much more to rectify his books and records during the probationary period, and after institution of the current charges.

F. ABA Standard Section 9.22(f) - "Submission of False Evidence, False Statements, or other Deceptive Practices During the Disciplinary Process"

While the Board cannot find the bad faith obstruction of the disciplinary proceeding, the Board does find that Respondent used deceptive practices during the disciplinary process, by his failure to provide all relevant information to ODC and Mr. McCullough, regarding the Wilmington

Trust debt pending Sheriff's Sale, and the bank's withdrawal of client funds from Respondent's attorney account. Respondent's knowing conduct in this regard is deemed admitted. See Petition, Paragraphs 66 and 67.

G. ABA Standard Section 9.22(g) – "Refusal to Acknowledge Wrongful Nature of Conduct"

Respondent has recognized the wrongful nature of his conduct and has not opposed the charges, and this factor shall be considered as mitigating and not aggravating. However, Respondent does refuse to recognize the wrongfulness of his knowingly providing false information to ODC.

H ABA Standard Section 9.22(h) – "Vulnerability of the Victim"

The Board does not believe this factor is an aggravating one under these circumstances. The Bank of Delmarva should not be deemed a "vulnerable victim." Little information is known about the client, whose funds were wrongly deposited in Respondent's attorney account, but there does not appear to be ultimate damage.

I. ABA Standard Section 9.22(i) – "Substantial Experience in the Practice of Law"

This factor weights as an aggravating factor, in light of Respondent's admission to the Delaware Bar, since 1983.

J. ABA Standard Section 9.22(j) - "Indifference to Making Restitution"

Respondent has made no effort to make restitution to the Bank of Delmarva. Respondent cannot financially even begin to make reasonable restitution of the total judgment. It is not clear if any client is damaged by the remaining unresolved negative balances, totaling $4,000.00. Respondent has made no recent, real effort to resolve those matters.

K. ABA Standard Section 9.22(k) – "Illegal Conduct, Including that Involving the Use of a Controlled Substance."

This factor has no application to this matter.

- **Mitigating Factors:**

Only those mitigating factors deemed to have application to this matter will be reviewed below:

A. ABA Standard Section 9.32(a) – "Absence of Prior Disciplinary Record"

In light of Respondent's prior Disciplinary Record, this mitigating factor has no application.

B. ABA Standard Section 9.32(b) – "Absence of a Dishonest or Selfish Motive"

The Board does not believe Respondent acted with dishonest, selfish motive in the initial deposit of the client funds into Respondent's trust account. Although that finding would significantly mitigate any sanction, the factor's weight is diminished by Respondent's failure to timely correct the error once the problem was known, or should have been known.

C. ABS Standard Section 9.32(c) – "Personal or Emotional Problems"

The Board does believe Respondent's financial stress is a personal problem to him, which does impact upon his ability to obtain the psychiatric evaluation and counseling, and the preparation of corporate tax returns. These services generally would be performed by professionals, at a significant cost, and Respondent's lack of funds must significantly impede his ability in this regard. Respondent repeatedly indicated all he could do about his problems was put his head in the sand and do nothing about them. While this does not qualify as a mental disability under subsection (i) below, the Board does believe Respondent truly saw no way out of his dilemma, and therefore could do nothing but put his head in the sand, and ignore his problems.

D. ABS Standard Section 9.32(d) – "Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct"

As previously indicated, the facts do not present any mitigating factor in this category. Although Respondent's efforts may not have been timely, Respondent did ultimately take appropriate steps to obtain a loan from his mother, and deposited the funds into the escrow account.

E. ABS Standard Section 9.32(e) – "Full and Free Disclosure to Disciplinary Board or Cooperative Attitude toward Proceedings"

The Board is not convinced that Respondent has yet become fully cooperative and open to ODC.

F. ABS Standard Section 9.32(f) – "Inexperience in the Practice of Law"

This mitigating factor has no application.

G. ABS Standard Section 9.32(g) – "Character or Reputation"

No evidence was presented that would have character or reputation a factor for or against increased sanctions.

H. ABS Standard Section 9.32(h) - "Physical Disability"

This factor has no application to these proceedings.

I. ABS Standard Section 9.32(i) – "Mental Disability or Chemical Dependency, Including Alcoholism or Drug Abuse"

There was no evidence presented to indicate these factors have any application to this matter.

J. ABS Standard Section 9.32(j) – "Delay in Disciplinary Proceedings"

This factor has no application to these proceedings.

K. ABS Standard Section 9.32(k) – "Imposition of Other Penalties or Sanctions"

All lesser sanctions below suspension have been considered by the Board, but Respondent's pattern of repeated conduct leaves no other choice but to impose suspension.

L. ABS Standard Section 9.32(l)- "Remorse"

Respondent appears to repeatedly express his remorse over a period of multiple years, but seems to do little to act upon such remorse and rectify the multiple problems at issue.

M. ABS Standard Section 9.32(m) – "Remoteness of Prior Offenses"

This factor has no application to these proceedings.

6. **Recommendation for Sanctions.**

This Board believes it has no choice but to recommend the lengthiest period of suspension: a term of three (3) years.

This Board has carefully reviewed all of the factors, and all of the case law submitted by counsel for the parties. On the facts, Respondent has repeatedly failed to comply with basic professional requirements regarding the care and treatment of clients, bookkeeping, and taxation matters. The repetitive nature of these problems, in and of themselves, would warrant suspension. In the present circumstances, the Board believes Respondent initially made an error in the deposit of client funds into his office/attorney account. The Board believes that, although Respondent's initial error resulted from poor bookkeeping practices; and such poor bookkeeping practices could have delayed the time within which Respondent recognized the problem, at some point, Respondent knew or should have known the client funds had been erroneously deposited. The Board is not prepared to say when that occurred, but believes such discovery came well before March, 2006, when Respondent acknowledges his discovery of the problem and efforts to reconcile it.

In urging a shorter period of suspension, with additional probation thereafter, Respondent argues In re Hull, 767 A.2d 197 (Del. 2001), in which the Court issued a two-year suspension. In that decision, however, the Court found an alarming pattern of failure to communicate with clients,

failure to consult with clients about litigation decisions, failure to keep clients reasonably informed, and failure to provide competent representation. The Court also considered the prior public reprimand and previous private admonitions, which dealt with similar and additional issues. That decision involved significant prior sanctions and significant multiple new violations, and those similar types of problems exist here. In addition, Respondent's problems appear to be getting worse, and include: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records, which remains unresolved; knowingly making false statements of material fact to ODC; false representations in Certificates of Compliance for three years; failure to file corporate tax returns for three years. It is also noted that in Hull, a psychiatrist did testify as to numerous personal difficulty during the time of the violation. No such professional testimony was presented by Respondent.

Respondent also argues that his circumstances present facts more akin to In re Shamers, 873 A.2d, 1089 (Del. 2005). In that case, a similar Board recommended a two-year suspension, a public reprimand, and a three-year public probation following suspension. The Board also recommended the attorney be allowed to petition for reinstatement after one year, subject to conditions. The Shamers decision is distinguishable in that Shamers had no prior disciplinary record, had filed Federal and State income tax returns that were lacking before the investigation, cooperated fully with ODC and the proceedings before the Board, and the attorney had a history of volunteer service of assistance to the public. Here, Respondent has a significant prior disciplinary record, with similar charges; Respondent has not filed the tax returns; Respondent did not fully cooperate with Mr. McCullough and ODC, at least in the early stages of the investigation; and Respondent withheld information that was clearly probative of the issues at hand.

This Board believes the persistent and significant pattern of wrongdoing, and the prior efforts at sanctions, make this case more akin to cases where a three-year suspension was ordered. In re Ayers, 802 A.2d 266 (Del. 2002); In re Garrett, 835 A.2d 514 (Del. 2003); In re Thompson, 911 A.2d 373 (Del. 2006); and In re Wilson, 2006 WL 1291349 (Del. 2006). The Board believes a full three-year suspension is appropriate, "...to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter lawyers from similar misconduct." (In re

(continued on next page)

Hull, *supra*, at p. 201; In re Garrett, *supra*, at p. 1270.)

October 17, 2007
Date

Robert K. Beste, Jr., Esquire – Chair

10/17/07
Date

Kevin F. Brady, Esquire

10-16-07
Date

Betsy Adams Holden

RKB/msj
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