ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: CLAUDE C. LIGHTFOOT, JR.

DOCKET NUMBER: 10-DB-057

RECOMMENDATION TO THE LOUISIANA SUPREME COURT

This is a disciplinary proceeding based on the filing of formal charges by the Office of Disciplinary Counsel ("ODC") against the Respondent, Claude C. Lightfoot, Jr. ("Respondent" or "Mr. Lightfoot"). For reasons stated below, the Disciplinary Board ("Board") recommends that the Respondent be suspended from the practice of law for six (6) months, with all but thirty (30) days deferred. The Board also recommends that the Respondent be assessed with all costs and expenses of these proceedings.

PROCEDURAL HISTORY

On October 4, 2010, the ODC filed formal charges against the Respondent[1] of New Orleans. The ODC alleged that Respondent counseled then-Federal Judge G. Thomas Porteous[2] and his wife Carmella Porteous to file a bankruptcy petition using a false or fictitious name. Respondent additionally counseled the judge and his wife to secure a temporary post office box to list on the bankruptcy petition rather than listing their true residential address. ODC alleges that Respondent's actions violate the Rules of Professional Conduct, namely: Rule 1.2(d) - A lawyer shall not counsel a client to engage in, or assist a client in conduct that a lawyer knows is criminal or fraudulent...; Rule 3.3(a)(1) and (3) - A lawyer shall not knowingly 1) make a false

[1] Mr. Lightfoot is a Louisiana licensed attorney born October 19, 1954 and admitted to the practice of law in the State of Louisiana April 10, 1987, after graduating from Loyola School of law.

[2] Although former Judge G. Thomas Porteous resigned from the practice of law on January 12, 2011, during the time period pertinent to the case at bar, he was a United States District Judge for the Eastern District of Louisiana.

statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; 3) offer evidence that the lawyer knows to be false; Rule 3.3(b) - A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in a criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures including if necessary disclosure to the tribunal; Rule 8.4(c) - A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation; Rule 8.4(d) - A lawyer shall not engage in conduct prejudicial to the administration of justice; and Rule 8.4(a) - It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

The charges were served on the Respondent, via certified mail, on October 7, 2010. The Respondent filed an answer to the charges on October 25, 2010, admitting some of the factual allegations of the formal charges, specifically that Respondent deliberately used a false name in filing the bankruptcy petition, but denying that he violated the Rules of Professional Conduct as charged. He specifically admitted that he violated Rule 3.3(a)(1) and 8.4(a) warranting discipline, but denied that his conduct violated Rules 1.2(d), 3.3(a)(3), 3.3(b), 8.4(c) and 8.4(d). The matter was scheduled for hearing before Hearing Committee No. 11[3] (the "Committee") on January 11, 2011. ODC filed a prehearing memorandum on December 16, 2010. Respondent filed a prehearing memorandum on January 3, 2011.

The Committee issued its report on February 17, 2011, finding that the Respondent violated Rule 1.2(d); Rule 3.3(a)(1) and (3); Rule 3.3(b): and Rule 8.4(c). The Committee recommended that the Respondent be suspended from the practice of law for a period of six (6)

[3] Hearing Committee No. 11 is comprised of attorney chairman Thomas P. Breslin, attorney member DeWayne L. Williams and public member John J. Uhl.

months with all but thirty days deferred. On February 18, 2011, ODC filed its objection to the Committee report. Although ODC agreed with the factual conclusions reached by the Committee and the rule violations as found to be supported by the evidence, it objected to the length of the suspension recommended by the Committee.

Oral argument before Panel "C" of the Disciplinary Board was set for April 7, 2011. Upon the unopposed motion of the Respondent, the oral argument was continued until May 19, 2011. ODC filed a pre-argument brief on April 19, 2011. Respondent's pre-argument brief was filed in this matter on April 29, 2011. Oral argument before Panel "A" of the Adjudicative Committee of the Disciplinary Board took place on May 19, 2011. Chief Disciplinary Counsel Charles B. Plattsmier appeared on behalf of ODC. Respondent appeared with his attorney, Mr. Dane Ciolino.

THE FORMAL CHARGES

The formal charges filed in this matter are as follows:

I.

As an experienced bankruptcy attorney in the City of New Orleans, the Respondent was consulted by Federal Judge G. Thomas Porteous who, during the course of his representation of the federal judge, recommended that the judge and his wife avail themselves of the provisions of Chapter 13 of the United States Bankruptcy Code which would allow for the personal reorganization of the their finances.

II.

Bankruptcy petitions seeking Chapter 13 relief are required to be signed by the debtor under penalty of perjury.

III.

During the course of providing legal advice to his clients Judge Porteous and his wife, the Respondent specifically and intentionally counseled Judge Porteous to file a bankruptcy petition using a false or fictitious name. Specifically, rather than list his true identity as the debtor, the Respondent counseled Judge Porteous to list his identity as "G. T. Ortous" and directed Judge Porteous to sign his name in that fashion as well. Additionally, rather than properly fill out the bankruptcy petition listing the judge's required residential address, the Respondent intentionally counseled Judge Porteous to secure a temporary post

office box in Harvey, Louisiana at a location which was not his residence and list same on the bankruptcy petition.

IV.

The Respondent's intentional conduct reflects violations of the Rules of Professional Conduct including: Rule 1.2(d) A lawyer shall not counsel a client to engage in, or assist a client in conduct that a lawyer knows is criminal or fraudulent...; Rule 3.3(a)(1) and (3) A lawyer shall not knowingly 1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; 3) offer evidence that the lawyer knows to be false; Rule 3.3(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in a criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures including if necessary disclosure to the tribunal; Rule 8.4(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation; Rule 8.4(d) A lawyer shall not engage in conduct prejudicial to the administration of justice; and Rule 8.4(a) It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

THE HEARING COMMITTEE REPORT

In their report filed February 17, 2011, the Committee recounted the "undisputed factual account of the events that led to the current charges against Respondent" as follows:

> In or around the summer of 2000, former United States Court District Judge Gabriel Thomas Porteous, Jr. was experiencing significant financial difficulties, and therefore contacted the Respondent to explore means by which he may manage his debt, including the possibility of bankruptcy protection. The Respondent met with then Judge Porteous and his wife and determined to deploy initially a non-bankruptcy "workout", whereby the Respondent would contact each creditor and ask them to consider a reduction in the debt owed to allow then Judge Porteous and his wife a means of retiring the debt without filing for bankruptcy.
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> To that end, Respondent mailed letters to each of the creditors, setting forth his representation and inviting each creditor to consider a workout proposal. Thereafter, Respondent followed up his letters with telephone calls to the creditors in an effort to get then Judge Porteous and his wife some relief. This process proved to be futile, as the majority of the creditors did not respond at all and the few that did, knowingly or unknowingly, responded with a lawsuit and a subsequent rejection by their counsel of Respondent's proposal on behalf then Judge Porteous and his wife.
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> As a result, Respondent again met with then Judge Porteous and his wife and recommended a Chapter 13 Bankruptcy. In addition to recommending the filing, Respondent, on his own volition, also recommended that then Judge

Porteous and his wife essentially falsify the petition. Specifically, Respondent recommended that his clients agree to allow him to purposefully misspell their names as "Ortous, G.T." and "Ortous, C.A." Additionally, Respondent counseled then Judge Porteous to obtain a post office box and recommended that his clients agree to allow him to purposefully use that post office box as the debtors' mailing address.

Respondent's reasoning for this deception was supposedly to protect then Judge Porteous and his wife's identities from the press and the public. Apparently, during this time the local newspaper, the Times Picayune, would publish the names of all those persons who filed for bankruptcy. The data used to compile the information for these publications were solely the initial petitions.

Thus, Respondent's plan, which he solely concocted without any prodding from then Judge Porteous or his wife, was to purposely falsify the initial petition, have the Times Picayune publish the false names, and then amend the petition to properly name then Judge Porteous and his wife and put their proper address. Respondent sold this plan to his clients, and they agreed to allow him to proceed with drafting and filing the initial petition as indicated.

Respondent's plan worked flawlessly. The falsified initial petition was filed and the Times Picayune published the "alias" created by Respondent. The very next day, Respondent sought to amend the initial petition to properly name then Judge Porteous and his wife, and also put their correct address. To accomplish this amendment, however, Respondent sought the permission of bankruptcy trustee S.J. Beaulieu.[4] When questioned relative to the need for the amendment, Respondent indicated that there were "typos" that needed to be corrected.[5] Trustee Beaulieu testified that had he been truthfully advised by Respondent of how the false name had been included in the initial petition, he would have recommended dismissal of the bankruptcy petition as having been filed in bad faith.

Based upon the above, the Committee found that Respondent violated Rule 1.2(d); Rule 3.3(a)(1) and (3); Rule 3.3(b): and Rule 8.4(c).

In determining the appropriate sanction, the committee cited Rule XIX, Section 10(c), and the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards"). The Committee concluded that although none of the ABA Standards squarely fit Respondent's conduct, they

[4] It is unclear as to whether leave from the Trustee to amend the initial petition was actually needed. However, it is undisputed that Respondent contacted Trustee Beaulieu to advise him of the change and to seek such permission.

[5] Respondent testified that he was "very careful" with his words and did not lie to the Trustee and say that there were "merely typos" that needed to be corrected. However, Trustee Beaulieu's testimony, which was more credible to this Committee, was that Respondent did indeed indicate that the amendment was to correct "typos".

agreed with ODC and the Respondent that Standard 6.1[6] is the most applicable. They cited several cases in support of their finding that Standard 6.12,[7] which calls for suspension, fits Respondent's conduct. *In re Watkiva,* 95-0459, (La. 6/16/1995), 656 So.2d 984 (respondent suspended for two years after a federal conviction of making false statements to a social security administration official to receive benefits for a client and for collecting excessive fees); *In re Ellis,* 98-0078 (La. 05/01/1998), 710 So.2d 794 (attorney suspended for three years for falsifying a court judgment and order); *In re Bruno,* 2006-2791 (La. 05/11/2007), 956 So.2d 577 (respondent failed in his duty of candor towards a federal judge regarding whether or not members of the plaintiffs' steering committee in a class action case had made impermissible payments to a witness identified with the defense. Noting that the Respondent had previously served a federal court system period of suspension and that he had no prior disciplinary record in nearly thirty years of practice, a three year period of suspension deferring all but eighteen months was imposed.).

The Committee rejected Respondent's argument that the baseline sanction for his conduct is a public reprimand. Respondent argued that under the guidelines, suspension is appropriate only where the lawyer "causes injury or potential injury to a party in the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." In this case, Respondent argued there was no injury or potential injury. The Committee agreed with ODC that the appropriate baseline sanction in this matter was suspension as they noted that although

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[6] ABA Standard 6.1- False Statements, Fraud and Misrepresentation
Absent aggravating or mitigation circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court.

[7] ABA Standard 6.1- False Statements, Fraud and Misrepresentation
6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

there was no harm to the client or the legal proceedings, there was significant harm to the reputation and sanctity of the legal profession.

In mitigation, the Committee found that Respondent has no disciplinary history, and that he fully disclosed and exhibited a cooperative attitude towards the disciplinary process. The Committee did not specify any aggravating factors.

Noting that the ABA Standards are "not mandatory; merely recommendations," the Committee concluded that the Respondent should be suspended from the practice of law for a period of six months, with all but thirty days deferred.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. The Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges ... and prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004 (La. Atty. Disc. Bd. 1/22/92).

A. The Manifest Error Inquiry

The Respondent's answer to the formal charges, the documents submitted into evidence by both parties, the testimony of Respondent, Jan M. Hayden, Esq., David S. Rubin, Esq., and

Bankruptcy Trustee S.J. Beaulieu support the Committee's findings of fact. There is nothing to suggest that the Committee strayed from the facts as supported by the record. The Board therefore adopts the Committee's factual findings.

B. *De Novo* Review of the Application of the Rules of Professional Conduct

A *de novo* review of the record demonstrates that the Committee appropriately applied the Rules of Professional Conduct. An analysis of what Rules have been proven to be violated follows:

- Rule 1.2(d) provides that a lawyer shall not counsel a client to engage in, or assist a client in conduct that a lawyer knows is criminal or fraudulent. Respondent admits that he counseled his clients to submit a bankruptcy petition under a fictitious name. Therefore, the Board finds that Respondent violated Rule 1.2(d).
- Rule 3.3(a)(1) and (3) provide that a lawyer shall not knowingly 1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; 3) offer evidence that the lawyer knows to be false. Respondent admits that he recommended to his clients that they file a bankruptcy petition under a false name and he subsequently filed the petition with the Bankruptcy Court with the knowledge that the names were false. Accordingly, the Board finds that Respondent violated Rules 3.3(a)(1) and (3).
- Rule 3.3(b) provides that a lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in a criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures including if necessary disclosure to the tribunal. Respondent admits that he recommended to his clients that they file a bankruptcy petition under a false name and he

subsequently filed the petition with the knowledge that the clients name, as listed, was false. Twelve days after filing the false petition, Respondent filed a corrected petition, however he did not disclose to the bankruptcy court why he filed a corrected petition. He also lied to a court official, the Chapter 7 Trustee, when he was less than truthful and candid in his explanation for the need to correct the "typos". Hence, Respondent's "remedial" action served to preserve the legal proceedings, but was not remedial in the sense that he disclosed the fraudulent conduct to the bankruptcy court. Therefore, the Board finds that Respondent violated Rule 3.3(b).

- Rule 8.4(c) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent admits that he recommended to his clients that they file a bankruptcy petition under a false name and he subsequently filed the petition with the knowledge that his client's name was false. Further, Respondent continued the perpetration of the fraud when he was vague and perhaps deceptive in advising the Chapter 7 Trustee of the reasons for the needed correction. Accordingly, the Board finds that Respondent violated Rule 8.4(c).
- Rule 8.4(d) provides that a lawyer shall not engage in conduct prejudicial to the administration of justice. By recommending to his clients that they file their bankruptcy petition with false information, the Respondent hindered the proper administration of the bankruptcy laws. Further, Respondent then continued this process by knowingly providing inaccurate and incorrect reasons for the "typos" to the Chapter 7 Trustee. Accordingly, the Board finds that Respondent violated Rule 8.4(d).
- Rule 8.4(a) provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so,

or do so through the acts of another. Respondent admits that he violated some of the Rules of Professional Conduct, thereby he is in violation Rule 8.4(a).

Accordingly, the Board therefore adopts the Committee's findings that the following rule violations occurred: Rule 1.2(d); Rule 3.3(a)(1) and (3); Rule 3.3(b); and Rule 8.4(c). Although the Committee did not find a violation of Rule 8.4(a) or Rule 8.4(d), the record, as described above, supports a finding of a violation of these two Rules which were pled by ODC in the formal charges filed against Respondent.

II. THE APPROPRIATE SANCTION

A. Application of Rule XIX, §10(C) Factors

Louisiana Supreme Court Rule XIX, §10(C) states that in imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
2. whether the lawyer acted intentionally, knowingly, or negligently;
3. the amount of actual or potential injury caused by the lawyer's misconduct; and
4. the existence of any aggravating or mitigating factors.

The Board finds that Respondent knowingly violated duties owed to his client, the public, the legal system and to the profession. The Respondent included false and deceptive information on a federal bankruptcy petition executed by the Respondent under penalty of perjury, counseled his clients to provide false and deceptive information regarding their name and address, instructed his clients to execute the petition knowing that he was instructing them to do so under penalty of perjury and with information which was false, and thereafter continued the deception by providing false information to the Chapter 7 Trustee. Although Respondent's actions did not

monetarily harm his clients or the bankruptcy proceedings,[8] the actual harm to the legal system and the profession must be considered. When a lawyer is the source of misconduct, the integrity of the profession as a whole is suspect. Additionally, because of Respondent's role in Judge Porteous' impeachment proceedings, he was required to testify before the United States Senate. These proceedings were publicly broadcast and closely followed, which served only to cast a negative light on Louisiana's legal profession.

Although not mentioned by the Committee, the record supports substantial experience in the practice of law[9] as the sole aggravating factor in this matter. The Committee declined to include the additional aggravating factors put forth by ODC of (a) a dishonest and selfish motive; and (b) a pattern of misconduct. The Board likewise does not find these two aggravating factors as (a) the record reflects that Respondents misguided effort to help his clients was motivated by compassion for his clients[10]; there is nothing in the record that supports he was motivated by selfish reasons or dishonest reasons; and (b) the record makes it clear that Respondents misconduct in this matter is a single blemish on an otherwise reputable and meaningful 24 year law career.

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[8] Twelve days after filing the false petition with the Bankruptcy Court, the Respondent filed a corrected petition with the Court. *See* Hearing Transcript (1/11/11), pgs. 49-50.

[9] As mentioned above, Respondent was admitted to the Bar on April 10, 1987. Further, although the record does not say *when* respondent was himself a Chapter 7 Trustee in the Eastern District of Louisiana, he testified that he "spent a lot of time as a Chapter 7 Trustee." *See* Hearing Transcript (1/11/11), pg. 22, ln 1-9.

[10] In the summer of 2000, former United States District Judge G. Thomas Porteous, Jr., contacted Respondent regarding the management of consumer debt that he and his wife Carmella, had accumulated. *See* Brief of Respondent (4/29/11), pg. 1. Prior to the beginning of this attorney-client relationship in 2000, the Respondent did not know the Judge or his wife and had not ever appeared in his court room. *See* Hearing Transcript (1/11/11), pgs. 15-16. Respondent's desire to assist them avoid the negative publicity and embarrassment which would have been generated by the Times Picayune publication of their bankruptcy filing appears to have arisen from his client-attorney meetings with the Porteous' where both, but in particular Carmella Porteous, was clearly distraught. *See* Hearing Transcript (1/11/11), pgs. 23:1-4; and pgs 34-36.

The record supports the mitigating factors found by the Committee of absence of a prior disciplinary history, and full and free disclosure to the Board and a cooperative attitude toward the proceedings. In addition the Board finds as mitigating factors (a) Respondent's excellent character and reputation among his colleagues; (b) the remorse he has exhibited throughout the proceedings; and (c) his personal problems.[11]

B. The ABA Standards and the Case Law

The Louisiana Supreme Court also relies on the *ABA Standards for Imposing Lawyer Sanctions* ("ABA Standards') to determine the baseline sanction.[12] However, none of the ABA Standards squarely fit the conduct in this case. Nonetheless, ODC and Respondent agree that even though no ABA Standard precisely fits Respondent's conduct, Standard 6.1, which governs "False Statements, Fraud, and Misrepresentation", is the closest. Standard 6.1 provides as follows:

> Absent aggravating or mitigating circumstances... the following sanctions are generally appropriate. In cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:
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> 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

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[11] Respondent has experienced personal hardship and distress as a result of the death of his first wife, the illness of his current wife and his father's suicide. *See*, e.g., Hearing Transcript (1/11/11), pgs. 40:15-25, 41:1-2. "Looking back on – on what motivated me, I had not too many years before meeting Judge Porteous lost my father to a suicide – and to despair basically. And seeing him and his wife in this tremendous despair, I was thinking of that. And it sort of clouded my good judgment and caused me to come up with this. It certainly didn't inure to my benefit in any way. I - it didn't damage creditors in anyway. It was immaterial to the proceeding. But - but I was just trying to save – save these poor people embarrassment. And really that was the months of work trying to get them to do the workout was part of that too. I don't normally do that." *Id.*, pgs. 40:20-25, 41:1-10.

[12] *In re Quaid*, 94-1316 (La. 11/30/94), 646 So.2d 343.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.13 Reprimand is generally appropriate when a lawyer is negligent in either determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

The record supports the Committee's recommendation that Standard 6.12, which calls for suspension, fits the conduct in this case.

The Louisiana Supreme Court has addressed the appropriate discipline to be imposed when a lawyer provides false statements, evidence or information in connection with a pending proceeding in a number of cases which resulted in sanctions ranging from three years to six month suspensions. An example of this range of sanctions is as follows:

In re Bruno, 2006-2791 (La. 05/11/2007), 956 So.2d 577, the Respondent failed in his duty of candor towards a federal judge regarding whether or not members of the plaintiffs steering committee in a class action case had made impermissible payments to a witness identified with the defense. Noting that the Respondent had previously served a federal court system period of suspension and that he had no prior disciplinary record in nearly thirty years of practice, the Court imposed a three year period of suspension deferring all but eighteen months.

In the case of *In re Stephens*, 94-1924 (La. 11/18/94), 645 So.2d 1133, the attorney violated rules 3.3(a), 3.4(b), 8.4(c) and 8.4(d) by failing to keep the client informed and

notarizing a false affidavit for which he was suspended for eighteen months. In *La. State Bar Ass'n v. White*, 539 So.2d 1216 (La. 1989) an attorney received a two-year suspension for misconduct including advising client to commit perjury, communicating with adverse party without consent of party's attorney, misrepresenting to court status of case in another court to avoid being appointed to represent indigent, and confirming default judgment against former client in amount of $4,011.44 while concealing from court the receipt of prior payment of $2,000, aggravated by pattern of dishonesty and self-seeking, but mitigated by relative inexperience and lack of prior disciplinary record. In *In re Broome*, 01-2260 (La. 2/26/02), 815 So.2d 1, the attorney was suspended for one year and one day for making misleading statements to the federal court and for solicitation of clients.

In *In re Landry*, 05-1871 (La. 7/6/06), 934 So.2d 694, a six month suspension, with all but thirty days deferred, subject to a six month period of probation, was imposed on an attorney who notarized and caused to be filed into a succession proceeding two affidavits that he knew or should have known contained false information. In *In re Richmond*, 08-0742 (La. 12/2/08), 996 So.2d 282, the Court imposed a six month suspension with all deferred but sixty days, subject to a six month period of probation, upon an attorney who while serving as a member of the state legislature, filed a notice of candidacy certifying that he lived at a false address.

The facts of the case at bar are extremely specific, and not surprisingly, there are no cases with an analogous fact pattern. However, the Court has handed down a range of sanctions from six months to three years for misconduct involving false statements made to a court, or filing knowingly false documents with a court. The Board finds that Respondent's conduct is most analogous to *In re Landry*, and *In re Richmond.*

Partial deferral of a suspension may be also appropriate. The Court in *In re Zohdy*, 04-2361 (La. 1/19/05); 892 So.2d 1277, deferred one-year of a three-year suspension, reasoning that "respondent has no other history of discipline, has been heavily penalized by the federal courts, and has established a good reputation among clients and colleagues in the Baton Rouge area, particularly related to his pro bono contributions . . . ."[13]

In the instant matter, Respondent has no prior history of discipline, is remorseful, has fully and freely disclosed to the Board, has exhibited a cooperative attitude toward the proceedings, and has established through colleagues' letters and testimony his excellent reputation in the legal community. This event of misconduct during Respondent's 24 year law career was not motivated by financial gain, or the desire to gain an advantage in litigation, or any ulterior motive other than his desire to protect his client from humiliating circumstances.[14] The Board finds the Committee's proposed sanction of six months, with all but thirty days deferred, is appropriate.

CONCLUSION

The Board finds that the Committee's findings of fact are not manifestly erroneous and that ODC has proven by clear and convincing evidence that Respondent violated Rules 1.2(d); Rule 3.3(a)(1) and (3); Rule 3.3(b); Rule 8.4(a); Rule 8.4(c) and Rule 8.4(d). The Board

[13] The *Zohdy* case contained numerous violations resulting in a longer suspension, but did include a Rule 3.3 violation.

[14] *See* Hearing Transcript (1/11/11), pg. 35: 1-21, where Respondent states, "And I hoped to avoid the embarrassment that would have come from a splash in the paper. Of course, it was as stupid idea. It was wrong to have done it. I've admitted that throughout. Compassion overwhelmed good judgment. I knew that I wasn't going to prejudice anyone else. There would be no effect on the proceeding. Because my intention was to correct it immediately after it appeared in the paper and before any notices went out to any creditors, which is in fact exactly how my misguided plan happened. That part of it went according to plan in the sense that the case was unaffected. The notices that went to creditors went under the proper name and proper address. And creditors filed claims were paid, participated. The case went on for three years and completed as normal. But my misguided idea was to try to keep his name from appearing properly in the Times Picayune. That was the purpose of my bad advice to Mr. Porteous."

recommends Respondent be suspended for six months, with all but thirty days deferred. The Board also recommends that the deferred portion of the sanction be made executory in the event of any additional misconduct on the part of Respondent. The Board further recommends that the Respondent be assessed all costs and expenses of these proceedings.

RECOMMENDATION

The Disciplinary Board recommends that the Respondent, Claude C. Lightfoot, Jr., be suspended from the practice of law for six months, with all but thirty days deferred. The Board also recommends that the deferred portion of the sanction be made executory in the event of any additional misconduct on the part of Respondent. The Board also recommends that the Respondent be assessed with all costs and expenses of these proceedings.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Carl A. Butler
George L. Crain, Jr.
Jamie E. Fontenot
Edwin G. Preis, Jr.
R. Lewis Smith, Jr.
Linda P. Spain
R. Steven Tew

BY: _____
STEPHEN F. CHICCARELLI
FOR THE ADJUDICATIVE COMMITTEE

Dow M. Edwards-Recused.

APPENDIX

RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
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RULE 3.3. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

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CERTIFICATE OF MAILING

In re: **Claude C. Lightfoot, Jr.**
Docket No(s). **10-DB-057**

I hereby certify that a copy of the Recommendation of the Louisiana Attorney Disciplinary Board has this day been mailed to the Respondent(s) and/or the Counsel for the Respondent(s) by United States Mail and E-Filed to the Office of Disciplinary Counsel this **8th day of September, 2011** at the following address:

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DONNA ROBERTS
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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 10-2154

_____

In re: NILES C. TAYLOR; ANGELA J. TAYLOR,
Debtors

ROBERTA A. DEANGELIS, Acting United States Trustee,
Appellant

_____

On Appeal from the District Court
for the Eastern District of Pennsylvania
(No. 09-cv-02479, 07-cv-15385 (bankruptcy))
District Judge: Honorable John P. Fullam

_____

Argued March 22, 2011

Before: FUENTES, SMITH and VAN ANTWERPEN,
Circuit Judges

(Opinion Filed: August 24, 2011)

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OPINION

Fuentes, Circuit Judge

The United States Trustee, Region 3 ("Trustee"), appeals the reversal by the District Court of sanctions originally imposed in the bankruptcy court on attorneys Mark

J. Udren and Lorraine Doyle, the Udren Law Firm, and HSBC for violations of Federal Rule of Bankruptcy Procedure 9011. For the reasons given below, we will reverse the District Court and affirm the bankruptcy court's imposition of sanctions with respect to Lorraine Doyle, the Udren Law Firm, and HSBC.[1] However, we will affirm the District Court's reversal of the bankruptcy court's sanctions with respect to Mark J. Udren.

I.

A. Background

This case is an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court. It arises from the bankruptcy proceeding of Mr. and Ms. Niles C. and Angela J. Taylor. The Taylors filed for a Chapter 13 bankruptcy in September 2007. In the Taylors' bankruptcy petition, they listed the bank HSBC, which held the mortgage on their house, as a creditor. In turn, HSBC filed a proof of claim in October 2007 with the bankruptcy court.

We are primarily concerned with two pleadings that HSBC's attorneys filed in the bankruptcy court—(1) the request for relief from the automatic stay which would have permitted HSBC to pursue foreclosure proceedings despite the Taylors' bankruptcy filing and (2) the response to the

[1] Although HSBC was sanctioned by the bankruptcy court, it did not participate in this appeal.

Taylors' objection to HSBC's proof of claim. We are also concerned with the attorneys' conduct in court in connection with those pleadings. We draw our facts from the findings of the bankruptcy court.

1. The proof of claim (Moss Codilis law firm)

To preserve its interest in a debtor's estate in a personal bankruptcy case, a creditor must file with the court a proof of claim, which includes a statement of the claim and of its amount and supporting documentation. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004); Fed. R. Bank. P. 3001; Official Bankruptcy Form 10. In October 2007, HSBC filed such a proof of claim with respect to the Taylors' mortgage. To do so, it used the law firm Moss Codilis.[2] Moss retrieved the information on which the claim was based from HSBC's computerized mortgage servicing database. No employee of HSBC reviewed the claim before filing.

This proof of claim contained several errors: the amount of the Taylors' monthly payment was incorrectly stated, the wrong mortgage note was attached, and the value

[2] Moss Codilis is not involved in the present appeal. However, it is worth noting that the firm has come under serious judicial criticism for its lax practices in bankruptcy proceedings. "In total, [the court knows] of 23 instances in which [Moss Codilis] has violated [court rules] in this District alone." *In re Greco*, 405 B.R. 393, 394 (Bankr. S.D. Fla. 2009); *see also In re Waring*, 401 B.R. 906 (Bankr. N.D. Ohio 2009).

of the home was understated by about $100,000. It is not clear whether the errors originated in HSBC's database or whether they were introduced in Moss Codilis's filing.[3]

2. The motion for relief from stay

At the time of the bankruptcy proceeding, the Taylors were also involved in a payment dispute with HSBC. HSBC believed the Taylors' home to be in a flood zone and had obtained "forced insurance" for the property, the cost of which (approximately $180/month) it passed on to the Taylors. The Taylors disputed HSBC's position and continued to pay their regular mortgage payment, without the additional insurance costs.[4] HSBC failed to acknowledge that the Taylors were making their regular payments and instead treated each payment as a partial payment, so that, in its records, the Taylors were becoming more delinquent each month.

Ordinarily, the filing of a bankruptcy petition imposes an automatic stay on all debt collection activities, including foreclosures. *McCartney v. Integra Nat'l Bank North*, 106 F.3d 506, 509 (3d Cir. 1997). However, pursuant to 11 U.S.C. § 362(d)(1), a secured creditor may file for relief from the stay "for cause, including the lack of adequate protection of an interest in property" of the creditor, in order to permit it to commence or continue foreclosure proceedings. Because

[3] HSBC ultimately corrected these errors in an amended court filing.

[4] This dispute has now been resolved in favor of the Taylors. (App. 199.)

of the Taylors' withheld insurance payments, HSBC's records indicated that they were delinquent. Thus, in January 2008, HSBC retained the Udren Firm to seek relief from the stay.

Mr. Udren is the only partner of the Udren Firm; Ms. Doyle, who appeared for the Udren Firm in the Taylors' case, is a managing attorney at the firm, with twenty-seven years of experience. HSBC does not deign to communicate directly with the firms it employs in its high-volume foreclosure work; rather, it uses a computerized system called NewTrak (provided by a third party, LPS) to assign individual firms discrete assignments and provide the limited data the system deems relevant to each assignment.[5] The firms are selected and the instructions generated without any direct human involvement. The firms so chosen generally do not have the capacity to check the data (such as the amount of mortgage payment or time in arrears) provided to them by NewTrak and are not expected to communicate with other firms that may have done related work on the matter. Although it is technically possible for a firm hired through NewTrak to contact HSBC to discuss the matter on which it has been retained, it is clear from the record that this was discouraged

[5] LPS is also not involved in the present appeal, as the bankruptcy court found that it had not engaged in wrongdoing in this case. However, both the accuracy of its data and the ethics of its practices have been repeatedly called into question elsewhere. *See, e.g.*, *In re Wilson*, 2011 WL 1337240 at *9 (Bankr. E.D.La. Apr. 7, 2011) (imposing sanctions after finding that LPS had issued "sham" affidavits and perpetrated fraud on the court); *In re Thorne*, 2011 WL 2470114 (Bankr. N.D. Miss. June 16, 2011); *In re Doble*, 2011 WL 1465559 (Bankr. S.D. Cal. Apr. 14, 2011).

and that some attorneys, including at least one Udren Firm attorney, did not believe it to be permitted.

In the Taylors' case, NewTrak provided the Udren Firm with only the loan number, the Taylors' name and address, payment amounts, late fees, and amounts past due. It did not provide any correspondence with the Taylors concerning the flood insurance dispute.

In January 2008, Doyle filed the motion for relief from the stay. This motion was prepared by non-attorney employees of the Udren Firm, relying exclusively on the information provided by NewTrak. The motion said that the debtor "has failed to discharge arrearages on said mortgage or has failed to make the current monthly payments on said mortgage since" the filing of the bankruptcy petition. (App. 65.) It identified "the failure to make . . . post-petition monthly payments" as stretching from November 1, 2007 to January 15, 2008, with an "amount per month" of $1455 (a monthly payment higher than that identified on the proof of claim filed earlier in the case by the Moss firm) and a total in arrears of $4367. (App. 66.) (It did note a "suspense balance" of $1040, which it subtracted from the ultimate total sought from the Taylors, but with no further explanation.) It stated that the Taylors had "inconsequential or no equity" in the property.[6] *Id.* The motion never mentioned the flood insurance dispute.

[6] The U.S. Trustee now points out that the motion also claimed that the Taylors were not making payments to other creditors under their bankruptcy plan and argues that this claim was false as well. Since the bankruptcy court did not

Doyle did nothing to verify the information in the motion for relief from stay besides check it against "screen prints" of the NewTrak information. She did not even access NewTrak herself. In effect, she simply proofread the document. It does not appear that NewTrak provided the Udren Firm with any information concerning the Taylors' equity in their home, so Doyle could not have verified her statement in the motion concerning the lack of equity in any way, even against a "screen print."

At the same time as it filed for relief from the stay, the Udren Firm also served the Taylors with a set of requests for admission (pursuant to Federal Rule of Bankruptcy Procedure 7036, incorporating Federal Rule of Civil Procedure 36) ("RFAs"). The RFAs sought formal and binding admissions that the Taylors had made *no* mortgage payments from November 2007 to January 2008 and that they had no equity in their home.

In February 2008, the Taylors filed a response to the motion for relief from stay, denying that they had failed to make payments and attaching copies of six checks tendered to HSBC during the relevant period. Four of them had already been cashed by HSBC.[7]

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make any findings with respect to this issue, we will not consider it.

[7] It is not clear from the briefing whether the last two checks, for February and March 2008, had actually been submitted to HSBC at the time the motion was filed; appellees deny that they were. However, appellees do not dispute that checks for

3. The claim objection and the response to the claim objection

In March 2008, the Taylors also filed an objection to HSBC's proof of claim. The objection stated that HSBC had misstated the payment due on the mortgage and pointed out the dispute over the flood insurance. However, the Taylors did *not* respond to HSBC's RFAs. Unless a party responds properly to a request for admission within 30 days, the "matter is [deemed] admitted." Fed. R. Civ. P. 36(a)(3).

In the same month, Doyle filed a response to the objection to the proof of claim. The response did not discuss the flood insurance issue at all. However, it stated that "[a]ll figures contained in the proof of claim accurately reflect actual sums expended . . . by Mortgagee . . . and/or charges to which Mortgagee is contractually entitled and which the Debtors are contractually obligated to pay." (App. 91.) This was indisputably incorrect, because the proof of claim listed an inaccurate monthly mortgage payment (which was also a different figure from the payment listed in Doyle's own motion for relief from stay).

4. The claim hearings

In May 2008, the bankruptcy court held a hearing on both the motion for relief and the claim objection. HSBC was represented at the hearing by a junior associate at the Udren Firm, Mr. Fitzgibbon. At that hearing, Fitzgibbon ultimately

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October and November 2007 and January 2008 had been cashed.

admitted that, at the time the motion for relief from the stay was filed, HSBC had received a mortgage payment for November 2007, even though both the motion for stay and the response to the Taylors' objection to the proof of claim stated otherwise.[8] Despite this, Fitzgibbon urged the court to grant the relief from stay, because the Taylors had not responded to HSBC's RFAs (which included the "admission" that the Taylors had not made payments from November 2007 to January 2008). It appears from the record that Fitzgibbon initially sought to have the RFAs admitted as evidence even though he knew they contained falsehoods. (App. 101-102.)[9]

[8] Appellees concede that, by the time the May hearing was held, HSBC had received all of the relevant checks.

[9] Appellees now claim that "[i]t is clear from the record, that Mr. Fitzgibbon honestly disclosed to the Court that these checks had just been received by [the] Udren [Firm] and that the only issue was that of flood insurance." (App'ee Br. 16.) However, this disclosure did not occur until *after* Fitzgibbon had attempted to enter the RFAs, which made contrary claims, as evidence, and debtor's counsel raised the issue. As the bankruptcy court described it, "[Fitzgibbon] *first* argued that I should rule in HSBC's favor . . . *On probing by the court*, he acknowledged that as of the date of the continued hearing, he had learned that [the Taylors] had made every payment." (App. 196, emphasis added.) In a Rule 9011/11 proceeding such as the present one, one would expect the challenged parties to be scrupulously careful in their representations to the court.

The bankruptcy court denied the request to enter the RFAs as evidence, noting that the firm "closed their eyes to the fact that there was evidence that . . . conflicted with the very admissions that they asked me [to deem admitted]. They . . . had that evidence [that the assertions in its motion were not accurate] in [their] possession and [they] went ahead like [they] never saw it." (App. 108-109.) The court noted:

> Maybe they have somebody there churning out these motions that doesn't talk to the people that—you know, you never see the records, do you? Somebody sends it to you that sent it from somebody else.

(App. 109.) "I really find this motion to be in questionable good faith," the court concluded. (App. 112.)

After the hearing, the bankruptcy court directed the Udren Firm to obtain an accounting from HSBC of the Taylors' prepetition payments so that the arrearage on the mortgage could be determined correctly. At the next hearing, in June 2008, Fitzgibbon stated that he could not obtain an accounting from HSBC, though he had repeatedly placed requests via NewTrak. He told the court that he was literally unable to contact HSBC—his firm's client—directly to verify information which his firm had already represented to the court that it believed to be true.

At the end of the June 2008 hearing, the court told Fitzgibbon: "I'm issuing an order to show cause on your firm, too, for filing these things . . . without having any knowledge. And filing answers . . . without any knowledge." (App. 119.) Thereafter, the court entered an order *sua sponte* dated June

9, 2008, directing Fitzgibbon, Doyle, Udren, and others to appear and give testimony concerning the possibility of sanctions.

5. The sanctions hearings

The order stated that the purpose of the hearing included "to investigate the practices employed in this case by HSBC and its attorneys and agents and consider whether sanctions should issue against HSBC, its attorneys and agents." (App 96-98.) Among those practices were "pressing a relief motion on admissions that were known to be untrue, and signing and filing pleadings without knowledge or inquiry regarding the matters pled therein." *Id.* The order noted that "[t]he details are identified on the record of the hearings which are incorporated herein." *Id.* In ordering Doyle to appear, the order noted that "the motion for relief, the admissions and the reply to the objection were prepared over Doyle's name and signature." *Id.* However, this order was not formally identified as "an order to show cause."

The bankruptcy court held four hearings over several days, making in-depth inquiries into the communications between HSBC and its lawyers in this case, as well as the general capabilities and limitations of a system like NewTrak. Ultimately, it found that the following had violated Rule 9011: Fitzgibbon, for pressing the motion for relief based on claims he knew to be untrue; Doyle, for failing to make reasonable inquiry concerning the representations she made in the motion for relief from stay and the response to the claim objection; Udren and the Udren Firm itself, for the conduct of its attorneys; and HSBC, for practices which caused the failure to adhere to Rule 9011.

Because of his inexperience, the court did not sanction Fitzgibbon. However, it required Doyle to take 3 CLE credits in professional responsibility; Udren himself to be trained in the use of NewTrak and to spend a day observing his employees handling NewTrak; and both Doyle and Udren to conduct a training session for the firm's relevant lawyers in the requirements of Rule 9011 and procedures for escalating inquiries on NewTrak. The court also required HSBC to send a copy of its opinion to all the law firms it uses in bankruptcy proceedings, along with a letter explaining that direct contact with HSBC concerning matters relating to HSBC's case was permissible.[10]

B. The District Court's Decision

Udren, Doyle, and the Udren Firm (but not HSBC) appealed the sanctions order to the District Court, which ultimately overturned the order. The District Court's decision was based on three considerations: that the confusion in the case was attributable at least as much to the actions of

[10] Taylor's counsel was also ultimately sanctioned and removed from the case. Counsel did not perform competently, as is evidenced by the Taylors' failure to contest HSBC's RFAs. She also made a number of inaccurate statements in *her* representations to the court. However, it is clear that her conduct did not induce the misrepresentations by HSBC or its attorneys. As the bankruptcy court correctly noted, "the process employed by a mortgagee and its counsel must be fair and transparent without regard to the quality of debtor's counsel since many debtors are unrepresented and cannot rely on counsel to protect them." (App. 214.)

Taylor's counsel as to Doyle, Udren, and the Udren Firm; that the bankruptcy court seemed more concerned with "sending a message" to the bar concerning the use of computerized systems than with the conduct in the particular case; and that, since Udren himself did not sign any of the filings containing misrepresentations, he could not be sanctioned under Rule 9011. Although HSBC had not appealed, the District Court overturned the order with respect to HSBC, as well.

The United States trustee then appealed the District Court's decision to this court.[11]

II.

Rule 9011 of the Federal Rules of Bankruptcy Procedure, the equivalent of Rule 11 of the Federal Rules of Civil Procedure, requires that parties making representations to the court certify that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support." Fed. R. Bank. P. 9011(b)(3).[12] A party must reach this conclusion based on "inquiry reasonable under the circumstances." Fed. R. Bank. P. 9011(b). The concern of Rule 9011 is not the truth or falsity of the representation in itself, but rather whether the party making the representation reasonably

[11] The bankruptcy court had jurisdiction under 28 U.S.C. § 157(a). The District Court had jurisdiction under 28 U.S.C. § 158(a)(1), except as discussed below. We have jurisdiction under 28 U.S.C. § 158(d).

[12] "[C]ases decided pursuant to [Fed. R. Civ. P. 11] apply to Rule 9011." *In re Gioioso*, 979 F.2d 956, 960 (3d Cir. 1992).

believed it at the time to have evidentiary support. In determining whether a party has violated Rule 9011, the court need not find that a party who makes a false representation to the court acted in bad faith. "The imposition of Rule 11 sanctions . . . requires only a showing of objectively unreasonable conduct." *Fellheimer, Eichen & Braverman, P.C. v. Charter Tech., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995). We apply an abuse of discretion standard in reviewing the decision of the bankruptcy court. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). However, we review its factual findings for clear error. *Stern v. Marshall*, --- U.S. ---, 131 S. Ct. 2594, 2627 (2011) (Breyer, J., dissenting).

In this opinion, we focus on several statements by appellees: (1) in the motion for relief from stay, the statements suggesting that the Taylors had failed to make payments on their mortgage since the filing of their bankruptcy petition and the identification of the months in which and the amount by which they were supposedly delinquent; (2) in the motion for relief from stay, the statement that the Taylors had no or inconsequential equity in the property; (3) in the response to the claim objection, the statement that the figures in the proof of claim were accurate; and, (4) at the first hearing, the attempt to have the requests for admission concerning the lack of mortgage payments deemed admitted. As discussed above, all of these statements involved false or misleading representations to the court. [13]

[13] Appellees expend great energy in questioning the factual findings of the bankruptcy court, but we, like the District Court before us, see no error.

A. Alleged literal truth

As an initial matter, the appellees' insistence that Doyle's and Fitzgibbon's statements were "literally true" should not exculpate them from Rule 9011 sanctions. First, it should be noted that several of these claims were not, in fact, accurate. There was no literal truth to the statement in the request for relief from stay that the Taylors had no equity in their home. Doyle admitted that she made that statement simply as "part of the form pleading," and "acknowledged having no knowledge of the value of the property and having made no inquiry on this subject." (App. 215.) Similarly, the statement in the claim objection response that the figures in the original proof of claim were correct was false.

Just as importantly, appellees cite no authority, and we are aware of none, which permits statements under Rule 9011 that are literally true but actually misleading. If the reasonably foreseeable effect of Doyle's or Fitzgibbon's representations to the bankruptcy court was to mislead the court, they cannot be said to have complied with Rule 9011. *See Williamson v. Recovery Ltd. P'ship*, 542 F.3d 43, 51 (2d Cir. 2008) (a party violates Rule 11 "by making false, *misleading*, improper, or frivolous representations to the court") (emphasis added).

In particular, even assuming that Doyle's and Fitzgibbon's statements as to the payments made by the Taylors *were* literally accurate, they were misleading. In attempting to evaluate whether HSBC was justified in seeking a relief from the stay on foreclosure, the court needed to know that at least partial payments had been made and that the failure to make some of the rest of the payments was due

to a bona fide dispute over the amount due, not simple default. Instead, the court was told only that the Taylors had "failed to make regular mortgage payments" from November 1, 2007 to January 15, 2008, with a mysterious notation concerning a "suspense balance" following. (App. 214-15.) A court could only reasonably interpret this to mean that the Taylors simply had not made payments for the period specified. As the bankruptcy court found, "[f]or at best a $540 dispute, the Udren Firm mechanically prosecuted a motion averring a $4,367[] post-petition obligation, the aim of which was to allow HSBC to foreclose on [the Taylors'] house." (App. 215.) Therefore, Doyle's and Fitzgibbon's statements in question were either false or misleading.

B. Reasonable inquiry

We must, therefore, determine the reasonableness of the appellees' inquiry before they made their false representations. Reasonableness has been defined as "an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well-grounded in law and fact." *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 289 (3d Cir. 1991) (internal quotations omitted). The requirement of reasonable inquiry protects not merely the court and adverse parties, but also the client. The client is not expected to know the technical details of the law and ought to be able to rely on his attorney to elicit from him the information necessary to handle his case in the most effective, yet legally appropriate, manner.

In determining reasonableness, we have sometimes looked at several factors: "the amount of time available to the signer for conducting the factual and legal investigation; the

necessity for reliance on a client for the underlying factual information; the plausibility of the legal position advocated; . . . whether the case was referred to the signer by another member of the Bar . . . [; and] the complexity of the legal and factual issues implicated." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 95 (3d Cir. 1988). However, it does not appear that the court must work mechanically through these factors when it considers whether to impose sanctions. Rather, it should consider the reasonableness of the inquiry under all the material circumstances. "[T]he applicable standard is one of reasonableness under the circumstances." *Bus. Guides, Inc. v. Chromatic Commc'ns Ents., Inc.*, 498 U.S. 533, 551 (1991); *accord Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1279 (3d Cir. 1994).

Central to this case, then, is the degree to which an attorney may reasonably rely on representations from her client. An attorney certainly "is not always foreclosed from relying on information from other persons." *Garr*, 22 F.3d 1278. In making statements to the court, lawyers constantly and appropriately rely on information provided by their clients, especially when the facts are contained in a client's computerized records. It is difficult to imagine how attorneys might function were they required to conduct an independent investigation of every factual representation made by a client before it could be included in a court filing. While Rule 9011 "does not recognize a 'pure heart and empty head' defense," *In re Cendant Corp. Derivative Action Litig.*, 96 F. Supp. 2d 403, 405 (D.N.J. 2000), a lawyer need not routinely assume the duplicity or gross incompetence of her client in order to meet the requirements of Rule 9011. It is therefore usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially

plausible and the client provides its own records which appear to confirm the information.

However, Doyle's behavior was unreasonable, both as a matter of her general practice and in ways specific to this case. First, reasonable reliance on a client's representations assumes a reasonable attempt at eliciting them by the attorney. That is, an attorney must, in her independent professional judgment, make a reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. She cannot simply settle for the information her client determines in advance—by means of an automated system, no less—that she should be provided with.

Yet that is precisely what happened here. "[I]t appears," the bankruptcy court observed, "that Doyle, the manager of the Udren Firm bankruptcy department, had no relationship with the client, HSBC." (App. 202.) By working solely with NewTrak, a system which no one at the Udren Firm seems to have understood, much less had any influence over, Doyle permitted HSBC to define—perilously narrowly—the information she had about the Taylors' matter. That HSBC was not providing her with adequate information through NewTrak should have been evident to Doyle from the face of the NewTrak file. She did not have any information concerning the Taylors' equity in the home, though she made a statement specifically denying that they had any.

More generally, a reasonable attorney would not file a motion for relief from stay for cause without inquiring of the client whether it had any information relevant to the alleged cause, that is, the debtor's failure to make payments. Had

Doyle made even that most minimal of inquiries, HSBC presumably would have provided her with the information in its files concerning the flood insurance dispute, and Doyle could have included that information in her motion for relief from stay—or, perhaps, advised the client that seeking such a motion would be inappropriate under the circumstances.

With respect to the Taylors' case in particular, Doyle ignored clear warning signs as to the accuracy of the data that she did receive. In responding to the motion for relief from stay, the Taylors submitted documentation indicating that they had already made at least partial payments for some of the months in question. In objecting to the proof of claim, the Taylors pointed out the inaccuracy of the mortgage payment listed and explained the circumstances surrounding the flood insurance dispute. Although Doyle certainly was not obliged to accept the Taylors' claims at face value, they indisputably put her on notice that the matter was not as simple as it might have appeared from the NewTrak file. At that point, any reasonable attorney would have sought clarification and further documentation from her client, in order to correct any prior inadvertent misstatements to the court and to avoid any further errors. Instead, Doyle mechanically affirmed facts (the monthly mortgage payment) that *her own prior filing* with the court had already contradicted.

Doyle's reliance on HSBC was particularly problematic because she was not, in fact, relying directly on HSBC. Instead, she relied on a computer system run by a third-party vendor. She did not know where the data provided by NewTrak came from. She had no capacity to check the data against the original documents if any of it seemed implausible. And she effectively could not question

the data with HSBC. In her relationship with HSBC, Doyle essentially abdicated her professional judgment to a black box.

None of the other factors discussed in the *Mary Ann Pensiero* case which are applicable here affect our analysis of the reasonableness of appellees' actions. This was not a matter of extreme complexity, nor of extraordinary deadline pressure. Although the initial data the Udren Firm received was not, in itself, wildly implausible, it was facially inadequate. In short, then, we find that Doyle's inquiry before making her representations to the bankruptcy court was unreasonable.

In making this finding, we, of course, do not mean to suggest that the use of computerized databases is inherently inappropriate. However, the NewTrak system, as it was being used at the time of this case, permits parties at every level of the filing process to disclaim responsibility for inaccuracies. HSBC has handed off responsibility to a third-party maintainer, LPS, which, judging from the results in this case, has not generated particularly accurate records. LPS apparently regards itself as a mere conduit of information. Appellees, the attorneys and final link in the chain of transmission of this information to the court, claim reliance on NewTrak's records. Who, precisely, can be held accountable if HSBC's records are inadequately maintained, LPS transfers those records inaccurately into NewTrak, or a law firm relies on the NewTrak data without further investigation, thus leading to material misrepresentations to the court? It cannot be that all the parties involved can insulate themselves from responsibility by the use of such a system. In the end, we must hold responsible the attorneys

who have certified to the court that the representations they are making are "well-grounded in law and fact."

C. Notice

Doyle, Udren, and the Udren Firm also argue on appeal that they had insufficient notice that they were in danger of sanctions.[14] Rule 9011 directs that a court "[o]n its own initiative . . . may enter an order describing the specific conduct that appears to violate [the rule] and directing an attorney . . . to show cause why it has not violated [the rule]." Fed. R. Bank. P. 9011(c)(1)(B). Due process in the imposition of Rule 9011 sanctions requires "particularized notice." *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990). The meaning of "particularized notice" has not been rigorously defined in this circuit. In *Fellheimer*, we noted that this requirement was met where the sanctioned party "was provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable." *Fellheimer*, 57 F.3d at 1225. In *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994), we held that "the party sought to be sanctioned is entitled to particularized notice including, at a minimum, 1) the fact that Rule 11 sanctions are under consideration, 2) the reasons why sanctions are under consideration . . . ."

The bankruptcy court's June order was clearly in substance an order to show cause, even if it was not

[14] Any claim regarding a due process right to notification of the *form* of sanctions being considered has been waived by appellees, as it was not raised in their papers, either here or in the district court. *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005).

specifically captioned as such. The more difficult question is whether the court adequately described "the specific conduct that appear[ed] to violate" Rule 9011, so as to give sufficient notice of "exactly which conduct was alleged to be sanctionable." As mentioned above, the court's June order identified "pressing a relief motion on admissions that were known to be untrue, and signing and filing pleadings without knowledge or inquiry regarding the matters pled therein" as the conduct the court wished to investigate. (App. 119) The judge also told Fitzgibbon, "I'm issuing an order to show cause on your firm, too, for filing these things . . . without having any knowledge. And filing answers . . . without any knowledge." *Id.* The June order also made specific reference to "the motion for relief, the admissions and the reply to the objection."

In these particular circumstances, the notice given to appellees was sufficient to put them on notice as to which aspects of their conduct were considered sanctionable. At that point in the case, the Udren Firm lawyers had only filed three substantive papers with the court—totaling six (substantive) pages—and the court found *all* of them problematic. Appellees' claim that they believed that the only issue at the time of the hearing was Fitzgibbon's inability to contact HSBC is simply not plausible in light of the language of the June order and the bankruptcy court's statements at the hearing, which were incorporated by reference into the June order. In a case in which more extensive docket activity had taken place, the bankruptcy court's order might not have been sufficient to inform appellees as to which of their filings were sanctionable, but, given the unusual circumstances here, it was. *But see Martens v. Thomann*, 273 F.3d 159, 178 (2d Cir. 2001)

(requiring specific identification of individual challenged statements to uphold imposition of sanctions).

D. The Udren Firm and Udren's individual liability

We also find that it was appropriate to extend sanctions to the Udren Firm itself. Rule 11 explicitly allows the imposition of sanctions against law firms. *Fellheimer*, 57 F.3d 1215 at 1223 n.5. In this instance, the bankruptcy court found that the misrepresentations in the case arose not simply from the irresponsibility of individual attorneys, but from the system put in place at the Udren Firm, which emphasized high-volume, high-speed processing of foreclosures to such an extent that it led to violations of Rule 9011.

However, we do not find that responsibility for these failures extends specifically to Udren, whose involvement in this matter was limited to his role as sole shareholder of the firm.

E. The District Court's reversal of sanctions against HSBC

Ordinarily, of course, a party which does not appeal a decision by a district court cannot receive relief with respect to that decision. "[T]he mere fact that a [party] may wind up with a judgment against one [party] that is not logically consistent with an unappealed judgment against another is not alone sufficient to justify taking away the unappealed judgment in favor of a party not before the court." *Repola v. Morbark Indus., Inc.*, 980 F.2d 938, 942 (3d Cir. 1992). However, "where the disposition as to one party is

inextricably intertwined with the interests of a non-appealing party," it may be "impossible to grant relief to one party without granting relief to the other." *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 344 (3d Cir. 1991). In *Tabor Court Realty*, a contract dispute, the assignee of a property had failed to appeal a decision, while the assignor had (and had ultimately prevailed). Given that the dispute was over the disposition of the property, it was impossible to grant relief to the assignor without also granting relief to the assignee.

In this instance, whether the lawyers at the Udren Firm violated Rule 9011 is a question analytically distinct from whether HSBC was responsible for any violations of Rule 9011. A court might find that HSBC was responsible for violations, whereas, say, Udren himself was not. It was entirely possible for HSBC to comply with the sanctions ordered (a letter to its firms informing them that they are permitted to consult with HSBC) without affecting the interests of the lawyers at the Udren Firm. Therefore, the interests of the lawyers at the Udren Firm and HSBC were not "inextricably intertwined," and the District Court lacked jurisdiction to reverse the sanctions against HSBC.

F. Alternative basis for the District Court's decision

In reversing the bankruptcy court's decision, the District Court focused on that court's apparent attention to the broader problems of high-volume bankruptcy practice in imposing sanctions. It is true that the bankruptcy judge noted that appellees were not the first attorneys to run into these sorts of difficulties in her court. But she nonetheless made

individualized findings of wrong-doing after four days of hearings and issued sanctions thoughtfully chosen to prevent the recurrence of problems at the Udren Firm based on what she had learned of practices there. Insofar as she considered the effect of the sanctions on the future conduct of other attorneys appearing before her, such considerations were permissible. After all, "the prime goal [of Rule 11 sanctions] should be deterrence of repetition of improper conduct." *Waltz v. County of Lycoming*, 974 F.2d 387, 390 (3d Cir. 1992).

G. Conclusion

We appreciate that the use of technology can save both litigants and attorneys time and money, and we do not, of course, mean to suggest that the use of databases or even certain automated communications between counsel and client are presumptively unreasonable. However, Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer. Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a "form pleading" she has been trained to fill out, and ignores obvious indications that her information may be incorrect, she cannot be said to have made reasonable inquiry. Therefore, we find that the bankruptcy court did not abuse its discretion in imposing sanctions on Doyle or the Udren Firm itself. However, it did abuse its discretion in imposing sanctions on Udren individually.

III.

For the foregoing reasons, we will reverse the District Court with respect to Doyle and the Udren Firm, affirming the bankruptcy court's imposition of sanctions. With respect to HSBC, as discussed previously, the District Court lacked jurisdiction to reverse the sanctions, as do we; therefore, we vacate the District Court's order with respect to that party, leaving the sanctions imposed by the bankruptcy court in place. We will affirm the District Court with respect to Udren individually, reversing the bankruptcy's court imposition of sanctions.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

In re:
NEW RIVER DRY DOCK, INC., Case No. 06-13274-BKC-JKO
Reorganized Debtor / Chapter 11

RESPONSE TO ORDER TO SHOW CAUSE WHY NON-MONETARY SANCTIONS SHOULD NOT BE IMPOSED

In your fourth published example of "Ready-Fire-Aim" against this attorney[1], it is obvious that you have not reviewed the record in this case which does not support the purported findings of fact. It is further quite obvious that you do not believe that the same respect mandated to be shown to you should also be shown to me. Your conclusion that Mr. Denison's attempt to exempt his commissions as the head of a household is not supported by law is belied by the language of the actual statute. Your conduct in this case was been without citation to any authority for the propositions that: your jurisdiction is never ending and without geographic bounds; your unconditional releases are meaningless; and pronouncements of the United States Supreme Court are mere suggestions.

In the Order to Show Cause [ECF 588] (hereinafter OSC) at pages 1 and 3, you "found" that " Denison had already admitted he owed those commissions to the Plan Administrator under the Debtor's confirmed Chapter 11 Plan." Wrong. Denison admitted that he was overpaid through a mathematical error not of his making. He

[1] See Case No 05-90029, at ECF # 265 wherein you published indiscriminately to a dozen persons your "Order to Show Cause Why Kevin Gleason, Esq. Should Not Be Sanctioned for Negligent Practice of Law" for my failure to timely submit an order where the client did not give me instructions after his discharge was denied whether to take a dismissal or let the case be administered in the ordinary course. Also see in the same case, ECF # 267 where the same sin is alleged, but I was given no instructions at the end of the previous hearing to that missive. Also see Adv Pro 09-01974-JKO where a mis-calendared hearing on a matter where an agreed judgment was submitted in favor of my client was treated as though a surgeon removed the wrong leg.

further pledged to repay that amount. He did not consent to the entry of a judgment against him, an act undertaken *sua sponte* and *ultra vires*.

In the OSC, at page 2, you found that "On December 6, 2010, Gleason and MMS entered into an agreed order to strike the Claim." Where you draw this conclusion can only be from the ether. The order striking the claim of exemption [ECF 552] was entered after a full hearing where the legal theories of Mr. Denison were put on the record. It is not an agreed order.

You brush off the statutory protection of the earnings of the head of a household as "Fla. Stat. § 222.11(b)5 plainly did not apply", because "Fla. Stat. § 222.11(b) refers to garnishment and attachment and is utterly inapplicable to court orders sequestering and directing disbursement of funds." A garnishment is the interception of funds payable to a debtor by judicial intervention which redirects payment to the creditor of the debtor. You may call what you did a "sequestrating and directing disbursement," but the effect was the very same as a garnishment and attachment. Your semantic distinctions express no difference.

You admit that most of the preconditions to exemption have been fulfilled in the record by virtue of the uncontested facts that Denison is the head of his household and that the subject funds were his earnings as defined in F.S. 222.11(1)(a).

In the OSC, at page 3, you found that "During the January 4, 2011, hearing on the sanctions motion, Gleason made no attempt to assert that the Claim was proper (he actually conceded to the fact that it was improper by an agreed order to strike the Claim on December 6, 2010)..." Now I have ordered the transcript to demonstrate that you have "misremembered" the hearing, during which I argued: that the statute was applicable on its face; that I only signed the claim of exemption to certify service of same; that the actual claim of exemption was signed by Mr. Denison; and that the motion was filed prematurely.

In the OSC, at page 7, you have, once again, proven that the superficially sound logic of the OSC is specious by stating, "Gleason's frivolous Claim was stricken by agreed order on December 6, 2010..." First, it was not Gleason's claim. Denison asserted his statutory right to protect his commissions from this Court's unjustified money grab. Second, the claim was not frivolous. What is frivolous is your grabbing of funds without any statutory grounds for so doing, and calling a garnishment by another name. You did not even attempt to distinguish the prohibition of your actions by the United States Supreme Court.[2]

The fiction continues on page 8 of the OSC, where you write, again, "Gleason has already stricken the offending Claim by agreed order."

Continuing on page 8 of the OSC, See the disrespectful and derogatory footnote 26 on page 8, wherein you "find" that "Gleason surreptitiously handed MMS' counsel a copy of Denison's Claim of Exemption immediately after a November 2, 2010 hearing. The only possible reason for Gleason to have done this was to cast doubt upon my prior sequestration and disbursement orders." Wrong. The statute, which I followed and you ignored, requires service upon the party seeking to enforce a judgment, and permits that party 2 days to respond.[3] There is no provision for filing the claim of exemption with the

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[2] "Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 323, 119 S.Ct. 1961, 1970 (1999).

[3] F.S. § 222.12 provides, in pertinent part, "Whenever any money ... is attached by such process, the person to whom the same is due and owing may make oath before ... a notary public that the money attached is due for the personal labor and services of such person, and she or he is the head of a family residing in said state. When such an affidavit is made, notice of same shall be forthwith given to the party, or her or his attorney, who sued out the process, and if the facts set forth in such affidavit are not denied under oath within 2 business days after the service of said notice, the process shall be returned, and all proceedings under the

court for immediate hearing. ECF 535, the Claim of Exemption, was filed on the same day it was served, and was served on the day after the entry of judgment, not 14 days later as would have been possible. How does one "surreptitiously" hand a paper to one's opposing counsel in open court, file same with the Court, and include a certificate of service to all interested parties?

On page 9 of the OSC, you again blunder regarding the nature of the order you entered after a full hearing, and without my continuously-attributed agreement. I agreed to the form of the order only after you ruled against the claim of exemption with mere adverbial analysis.

It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings.

CERTIFICATE OF SERVICE

On April 18, 2011, the following parties were served via the Notice of Electric Filing: all parties receiving notice through electronic filing.

Respectfully submitted,

KEVIN C GLEASON
4121 N. 31st Ave.
Hollywood, FL 33021-2011
Attorney for Mr. Denison
954.893.7670/954.893.7675 Fax

s/Kevin C. Gleason
Florida Bar No. 369500
BankruptcyLawyer@aol.com
Kevin C Gleason is a Certified Specialist in Business Bankruptcy Law by the American Board of Certification. Accredited by The Florida Bar.

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same shall cease.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

In re	)	
	)	Case No. 06-13274-JKO
NEW RIVER DRY DOCK, INC.,	)	
	)	Chapter 11
Debtor.	)	

SECOND SUPPLEMENTAL RESPONSE TO ORDER TO SHOW CAUSE

Kevin C. Gleason ("Gleason") hereby submits this second supplemental response to the *Order (1) Denying Motion for Sanctions; (2) Directing Kevin Gleason to Appear on April 20, 2011 at 1:30 p.m. and Show Cause Why Non-Monetary Sanctions Should Not be Imposed* [D.E. 588] (the "Show Cause Order"). In further support of this reply, Attorney Gleason represents as follows:

BACKGROUND

1. Attorney Gleason represents Christopher Denison ("Denison") in New River Dry Dock, Inc.'s (the "Debtor") chapter 11 bankruptcy case.

2. On November 2, 2010, Attorney Gleason filed on behalf of Denison a *Claim of Exemption and Notice of Hearing* [D.E. 535], under which Denison himself sought to exempt his commission (the "Claim") earned from the sale of property that was unrelated to a prior commission earned three years earlier from the sale of certain of the Debtor's real estate.

3. The Claim was filed in response to prior orders of the Court directing that Denison's post-confirmation commission be sequestered [D.E. 510] and later disbursed [D.E. 532] by the plan administrator under the Debtor's confirmed chapter 11 plan. Both orders are

the subject of a timely notice of appeal. The appeal of these matters is pending presently before the United State District Court for the Southern District of Florida, Case No. 10-cv-62522-KAM (the "Appeal").

4. On November 29, 2010, Marina Mile Shipyard, Inc. ("MMS") filed a motion seeking to impose sanctions [D.E. 550] under Fed. R. Bankr. 9011 against Attorney Gleason for what MMS asserted was an unsupportable claim.

5. On December 2, 2010 and following a non-evidentiary hearing on the merits of the Claim and the *Motion of Marina Mile Shipyard, Inc. to Strike Denison's Claim of Exemption* [D.E. 537], this Court entered an order denying the Claim [D.E. 588].

6. On March 31, 2011, the Court entered the Show Cause Order denying MMS's motion for sanctions for failure to comply with the "safe harbor" provisions of Fed. R. Bankr. P. 9011. The Court concluded mistakenly that Denison had previously assented and agreed to turn over the commission and, as a result, concluded that the "contention by Gleason that Denison is entitled to exempt payment of a commission which he already admitted he owed to the Plan Administrator is frivolous, absurd, and is not warranted by existing law." Show Cause Order at 8. The Court, *sua sponte*, then directed Attorney Gleason to show cause why non-monetary sanctions should not be imposed upon him for filing the Claim.

7. On or about March 31, 2011, the Show Cause Order was submitted for publication on Westlaw. *See In re New River Dry Dock, Inc.*, 2011 WL 1355300 (Bankr. S.D. Fla. 2011).

8. On April 18, 2011, Gleason filed his *Response to Order the Show Cause Why Non-Monetary Sanctions Should Not Be Imposed* [D.E. 593] (the "Response"). On May 13, 2011, Gleason filed a *Supplement to Response to Order the Show Cause Why Non-Monetary*

Sanctions Should Not Be Imposed in Response to Order Continuing April 20, 2011 Show-Cause Hearing (the "First Supplemental Response" and together with the Response, the "Responses").

9. On June 10, 2011, the Court entered an order continuing the hearing on the Order to Show Cause to August 18, 2011 [D.E. 627] ("Clarification Order") and further clarified that *en banc* hearing on the Order to Show Cause shall determine "whether Mr. Gleason failed to conduct himself properly as an Officer of the Court or to abide by the standards of professional conduct that are incumbent upon all attorneys who practice before the Court" and should be sanctioned for "the unprofessional and disrespectful tone and/or content" of the Responses. Clarification Order at 2.

SUPPLEMENTAL RESPONSE

10. Before imposing appropriate discipline, the Court must consider the following factors: "(1) duties violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the lawyer's misconduct; (4) the existence of aggravating or mitigating circumstances." Florida's Standards for Imposing Lawyer Sanctions at Art. III.

A. Gleason Did Not Violate a Duty to the Court.

11. As an officer of the court, attorneys owe certain duties as a professional to the legal system. For attorneys practicing law in Florida, these duties are enumerated in the Florida Rules of Professional Conduct (the "Fla. R. Prof. Con."). The Show Cause Order and the Clarification Order do not indicate which rule that it is alleged Attorney Gleason violated by filing the Responses with the Court. In the matter presently before the Court, Fla. R. Prof. Con. 4-3.5(c) is instructive. Rule 4-3.5 provides that "[a] lawyer shall not engage in conduct intended to disrupt a tribunal." The comment to Rule 4-3.5 provides additional guidance:

> Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to on behalf of litigants. A lawyer may stand

> firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate.

Fla. R. Prof. Con. 4-2.5 cmt

12. Attorney Gleason recognizes the unprofessional and disrespectful tone of the Responses for which he is prepared to apologize to the Court.[1] Regardless of how disrespectful the Responses may be perceived, the question is whether they were intended to disrupt the matters pending in the Debtor's case. Moreover, the Responses were not filed with the intention to disrupt the Debtor's bankruptcy case nor did the responses have that effect. Given the pendency of the appeal, the Responses did not serve any purpose for the advancement of Denison's legal theories before the Court. As a result, the Responses did not result in a breach of Attorney Gleason's duties under Fla. R. Prof. Con. 4-3.5.

13. The matter presently before the Court stands in stark comparison to that in *The Florida Bar v. Wasserman*, 675 So. 2d 103 (Fla. 1996)(suspending attorney one year for losing temper in open court, shouting criticisms at the court and challenging the judge to hold the attorney in contempt) and *The Florida Bar v. Abramson*, 3. So. 3d 964 (Fla. 2009)(suspending attorney 91 days for making disparaging remarks concerning the judge's qualifications to prospective jurors and discourteous conduct directed towards the court). Unlike in instances where an attorney was disrespectful or impugned the qualifications of a judge in open court, the offending Responses were filed weeks after the Order to Show Cause and were not intended to impact the administration of the Debtor's bankruptcy case. Although inappropriate, the mere

1 Attorney Gleason attempted to resolve the matter amicably and in private with the Court. See Supplemental Response at 7. Attorney Gleason's offer demonstrates his willingness to cease and resolve any perceived hostility with the Court given his intention to practice before it in the future.

filing of the Responses did not disrupt the tribunal thereby breaching a duty owed to the Court by Attorney Gleason.

B. The Responses Are the Product of Frustration.

14. Attorney Gleason's responses are the product of frustration due in large part to the Court's mistaken conclusion that his client had assented, pursuant to an agreed order, to the turnover of his commission to the plan administrator. The proper method to seek redress in such circumstances is to file an appeal, which Attorney Gleason did. During the pendency of the appeal, which was filed on November 4, 2010, the Court issued the Show Cause Order and later submitted the order for publication with Westlaw. This unfortunate turn of events escalated what was initially perceived as a mere legal conflict into something more personal in nature. The Responses, while intentional, do not reflect a dishonest or selfish motive.

C. The Responses Result in No Actual Injury.

15. Given that the underlying issue of Denison's claim was already the subject of a pending appeal, there was no actual injury caused by Attorney Gleason's Responses. Moreover, the Show Cause Order and Responses are completely divorced from the bankruptcy case such that the Responses and resolution of the Show Cause Order do not affect the administration of justice in the Debtor's case nor do they affect Denison's rights and remedies. *Compare The Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001)(reprimanding attorney publicly for making unethical, disparaging and profane remarks about opposing counsel and client exacerbating the parties dispute).

D. Mitigating Circumstances in Favor of Attorney Gleason.

16. Although inappropriate, the Responses do not demonstrate a dishonest or selfish motive. Moreover, Attorney Gleason has no prior negative disciplinary record. As set forth herein, Attorney Gleason recognizes the impropriety of his tone in the Responses and is prepared to offer his apology to the Court. The facts and circumstances of the present case mitigate in favor of Attorney Gleason.

E. Sanctions are Unwarranted in the Present Matter.

17. The Supreme Court of Florida has sanctioned attorneys on several occasions, to varying degrees, based on unprofessional and/or disrespectful conduct before a tribunal. *See, e.g., Abramson*, 3 So. 3d at 968 (attorney disciplined on two prior occasions suspended for 91-days); *Martocci*, 791 So. 2d at 1078 (attorney placed on probation for two-year period and order to submit to evaluation for anger management or mental health assessment); *The Florida Bar v. Graham*, 679 So. 2d 1181 (Fla. 1996) (attorney with no prior disciplinary record reprimanded for impugning judge's qualifications); *Wasserman*, 675 So. 2d at 105-6 (twelve-month suspension warranted where attorney had been disciplined on three prior occasions); *The Florida Bar v. Price*, 632 So. 2d 69 (Fla. 1994) (suspending attorney for 91 days for appearing in court while intoxicated). The severity of the sanctions for disrespectful conduct before the tribunal depends in large part on whether the attorney had been previously sanctioned. While Attorney Gleason has been the subject of several show cause orders by only this Court, none of the prior show cause orders have resulted in the imposition of sanctions. In fact, all were discharged, without penalty. Moreover, the facts and circumstances of this present matter mitigate in favor of discharge, without penalty.

CONCLUSION

For the reasons stated, and for any additional reasons supported by the evidence presented at the hearing, or records of the Court, of which the Court may take Judicial Notice during any hearing held in connection with the Show Cause Order, the Court should enter an order discharging the Show Cause Order, and granting to Attorney Gleason such other and further relief as the Court deems proper and just.

Dated: August 16, 2011

Respectfully submitted

KEVIN C. GLEASON, ESQ.
By his attorneys,

s/ Francis G. Conrad, Esq.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:
New River Dry Dock, Inc.,

Debtor.
_____/

Case No. 06-13274-BKC-JKO
Chapter 11

ORDER SANCTIONING ATTORNEY KEVIN C. GLEASON

THIS MATTER came on for hearing before an *en banc* panel of the United States Bankruptcy Court for the Southern District of Florida on August 18, 2011. The panel convened to consider whether Kevin C. Gleason ("Mr. Gleason") should be sanctioned for the unprofessional and disrespectful tone and content of his April 18, 2011 Response (ECF No. 593) and May 13, 2011 Supplemental Response (ECF No. 614) (collectively, the "Responses"). *Order Setting En Banc Show-Cause Hearing* (ECF No. 612) and *Order Granting Ex-Parte Motion to Continue En Banc Hearing* (ECF No. 627) (collectively, the "En Banc Show-Cause Orders").

FACTUAL BACKGROUND

Mr. Gleason, an attorney specializing in bankruptcy, has practiced before this Court for many years. In this case, Mr. Gleason represents a real estate sales agent engaged to sell assets of the debtor. *See In re New River Dry Dock, Inc.*, 2011 WL 1355300 (Bankr. S.D. Fla. March 31, 2011). Mr. Gleason filed a Claim of Exemption on behalf of his client ("Claim") asserting that a commission received from a real estate sale was exempt from attachment or garnishment under Florida law, and

thus not subject to disgorgement under an order entered in this case.[1] *Id.* at *1. An unsecured creditor filed a motion to strike the Claim, and a motion for sanctions based upon the filing of the Claim. *Id.* Judge Olson denied the creditor's motion for sanctions because the 21-day safe harbor period of Fed. R. Bankr. P. 9011 had not run before the motion for sanctions was filed. *Id.* at *3. In the same order, on the Court's initiative pursuant to Fed. R. Bankr. P. 9011(c)(1)(B), Mr. Gleason was ordered to show cause why non-monetary sanctions should not be imposed for having filed the Claim ("New River Show-Cause Order") (ECF No. 589). *Id.* at *4. The New River Show-Cause Order was published in the Westlaw electronic database. *See* 2011 WL 1355300.

Mr. Gleason's written Responses to the New River Show-Cause Order are the subject of this disciplinary matter. The bankruptcy judges in this district seldomly sit *en banc*. The decision to convene this panel was based upon the extraordinary nature of the language contained in Mr. Gleason's initial April 18, 2011 Response. The wholly inappropriate and unprofessional content and style of the initial Response is evident from the very first sentence which states:

> In your fourth published example of "Ready-Fire-Aim" against this attorney, it is obvious that you have not reviewed the record in this case which does not support the purported findings of fact.

Then it gets worse. Mr. Gleason's disrespectful and impertinent attack on the Court continues with, for example, the following:

> Your conduct in this case has been without citation to any authority for the propositions that: your jurisdiction is never ending and without geographic

[1] Judge Olson's orders requiring sequestration and turn over of the real estate commission have been appealed by Mr. Gleason on behalf of his client.

> bounds, your unconditional releases are meaningless, and pronouncements of the United States Supreme Court are mere suggestions.
>
> In the Order to Show Cause [ECF 588] (hereinafter OSC) at pages 1 and 3, you "found" that "Denison had already admitted he owed those commissions to the Plan Administrator under the Debtor's confirmed Chapter 11 Plan." Wrong.
>
> * * *
>
> In the OSC, at page 2, you found that "On December 6, 2010, Gleason and MMS entered into an agreed order to strike the Claim." Where you draw this conclusion can only be from the ether.
>
> * * *
>
> Wrong. The statute, which I followed and you ignored, requires service upon the party seeking to enforce a judgment, and permits that party 2 days to respond.
>
> * * *
>
> On page 9 of the OSC, you again blunder regarding the nature of the order you entered after a full hearing, and without my continuously-attributed agreement.
>
> * * *
>
> It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings.

Response at 1-4.

One would think that after filing this incredible document, Mr. Gleason would have realized his mistake and would have immediately filed a paper seeking to strike the Response with a sincere apology for his written outburst. That did not happen. Instead, Mr. Gleason filed his Supplemental Response containing an extraordinary offer to participate in an *ex parte* communication with Judge Olson. As memorialized in the Supplemental Response, on April 29, 2011, Mr. Gleason delivered a bottle of wine to Judge Olson's chambers with a note reading: "Dear Judge Olson, A Donnybrook ends when someone buys the first drink. May we

resolve our issues privately?" Supplemental Response at 7. The wine and note were returned to Mr. Gleason's office unopened.

The Court has considered the record, including the Second Supplemental Response filed by Mr. Gleason ("Second Response") (ECF No. 662), considered the testimony of Mr. Gleason and the arguments of his counsel at the August 18th hearing, and reviewed the applicable law. For the reasons that follow, the panel finds that Mr. Gleason's Responses and actions constitute professional misconduct warranting the imposition of sanctions.

CONCLUSIONS OF LAW

I. Authority to Regulate the Conduct of Attorneys Appearing Before the Court

"Federal courts, including bankruptcy courts, have the inherent power to impose sanctions on parties and lawyers." *In re Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008); *see also In re Mroz*, 65 F.3d 1567, 1574 (11th Cir. 1995); *In re Evergreen Security, Ltd.*, 570 F.3d 1257, 1263 (11th Cir. 2009). "This power is derived from the court's needs to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." 570 F.3d at 1263 (*quoting In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1304 (11th Cir. 2006)) (alteration in original).

"It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991) (*quoting United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259

(1812)) (alteration in original). "Accordingly, '[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.'" *Thomas v. Tenneco Packaging Co. Inc.*, 293 F.3d 1306, 1320 (11th Cir. 2002) (*quoting Chambers*, 501 U.S. at 43, 111 S.Ct. at 2132) (alteration in original).

> This means, among other things, "that a federal court has the power to control admission to its bar and to discipline attorneys." *Chambers*, 501 U.S. at 43, 111 S.Ct. at 2132 ; *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980) (noting that "[t]he power of a court over members of its bar is at least as great as its authority over litigants"). That is, "[e]ven absent explicit legislative enactment, deeply rooted in the common law tradition is the power of any court ... to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1447 (11th Cir. 1985).

Id. (alterations in original). "Bankruptcy Courts also have authority under § 105(a) 'to regulate those who appear before it, and what they say and do during that representation.'" *In re Brooks-Hamilton*, 400 B.R. 238, 248 (9th Cir. B.A.P. 2009) (*quoting* 2 Collier on Bankruptcy ¶ 105.04[7]). "Courts have used those provisions of section 105 . . . to regulate the practice of lawyers." *Id.*

Thus, the Court has inherent and statutory authority to control admission to its bar and to discipline attorneys practicing before the Court. This authority is independent of the Florida Bar's authority to sanction its members for misconduct and is independent of any Florida Bar disciplinary proceeding. The Court's Local Rules, promulgated pursuant to Fed. R. Bankr. P. 9029, set forth, *inter alia*, the qualifications required for an attorney to practice before the Court, and the Court's

procedures concerning attorney discipline. Local Rules 2090-1, 2090-2. Sanctions may be imposed for failure to comply with the Local Rules. Local Rule 1001-1(D).

II. Mr. Gleason Has Been Afforded Due Process

It is well-established that a court must "exercise caution in invoking its inherent power, and it must comply with the mandates of due process[.]" *Chambers*, 501 U.S. at 50, 111 S.Ct. at 2136. "Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why." *Mroz*, 65 F.3d at 1575 (*citing Donaldson v. Clark*, 819 F.2d 1551, 1559-60 (11th Cir.1987)). "In addition, the accused must be given an opportunity to respond, orally or in writing to the invocation of such sanctions and to justify his actions." *Id.* at 1575-1576 (*citing Donaldson*, 819 F.2d at 1559-60). As discussed herein, the due process requirements of fair notice and an opportunity to be heard have been satisfied.

The *en banc* show-cause hearing was set pursuant to Local Rule 2090-2(B)(1) which provides:

> Upon order to show cause entered by at least one judge, any attorney appearing before the court may, after 30 days' notice and hearing and for good cause shown, be suspended from practice before the court, reprimanded or otherwise disciplined, by a judge whose order to show cause initiated the disciplinary proceedings.

Order Setting En Banc Show-Cause Hearing at 3. By citing this provision, the En Banc Show-Cause Orders provided fair notice to Mr. Gleason that the *en banc* panel would consider whether Mr. Gleason should be suspended from practice before the Court, reprimanded or otherwise disciplined for the unprofessional and

disrespectful tone and content of his Responses. The *Order Granting Ex Parte Motion to Continue En Banc Hearing* further stated that the panel would determine whether Mr. Gleason failed to conduct himself properly as an officer of the Court or to abide by the standards of professional conduct that are incumbent upon all attorneys who practice before the Court. This Order also advised Mr. Gleason that:

> In making this determination, the panel will consider "case law, applicable court rules, and the 'lore of the profession' as embodied in codes of professional conduct." *In re Snyder*, 472 U.S. 643, 645, 105 S.Ct. 2874 (1985).
>
> * * *
>
> Should the panel find Mr. Gleason has engaged in professional misconduct, the panel will consider factors, such as those set forth in the Florida Bar Standards for Lawyer Sanctions, to fashion appropriate sanctions. . . . *See* Fla. Bar Standards for Lawyer Sanctions, Std. 3.0 *et. seq.* As a point of further clarification, the underlying Rule 9011 issues will not be heard by the panel. [2]

Order Granting Ex-Parte Motion to Continue En Banc Hearing at 2-3. In addition to the En Banc Show-Cause Orders, the Local Rules provide notice of the standard of conduct by expressly requiring attorneys practicing before this Court to:

> read and remain familiar with these rules, administrative orders, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Florida Bar's Rules of Professional Conduct, and the Bankruptcy Code;

Local Rule 2090-1(A)(2). Local Rule 2090-2(D) concerning attorney discipline further provides that:

> The professional conduct of attorneys appearing before this court shall be governed by the Model Rules of Professional Conduct of the American Bar

[2] At the beginning of the hearing, Chief Judge Hyman reiterated that the panel was not convened to determine whether Judge Olson's underlying orders were correct. Judge Hyman indicated that issue was for Judge Olson to determine in the context of motions for rehearing or for an appellate court upon the filing of an appropriate appeal.

> Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar.

Local Rule 2090-2(D).

In addition to the notice provided to Mr. Gleason by the En Banc Show-Cause Orders and the Local Rules, "[t]he United States Supreme Court has stated that a federal court can charge attorneys with knowledge of, and hold them accountable to, state ethics rules in the state where the court sits." *Thomas v. Tenneco Packaging Co. Inc.*, 293 F.3d at 1323 n.25 (*citing In re Snyder*, 472 U.S. 634, 645 n. 6, 105 S.Ct. 2874, 2881 n. 6, 86 L.Ed.2d 504 (1985) ("The uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney's knowledge of the state code of professional conduct applicable in that state court. . . .")). In his opening remarks at the August 18th hearing, counsel for Mr. Gleason acknowledged this by stating: "As an officer of the Court attorneys have certain duties as a professional in the legal system. For attorneys practicing in Florida those rules are enumerated in the Florida Rules of Professional Conduct." En-Banc H'rg Tr. 19:8-11 (ECF No. 669).

Two days before the *en banc* hearing, Mr. Gleason filed a Second Response. In the Second Response and at the hearing, Mr. Gleason argued that the En Banc Show-Cause Orders did not adequately indicate, and Mr. Gleason did not know, which Florida Bar rule or rules of professional conduct he is alleged to have violated. Mr. Gleason and his counsel were given, and took, the opportunity to respond to the En Banc Show-Cause Orders orally and in writing. From his written responses and his presentation before the Court, it is apparent that Mr. Gleason

was and is well aware of his duties to this Court. The En Banc Show-Cause Orders provided ample notice to Mr. Gleason of the actions that the Court considered beyond the limits of appropriate professional behavior. The panel concludes that the mandate of due process - fair notice and an opportunity to be heard - was met.

III. Mr. Gleason's Responses And Conduct Constitute Professional Misconduct

"Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities." Preamble to Chapter 4: Florida Bar Rules of Professional Conduct ("Florida Bar Rules"). The Supreme Court discussed the duty of an officer of the court in *In re Snyder*, 472 U.S. 634, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985):

> Courts have long recognized an inherent authority to suspend or disbar lawyers. This inherent power derives from the lawyer's role as an officer of the court which granted admission.
>
> * * *
>
> The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed:
>
> > "Membership in the bar is a privilege burdened with conditions. [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-471, 162 N.E. 487, 489 (1928).

Id. at 643-44, 105 S.Ct at 2880-81 (internal citations omitted). "As an officer of the court, every lawyer must avoid compromising the integrity of his or her own reputation and that of the legal process itself." *Smith v. Johnston,* 711 N.E.2d 1259,

1264 (Ind. 1999). "Thus lawyers' duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system." *Id.* at 1263-64. The Responses are not just discourteous to this Court; their language and tone violate an attorney's duties as an officer of this Court, as set forth in the Florida Bar Rules, to maintain the integrity of the Court by demonstrating respect for the legal system and for judges.

It is important to note that this Court is not the Florida Bar and does not act for the purpose of applying the Florida Bar Rules. The panel is informed, but not controlled, by the Florida Bar Rules which provide a useful framework against which to measure the conduct under review.[3] The tone and content of Mr. Gleason's Responses and his conduct violate several Florida Bar Rules including a Lawyer's Responsibilities as set forth in the Preamble to Chapter 4, Rule 4-3.5(a), Rule 4-8.2 (a) and Rule 4-8.4. The Preamble to Chapter 4 states in pertinent part:

> A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
>
> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the

[3] Indeed, the Preamble to Chapter 4: Rules of Professional Conduct expressly recognizes that a lawyer's conduct is not governed solely by the Florida Bar Rules:

> The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

> public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Rule 4-8.2 "Judicial and Legal Officials" and commentary state in pertinent part:

> (a) Impugning Qualifications and Integrity of Judges or Other Officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.
>
> Comments: To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 4-8.4 "Misconduct" states in pertinent part:

> A lawyer shall not:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> * * *
>
> (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, . . .

Rule 4-3.5 "Impartiality and Decorum of the Tribunal" states in petinent part:

> (a) Influencing Decision Maker. A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.

As evident from the excerpts quoted earlier, the Responses are shockingly sarcastic and unprofessional. As previously cited, the first sentence of the initial Response states: "In your fourth published example of 'Ready-Fire-Aim' against this attorney, it is obvious that you have not reviewed the record in this case which does

not support the purported findings of fact." This statement alone impugns the qualifications and integrity of the Court in violation of Rule 4-8.2, constitutes misconduct pursuant to Rule 4-8.4(d), and undermines the public's understanding and confidence in the legal system in contravention of a lawyer's duty of an officer of the Court, and a lawyer's responsibilities as set forth in the Preamble to Chapter 4 of the Florida Bar Rules. The remainder of the Response, which will not be quoted again here, contains numerous disrespectful and impertinent attacks on the Court. These attacks unquestionably were in violation of Mr. Gleason's duties as a member of this Court's bar, responsibilities as an officer of the Court, and duties under the Florida Bar Rules.

Mr. Gleason offers no material justification for his diatribe. Indeed, there is no appropriate justification. If an attorney believes that a ruling is incorrect, he may seek reconsideration or file an appeal. If an attorney believes that a judge is unfairly prejudiced, he may seek the judge's recusal. If an attorney has concerns about a bankruptcy judge's behavior, he may file a judicial misconduct complaint with the Eleventh Circuit. There are many avenues for redress. However, a pleading containing a hostile, undignified and insulting tirade against a particular judge or the court in general is obviously not the way to redress an unfavorable ruling or a judge's alleged unfairness. A first year law student would know that. There is a distinction between zealous advocacy and judicial denigration. *In the Matter of Maloney*, 949 S.W.2d 385, 388 (Tex. App. 1997). The Responses crossed that line by a wide margin.

Having engaged in professional misconduct by filing the initial Response, Mr. Gleason compounded his error on April 29, 2011, by delivering a bottle of wine to Judge Olson's chambers with a note suggesting that Mr. Gleason and Judge Olson resolve their issues privately. Not only was this an *ex parte* communication prohibited by Fed. R. Bankr. P. 9003,[4] it violated Florida Bar Rule 4-3.5 which prohibits a lawyer's attempt to influence a judge. At the hearing, Mr. Gleason suggested that this *ex parte* communication was somehow less troubling because there was no adversary on the other side. But Mr. Gleason's admitted *ex parte* communication plainly involves the type of impropriety, or the appearance of impropriety, that the Code of Judicial Conduct directs judges to avoid. Whether or not one has an adversary in litigation, sending a judge a bottle of wine and a note suggesting an in-person meeting is so far beyond appropriate attorney behavior that any member of the bar, no matter how green, should reject such a course of conduct without a second thought. Missing this point entirely, Mr. Gleason's Supplemental Response, commenting upon the return of the wine and the note, stated:

> The attempted offering of the olive branch was rejected, and probably misinterpreted. It was not offered in surrender, but rather in truce, that we might desist in this digression from the use of our talents toward the ends for which he [*sic*] have been trained. The wine was to be consumed by us together, following which an armistice might be declared, that we both go in peace.
>
> It is obviously not possible for this attorney to convince this Court that the record does not support its findings of fact, and that the law does not support

[4] F. R. Bankr. P. 9003(a) provides:
Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

> its conclusions of law. It will be for another court, on another day, to dispassionately consider the record and determine who owes an apology to whom.

Supplemental Response at 7-8.

It is Mr. Gleason who owes a sincere apology, not just to Judge Olson but to this Court as an institution, for his derogatory remarks that injure and undermine the judiciary, the legal system, and the public's confidence in these institutions. The panel finds that Mr. Gleason's Responses and conduct violated his duty as an officer of the Court and his duties as a member of this Court's bar pursuant to Local Rules 2090-1 (A)(1) "Qualification to Practice" and 2090-2(D) "Professional Conduct"; his duties pursuant to the Florida Bar "Preamble" to Chapter 4: "A Lawyer's Responsibilities", Florida Bar Rule 4-8.2 (a) 'Impugning Qualifications of Judges and Other Officers", Rule 4-8.4 (a)&(d) "Misconduct", Rule 4-3.5 "Impartiality and Decorum of the Tribunal"; and Fed. Bankr. R. P. 9003 "Prohibition of Ex Parte Contacts". Based upon these violations, the panel finds Mr. Gleason engaged in sanctionable professional misconduct.

IV. Considerations for Imposition of Sanctions

The En Banc Show-Cause Orders state that upon a finding of professional misconduct, the panel would consider factors, such as those set forth in the Florida Bar Standards for Lawyer Sanctions, to fashion appropriate sanctions. *See* Fla. Bar Standards for Lawyer Sanctions, Std. 3.0 *et. seq.* Accordingly, the panel has considered: the duty violated by Mr. Gleason; Mr. Gleason's mental state; the

potential or actual injury caused by Mr. Gleason's misconduct; and the existence of aggravating or mitigating factors.

A. The Duty Violated and the Injury Caused by Mr. Gleason's Misconduct

The Second Response maintains that Mr. Gleason did not violate a duty to the Court because he did not engage in conduct intended to disrupt a tribunal as prohibited by Rule 4-3.5(c). The Second Response states:

> Attorney Gleason recognizes the unprofessional and disrespectful tone of the Responses for which he is prepared to apologize to the Court. *Regardless of how disrespectful the Responses may be perceived, the question is whether they were intended to disrupt the matters pending in the Debtor's case.*
>
> * * *
>
> *Given that the underlying issue of Denison's claim was already the subject of a pending appeal, there was no actual injury caused by Attorney Gleason's Responses.* Moreover, the Show Cause Order and Responses are completely divorced from the bankruptcy case such that the Responses and resolution of the Show Cause Order do not affect the administration of justice in the Debtor's case nor do they affect Denison's rights and remedies.

Second Resp. ¶¶ 12, 15 (emphasis added).

The implication - that the Responses' disrespectful tone and content are permissible so along as the Responses were not intended to disrupt pending matters in the case - misses the mark. The issue is not whether the Responses were intended to disrupt pending matters in the debtor's case regardless of how disrespectful they may be perceived. The correct issue is whether the disrespectful tone and content of the Responses violated Mr. Gleason's duties as an officer of the Court and as a member of this Court's bar. The answer is "yes".

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not

> only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Snyder, 472 U.S. at 644-45, 105 S.Ct, at 2881. Mr. Gleason's offensive Responses violated his duty as a member of this Court's bar to conduct himself in a manner compatible with the role of this Court in the administration of justice including his duty to maintain the dignity of the Court by addressing the Court in a professional manner without regard to how he may perceive the Court. A lawyer who disrespects and denigrates the Court, as has Mr. Gleason, undermines the authority of the Court and the "public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Florida Bar Preamble to Chapter 4.

Moreover, the Second Response's "no harm/no foul" argument completely ignores the institutional damage to the judiciary. This was not a two-party dispute between Judge Olson and Mr. Gleason. The damage caused by Mr. Gleason's misconduct was to the reputation of the Court, the judicial system, the legal process and the legal profession.

B. Mr. Gleason's Mental State and the Issue of Mitigating or Aggravating Factors

When imposing sanctions, courts consider an attorney's mental state, *i.e.*, whether the attorney acted intentionally, knowingly, or negligently. Regarding Mr.

Gleason's mental state, the Second Response admits "[t]he Responses, *while intentional*, do not reflect a dishonest or selfish motive." Second Response at ¶14 (emphasis added). In an unpersuasive attempt to justify the Responses, the Second Response further states:

> During the pendency of the appeal, which was filed on November 4, 2010, the Court issued the [New River Show-Cause Order] and later submitted the order for publication with Westlaw. This unfortunate turn of events escalated what was initially perceived as a mere legal conflict into something more personal in nature.

Second Response ¶14. Mr. Gleason contends that the fact of publication of the New River Show-Cause Order was damaging to his reputation and practice. At the hearing, counsel stated that he did not know why the order was published since it had no precedential value except as to Mr. Gleason. Counsel's statement implies that the order was published as a personal attack against Mr. Gleason. However, the New River Show-Cause Order addressed a legal issue warranting publication. But even had the order not contained a legal issue warranting publication, its publication does not justify Mr. Gleason's behavior.

At the August 18th hearing, Mr. Gleason testified that his reputation and practice were damaged by Judge Olson's show-cause orders. Perhaps this is true. Perhaps, and just as likely, Mr. Gleason caused the damage himself through the type of conduct that gave rise to the show-cause orders, and by filing the Responses here, which were widely circulated in the press and online.

The Court makes no finding regarding the cause of any damage to Mr. Gleason's reputation and practice. It does not matter because Mr. Gleason's effort to

defend the Responses, or mitigate the wrong, through his "protect my reputation" argument misses the point. However offended Mr. Gleason felt by the tone and content of Judge Olson's orders, no order entered by a court, whether right or wrong under the facts or law, is an invitation to "fight back" in the wholly irresponsible, disrespectful and unprofessional manner chosen by Mr. Gleason.

The Second Response acknowledges that the proper method to seek redress is to file an appeal, but nevertheless maintains that the Responses are the product of frustration. Frustration is not a mitigating factor in this case. Accordingly, Mr. Gleason's testimony and exhibits concerning his frustration arising from the Court's prior show-cause orders are not relevant. Frustration might arguably be considered a mitigating factor in the context of an inappropriate, "heat-of-the-moment" courtroom outburst. While neither disrespectful courtroom outbursts nor disrespectful written pleadings should be tolerated, the Responses are far worse than a courtroom outburst because Mr. Gleason carefully planned, wrote and filed both written Responses. In this electronic age, the content of the Responses was spread more quickly than any in-court outburst.

The Florida Bar Standards for Imposing Lawyer Sanctions lists remorse as a mitigating factor, and refusal to acknowledge wrongful nature of conduct as an aggravating factor.[5] Mr. Gleason offered an apology to Judge Olson at the *en banc*

[5] The Fla. Bar Standards for Imposing Sanctions include the following mitigating factors that may justify a reduction in the degree of discipline to be imposed:(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical or mental disability or impairment; (i) unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay

hearing. However, in the panel's view, rather than expressing sincere and genuine remorse, Mr. Gleason's apology was an attempt to justify his conduct by arguing that the Responses were an understandable reaction to Judge Olson's orders. On the whole Mr. Gleason's apology can be summed up as "I was wrong in my approach but...". There is no "but" based upon any relevant evidence presented in this case. Mr. Gleason's apology was a refusal to acknowledge the wrongful nature of his conduct. Perhaps more importantly, while Mr. Gleason apologized for taking the panel's time, his apology failed to recognize that his Responses were harmful to the Court as an institution. Mr. Gleason owes an apology to this Court as a whole in that regard, and none was tendered.

Mr. Gleason could have mitigated his unprofessional behavior with a timely good faith effort to rectify the consequences of his misconduct such as a quick withdrawal of the offending Response and a sincere apology to Judge Olson. That did not happen. Instead, Mr. Gleason inappropriately sent a bottle of wine to Judge Olson's chambers with a note that the wine was offered not in surrender but in truce, and raised the possibility that Judge Olson may someday owe Mr. Gleason an apology.

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and provided further that the respondent has demonstrated specific prejudice resulting from that delay; (j) interim rehabilitation; (k) imposition of other penalties or sanctions; (l) remorse; (m)remoteness of prior offenses; (n) prompt compliance with a fee arbitration award.
The Fla. Bar Standards for Imposing Sanctions include the following aggravating factors that may justify an increase in the degree of discipline to be imposed: a) prior disciplinary offenses; provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct shall not be considered as an aggravating factor; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution; (k) obstruction of fee arbitration awards by refusing or intentionally failing to comply with a final award.

Finally, Mr. Gleason argues that he has no prior disciplinary record and that he had no selfish or dishonest motive in filing the Responses. These are among the mitigating factors listed in the Florida Bar Standards for Imposing Sanctions. However, an aggravating factor, substantial experience in the practice of law, is also present here. Mr. Gleason has been practicing before this Court for many years. He should have known better.

V. Bad Faith

In the Eleventh Circuit, the imposition of sanctions pursuant to the Court's inherent powers requires a finding of bad faith or conduct tantamount to bad faith. *In re Mroz*, 65 F.3d at 1575. "Before imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct." *In re Dyer,* 322 F.3d 1178, 1196 (9th Cir. 2003). "With regard to the inherent sanction authority, bad faith or willful misconduct consists of something more egregious than mere negligence or recklessness." *Id.* (*citing Fink v. Gomez,* 239 F.3d 989, 993-94 (9th Cir. 2001)). Bad faith includes "the instance of an attorney slandering or maligning the dignity and reputation of the court." *Bettis v. Toys R Us,* 2009 WL 5206192, *7 (S.D. Fla. 2009); *see also Evergreen Security*, 570 F.3d at 1275-77 (as to respondent who was disrespectful to the court by refusing to answer questions, treating the court as an adversary, and continually making inflammatory statements, the "bankruptcy court did not err in finding that [respondent's] overzealous litigation tactics, use of factual inaccuracies and disrespectful behavior demonstrate bad faith"); *In re 60 East 80th Street Equities,*

Inc., 218 F.3d 109, 116-17 (2d Cir. 2000)(unsubstantiated allegations impugning the integrity of the bankruptcy court and the trustee and comments such as accusing the bankruptcy judge of fundamental ignorance and calling the trustee an idiot cross the line from passionate advocacy and disagreements with a court's decision into sanctionable conduct evincing bad faith).[6] As discussed above, the panel found that the Responses - which Mr. Gleason knowingly and intentionally planned, wrote and filed - violated Mr. Gleason's duties as a member of this Court's bar and were damaging to the Court as an institution. Therefore, the panel finds that Mr. Gleason acted in bad faith in filing the offensive Responses.

VI. Appropriate Sanctions

The Eleventh Circuit has stated that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Sunshine Jr. Stores, Inc.*, 456 F.3d at 1305 (*quoting Chambers*, 501 U.S. at 44, 111 S.Ct. at 2132) (alteration in original). "A primary aspect of that discretion is the ability to fashion an appropriate sanction. . . . " *Id.* The Fifth Circuit, noting that "[t]he ultimate touchstone of inherent powers is necessity," stated that:

> Such powers may be exercised only if essential to preserve the authority of the court and the sanction chosen must employ " 'the least possible power adequate to the end proposed.' " If there is a reasonable probability that a lesser sanction will have the desired effect, the court must try the less restrictive measure first.

Natural Gas Pipeline Co. of America v. Energy Gathering, Inc., 86 F.3d 464, 467-68 (5th Cir. 1996) (citations omitted).

[6] The district court in *United States of America v. Cleveland*, 1997 WL 539664 (E.D.La. 1997) predicated a finding of bad faith on the single point that an experienced attorney who physically threatened his adversary should have known better.

Attorney suspension or "[d]isbarment proceedings are not for the purpose of punishment but to maintain the integrity of the courts and the profession." *In re Lehtinen*, 564 F.3d 1052, 1059 (9th Cir. 2009) (*quoting Patterson v. Standing Comm. of Discipline to Bar of the U.S. Dist. Court of Or. (In re Patterson)*, 176 F.2d 966, 968 n. 1 (9th Cir.1949)).

> The power of a court to suspend an attorney from practice before that court is too well established to conceivably be doubted. The considerations involved when this action is taken were well summarized by Chief Justice Marshall one and one-half centuries ago:
>
> > On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised.... *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 529–530, 6 L.Ed. 152 (1824).

Castillo v. St. Paul Fire & Marine Ins. Co, 828 F. Supp. 594, 598 (C.D. Ill. 1992). In addition, pursuant to the Florida Bar Standards for Imposing Sanctions, § 7.2 provides that: "Suspension is appropriate when the lawyer knowingly violates a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system."

Based upon the foregoing, the panel finds Mr. Gleason's professional misconduct warrants suspension for a period of 60 days from practice before the United States Bankruptcy Court for the Southern District of Florida as the minimal sanction necessary to preserve the authority and integrity of the Court. In addition,

the panel will refer this matter to The Florida Bar for any additional sanctions they may find appropriate.[7] As Mr. Gleason's counsel stated in his opening remarks, words have consequences. The words contained in Mr. Gleason's Responses were damaging to the integrity of the Court, the legal system and the legal profession.

ORDER

The panel having considered Mr. Gleason's Responses and conduct, the duties and responsibilities he violated, the injury to the Court, the mitigating and aggravating factors, **ORDERS AND ADJUDGES** that:

1. Mr. Gleason is suspended from practice before the United States Bankruptcy Court for the Southern District of Florida for a period of 60 days commencing November 1, 2011.

2. Mr. Gleason will be referred to the Florida Bar for the imposition of any additional sanctions that the Florida Bar may find appropriate.

ENTERED THIS 20th DAY OF SEPTEMBER, 2011.

Paul G. Hyman
Chief United States Bankruptcy Judge
Southern District of Florida

A. Jay Cristol
United States Bankruptcy Judge
Southern District of Florida

[7] The panel recognizes Mr. Gleason's offer to take seven pro bono cases which he may do voluntarily. Pro bono service is not a sanction and this Court will not treat it as such.

Robert A. Mark
United States Bankruptcy Judge
Southern District of Florida

Raymond B. Ray
United States Bankruptcy Judge
Southern District of Florida

John K. Olson
United States Bankruptcy Judge
Southern District of Florida

Laurel M. Isicoff
United States Bankruptcy Judge
Southern District of Florida

Erik P. Kimball
United States Bankruptcy Judge
Southern District of Florida

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THERESA MORRIS, WIFE OF BOB MORRIS,
Plaintiff,

-vs-

Case Nos. A-11-MC-712-SS
A-11-MC-713-SS
A-11-MC-714-SS
A-11-MC-715-SS

JOHN COKER, ALLIS-CHALMERS CORPORATION AND/OR STRATE DIRECTIONAL DRILLING, INC.,
Defendants.

ORDER

BE IT REMEMBERED on this day the Court reviewed the files in the above-styled causes, and now enters the following opinion and orders.

Non-parties Lance Langford, Erik Hoover, and Brigham Oil & Gas, L.P. invite the Court to quash subpoenas issued to them on behalf of Jonathan L. Woods, in relation to a matter currently pending in the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, because the subpoenas were not properly served, are overly broad and unduly burdensome, and seek privileged information. In response, the Court issues the following invitation of its own:

Greetings and Salutations!

You are invited to a kindergarten party on **THURSDAY, SEPTEMBER 1, 2011, at 10:00 a.m.** in Courtroom 2 of the United States Courthouse, 200 W. Eighth Street, Austin, Texas.

The party will feature many exciting and informative lessons, including:

- How to telephone and communicate with a lawyer
- How to enter into reasonable agreements about deposition dates
- How to limit depositions to reasonable subject matter
- Why it is neither cute nor clever to attempt to quash a subpoena for technical failures of service when notice is reasonably given; and
- An advanced seminar on not wasting the time of a busy federal judge and his staff because you are unable to practice law at the level of a first year law student.

Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshals have beds available if necessary, so you may wish to bring a toothbrush in case the party runs late.

Accordingly,

IT IS ORDERED that defense counsel Jonathan L. Woods, and movants' attorney Travis Barton, shall appear in Courtroom 2 of the United States Courthouse, 200 W. Eighth Street, Austin, Texas, on **THURSDAY, SEPTEMBER 1, 2011, at 10:00 a.m.**, for a memorable and exciting event;

IT IS FINALLY ORDERED that Mr. Barton is responsible for notifying Mr. Woods of this order by providing him with a copy by mail or fax on this date.

SIGNED this the 26th day of August 2011.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Theresa Morris	§	
	§	CIVIL NO:
vs.	§	AU:11-MC-00712-SS
	§	
John Coker, Allis-Chalmers Corporation, Strate Directional Drilling, Inc., National American Insurance Co., Tres Management, Inc., Lance Langford	§	

ORDER CANCELLING SETTING

IT IS HEREBY ORDERED that the hearing for **KINDERGARTEN PARTY** on **Thursday, September 01, 2011 at 10:00 AM is hereby CANCELLED until further order of the court**.

IT IS SO ORDERED this 29th day of August, 2011.

SAM SPARKS
UNITED STATES DISTRICT JUDGE