APPENDIX

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

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF DELAWARE	)	**CONFIDENTIAL**
	)	BOARD CASE NO.
RICHARD L. ABBOTT, Respondent.	)	112512-B

BOARD PANEL CHAIR'S DECISION ON SUBPOENA RECIPIENTS' MOTIONS TO QUASH AND RESPONDENT'S MOTIONS TO COMPEL

I. INTRODUCTION

This is a decision of a Panel ("Panel") of the Board on Professional Responsibility of the Supreme Court of the State of Delaware (the "Board") in the above-captioned matter by its Chair (the "Board Panel Chair") concerning 8 motions to quash 13 subpoenas *duces tecum* and *testificandum* ("Motions to Quash") and Respondent's motions to compel discovery of the 13 subpoenas and for exculpatory evidence ("Motions to Compel"). The Motions to Quash were timely served on October 29, 2020 against subpoenas issued under Rule 12(a)(2) of the Disciplinary Rules of Procedure (the "Procedural Rules") on October 20, 2020 (the "October 2020 Subpoenas").

[2]

Respondent's Motions to Compel were served on November 30, 2020 about one month after an October 29 deadline for submitting "[m]otions and [s]ubmissions

related to [d]iscovery [s]ubpoenas."[1] In Respondent's Motion to Compel Discovery, he "seeks to compel deposition discovery against all party and third-party deponents who have failed to comply with their obligations to honor" the 2020 October Subpoenas.[2] To support this motion, Respondent relies on the same arguments made in opposition to the Motions to Quash. Respondent also served a Motion to Compel Exculpatory Evidence which primarily seeks much of the same information sought by his October 2020 Subpoenas and Motion to Compel.[3]

For the reasons discussed in this Decision, the Board Panel Chair grants the Subpoenas Recipients' Motion to Quash and denies Respondent's Motions to Compel.

A. Subpoena Recipients receive subpoenas and move to quash.

The October 2020 Subpoenas seeks discovery from thirteen persons: (a) Vice Chancellor Sam Glasscock III ("Vice Chancellor") ("Vice Chancellor Subpoena"); (b) former Chief Justice Leo E. Strine ("former Chief Justice Strine" or "former Chief Justice") ("former Chief Justice Strine Subpoena"); (c) Judge Eric M. Davis [3] ("Judge Davis") ("Judge Davis Subpoena"); (d) Chief Justice Collins J. Seitz, Jr, and Justices Karen L. Valihura, James T. Vaughn, Jr., Gary F. Traynor and Tamika R. Montgomery-Reeves ("5 Justices") ("5 Justices Subpoenas"); (e) the Office of Disciplinary Counsel's ("ODC") Chief Disciplinary Counsel,

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[1] *See* October 16, 2020 Amended Initial Case Scheduling Order ¶ 2.

[2] *See* Respondent's Brief in Opposition to Motions to Quash Deposition Subpoenas and in Support of His Motions to Compel ("Opp." or "Opposition Brief" or "Opposition"), Part 2.

[3] *See* Opp., Part 3.

Luke W. Mette and Deputy Disciplinary Counsel Kathleen M. Vavala ("ODC Counsel") ("ODC Counsel Subpoenas"); (f) ODC's Document Custodian ("ODC Custodian") ("ODC Custodian Subpoena"); (g) Jennifer Kate Aaronson, former Chief Disciplinary Counsel ("Aaronson" or "former Chief Disciplinary Counsel") ("Aaronson Subpoena") and (h) Karlis P. Johnson, Administrative Assistant of the Board and Supreme Court Administrator ("Johnson" or "Administrative Assistant") ("Johnson Subpoena" or "Administrative Assistant Subpoena") (collectively "the Subpoena Recipients").

Each Subpoena Recipient moved to quash the subpoenas under Rule 12(b) of the Procedural Rules ("Rule 12(b)"). Each motion asserts that the October 2020 Subpoenas are not proper and/or warranted because they intrude on privileges or other protected matter. Some of the motions also allege that they cause undue burden. The motions rely on standards set forth in Superior Court Civil Rule 45 ("Superior Court Civil Rule 45" or "Rule 45") which provide that subpoenas shall be quashed if they (a) seek disclosure of privileged or other protected matter or (b) subject the subpoena recipient to undue burden.

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Respondent now seeks discovery of the Vice Chancellor to determine the Vice Chancellor's "true motivation for his attacks on [Respondent]"[32] which, according to Respondent, would reveal the Vice Chancellor's

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[32] [Respondent's Brief in Opposition to Motions to Quash Deposition Subpoenas and in Support of His Motions to Compel ("Opp.")] at 94.

"*quixotic pursuit to harm* [15] *[Respondent] on personal grounds*."[33] Respondent asserts that the Vice Chancellor "was either lacking capacity or harbored personal animus."[34]

Respondent also claims that he "seeks to get to the bottom of why the Vice Chancellor would have undertaken a personal vendetta against [Respondent] by filing a totally unexplained complaint with the ODC."[35] Further, Respondent charges that the "Vice Chancellor intentionally doctored up the record with hyperbolic and defamatory statements about [Respondent] to get the ODC to further his campaign to harm [Respondent] solely on his personal dislike of [Respondent]."[36] Responded advocates that the Vice Chancellor should be "wide open to discovery, so that [Respondent] can unearth why the Vice Chancellor's bizarre and unfounded conduct, which has resulted in [Respondent] being victimized and hassled for over 5½ years now, took place."[37] Further, he argues that "[t]he Confrontation Clause of the 6th Amendment to the United States Constitution guarantees [Respondent] the right to confront his accuser at trial."[38]

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[33] *Id.* at 93 (emphasis in original).

[34] *Id.* at 94.

[35] *Id.* at 97.

[36] *Id.* at 94.

[37] *Id.* at 95.

[38] *Id.* at 98.

G. In March 2018, ODC files a Petition for Interim Suspension against Respondent, but the Supreme Court stays it.

On March 12, 2018, ODC filed a petition under Rule 16 of the Procedural Rules against Respondent seeking an interim suspension of the Respondent (the "Interim Petition").[78] The Interim Petition was filed *after* the Respondent filed his Writ of Mandamus[79] but *before* the Writ Hearing.[80] The Interim Petition asserted that Respondent should be immediately suspended because "he posed a significant threat of substantial harm to the orderly administration of justice."[81] To support its assertion, ODC alleged that Respondent filed "various frivolous motions" in different ODC disciplinary investigations.[82] The Interim Petition identified three actions Respondent filed in Superior Court that ODC contended were "frivolous."[83] One of those actions was Respondent's Writ of Mandamus.[84]

On April 19, 2018, the Delaware Supreme Court, after receiving submissions from Respondent, stayed the Interim Petition to permit time for these actions to be [24] resolved.[85] The Court stated that because one of the three actions "is currently on appeal" to the Supreme Court and the Writ of Mandamus "remains

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[78] [Opp.] Ex. 46 at 1.

[79] *Id.*; *see also supra* at 20.

[80] *See supra* at 20.

[81] *See* Opp. Ex. 46 at 1.

[82] *Id.*

[83] *Id.* at 1-2.

[84] *Id.* at 2.

[85] *Id.* 3-4.

pending before the Superior Court," it was "in the interests of the orderly administration of justice" to stay the Interim Petition while the actions remain pending.[86]

About a year later, on April 11, 2019, Chief Disciplinary Counsel Mette, who replaced Aaronson, caused ODC to move to withdraw the Interim Petition without prejudice ("Motion to Withdraw").[87] In response, Respondent objected and argued that the Writ of Mandamus should be dismissed rather than withdrawn. Respondent also moved to strike the motion because it contained "impertinent and unnecessary additional content."[88]

On May 13, 2019, the Court issued an order granting ODC's Motion to Withdraw ("Withdrawal Order").[89] It rejected Respondent's objection finding that "we do not see the difference between withdrawal or dismissal of the petition."[90] The Withdrawal Order also denied Respondent's request to strike the motion holding that "[t]here is nothing in the Motion to Withdraw, which recites the procedural history of this matter and quotes the Court that merits striking."[91]

[25]

The Petition (in this disciplinary action) alleges that Respondent made statements about the Withdrawal

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[86] *Id.*

[87] Opp. at 56; Opp. Ex. 49 at 2-3.

[88] Opp. Ex. 49 at 3.

[89] *Id.*

[90] *Id.*

[91] *Id.*

Order to the Supreme Court in a subsequent motion.[92] It refers to Respondent's January 2, 2020 Motion to Dismiss ("January 2020 Motion to Dismiss") in which he allegedly stated that "[t]he Delaware Supreme Court failed to even consider" Respondent's motion and "sided with ODC's cowardly, evasive 'Withdraw' of the baseless [Interim Petition] instead of dismissing it as required by the DLRDP."[93] The Petition further alleges that Respondent stated that "[i]t seems that when it comes to disciplinary proceedings, to quote George Orwell: 'some animals are more equal than others.'"[94]

Respondent seeks to depose three of the 5 Justices who were members of the Court's Panel.[95] Respondent argues that he needs to depose these Justices because his statements were "founded upon the decision of those three members of the Supreme Court" allowing ODC to withdraw the Interim Petition.[96] Further, he asserts that his statements should cause the entire Panel to become "witnesses that [he] must depose in order to defend against multiple charges."[97]

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[92] [Petition for Discipline (the "Petition") (Feb. 2020)] ¶ 32(g); Ex. 20 ¶27 and n.6.

[93] *Id.*

[94] *Id.*

[95] Opp. at 90. Respondent identifies Chief Justice Seitz, Justice Traynor, and Justice Vaughn as the Justices who granted the Motion to Withdraw, but it was then-Chief Justice Strine, then-Justice Seitz, and Justice Traynor who granted the motion.

[96] *Id.*

[97] *Id.* Further, as discussed *infra*, Respondent seeks discovery on whether the 5 Justices actually opened and/or considered the January 2020 Motion to Dismiss. *See infra* at 31-32.

[39]

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B. Discovery of judiciary and adjudicatory officials are generally barred.

Seeking discovery from a judge and adjudicatory officials is strongly discouraged. In *Brooks v. Johnson*, the Delaware Supreme Court held that judges and other persons performing adjudicatory functions are not subject to examination [40] in furtherance of a party's litigation objectives.[149] It concluded that members of a medical malpractice review panel who served as adjudicatory officials could not be subpoenaed.[150] It found that "it is most irregular to subject adjudicatory officials to pre-trial or trial interrogation regarding their mental or decisional processes in the proper performance of their official duties."[151]

Similarly, in *Evans v. Justice of the Peace Court No. 19*, the Court stated that a "Justice of the Peace who imposed [a] sanction is precluded from appearing or being compelled to appear as a witness in the Superior Court."[152] The Court reconfirmed its holding in *Brooks* explaining that that "examination of a judge's mental process would be destructive of judicial responsibility and undermine the integrity of the judicial process."[153]

The Delaware Supreme Court and the Board also have rejected arguments that a party has a constitutional right to depose a judge or adjudicatory official

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[149] *Brooks v. Robinson*, 560 A.2d 1001, 1002, 1004 (Del. 1989).

[150] *Id.* at 1004.

[151] *Id.*

[152] 652 A.2d 574, 577 (Del. 1995) (citing *Brooks*).

[153] *Evans*, 652 A.2d at 577 (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941); *see also Redacted Board Opinion Granting Judge's Motion to Quash Subpoena*, at 8 (Nov. 5, 1999).

when the underlying process itself provided due process. In *Brooks*, the Delaware Supreme Court found that the introduction of a "panel's opinion into evidence does not violate due process because the parties were given ample opportunity before and during trial [41] to refute the evidence, and to cross-examine witnesses relied upon by the panel."[154] Similarly, in *Redacted Board Opinion Granting ODC's Motion to Quash Subpoena Duces Tecum*,[155] the Board granted a motion to quash a subpoena of a Vice Chancellor over a respondent's argument that he/she had a due process constitutional right to present evidence to the Board concerning the Vice Chancellor's mental process.[156]

While not a complete bar, a party seeking discovery from a judge about facts he observed in another proceeding may obtain discovery, but only in "the rarest of circumstances."[157] And, to obtain this limited discovery, a party must satisfy a heavy burden.[158] A party must show that "there is a compelling need for a judge's testimony as to observed facts in order that justice be done."[159]

Accordingly, while, in the rarest of circumstances, a judge may be called for compelling reasons to testify as to observed facts, a judge's mental processes in

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[154] *Brooks*, 560 A.2d at 1002.

[155] *Redacted Board Opinion Granting ODC's Motion to Quash Subpoena Duces Tecum*, at 3, 7-9.

[156] *Id.* at 3.

[157] *McCool v. Gehret*, 657 A.2d 269, 281 (Del. 1995).

[158] *McCool*, 657 A.2d at 281. In *McCool*, the Delaware Supreme Court cited *Gold v. Warden, State Prison*, 610 A.2d 1153, 1157 (Conn. 1992).

[159] *Gold*, 610 A.2d at 1157 (Conn. 1992).

arriving at a decision may not be examined.[160] As stated in *United States v. Roth*,[161] the "overwhelming authority from the federal courts in this country, including the [42] United States Supreme Court, makes it clear that a judge may not be compelled to testify concerning the mental process used in formulating official judgments or the reasons that motivated him in the performance of his official duties. Judges are under no obligation to divulge the reasons that motivated them in their official acts; the mental processes employed in formulating the decision may not be probed."[162] Similarly, other state precedent is in accord.[163]

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C. The Vice Chancellor Subpoena seeking irrelevant and privileged information is not discoverable.

On October 21, 2020, the Vice Chancellor was served with a subpoena to appear for a deposition in

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[160] *State v. Williams*, 621 A.2d 1365, 1369 (Conn. App. Ct. 1993).

[161] *United States v. Roth*, 332 F. Supp. 565, 567 (S.D.N.Y. 2002).

[162] *Id. See also Zabresky v. Von Schmeling*, 2013 WL 1402324 *2-3, 4 (M.D. Pa. Apr. 5, 2013) (granting motion to quash subpoena issued to judge who allegedly had an *ex parte* conversation on the basis of the public policy that judges should not be required to testify concerning their judicial decisions).

[163] *See In re Enforcement of Subpoena*, 972 N.E.2d 1022, 1029 (Mass. 2012) (recognizing that maintaining the confidentiality of the inner workings of the court encourages candid discussions); *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727, 736 (W.Va. 2000) (holding "judicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts").

connection with this disciplinary matter and bring with him "[c]opies of all medical records, doctor prescriptions, diagnoses, and prognoses regarding any condition(s) that [he] sought or received treatment or medication for in the time period July 1, 2014 through December 31, 2015."

1. The Vice Chancellor Subpoena does not seek relevant information.

Based on the face of the Vice Chancellor Subpoena, beyond what is reflected in the Vice Chancellor hearings and orders, there is no indication that testimony from [43] the Vice Chancellor is relevant to the charges made in the Petition against Respondent. As discussed *supra*, the Petition makes allegations about Respondent's statements and conduct in the *Seabreeze Litigation*.[164] The Vice Chancellor's reasoning underlying his rulings are reflected by these court records. He is not otherwise involved in this proceeding or in possession of relevant information. Accordingly, the Vice Chancellor Subpoena fails to call for relevant discovery.[165]

2. The Vice Chancellor Subpoena improperly seeks discovery of the Vice Chancellor's mental process.

In an effort to establish relevance, Respondent, in the Opposition Brief, states that he subpoenaed the Vice Chancellor to examine his mental process underlying his ruling and referral.[166] For example, Respon-

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[164] *See supra* at 10, 12-15.

[165] *See In the Matter of a member of the Bar of the Supreme Court of Delaware Samuel L Guy, Esquire*, 625 A.2d 279, at *2, 4 (Del. 1993) (upholding denial of the issuance of subpoenas where the information requested was irrelevant to the proceedings).

[166] *See supra* at 14-15.

dent says that he wants this discovery to unearth the Vice Chancellor's alleged "true motivation" behind his referral to the ODC[167] and "to get to the bottom of why the Vice Chancellor would have undertaken a personal vendetta against [Respondent] by filing a totally unexplained complaint with the ODC."[168]

[44]

However, even if relevant (which it is not), as discussed *supra*, a member of the judiciary's mental process is privileged.[169] Any effort to discover the Vice Chancellor's decision-making process is precisely the sort of discovery that has been barred by many courts.[170]

Respondent's generalized allegations that the "[t]he Confrontation Clause of the 6th Amendment to the United States Constitution guarantees [him] the right to confront his accuser at trial" and that "Due Process makes it essential for a trial to be conducted before an unbiased judge"[171] does not provide a basis to overcome the judicial privilege. As discussed *supra*, a party does not have a constitutional right to depose a judge or adjudicatory official when a prior proceeding provided due process.[172] If a generalized claim

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[167] *Id.* at 14.

[168] *Id.* at 15.

[169] *See supra* at 39-42.

[170] *Id.*

[171] Opp. at 93, 97 and 98. ("[Respondent] has a right to confront his accuser." (Opp. at 93); "Due Process makes it essential for a trial to be conducted before an unbiased judge." (Opp. at 97 n. 44); "the Confrontation Clause of the 6th Amendment to the United States Constitution guarantees [Respondent] the right to confront his accuser at trial." (Opp at 98)).

[172] *See supra* at 40-41.

asserting the Confrontation or Due Process Clauses were permitted, it could eviscerate the well-established rule that shields a judicial member's mental process. A litigant could simply assert that a judge was biased or had animus which would then permit inquiry into the mental process of a judiciary member's "true motivation" "to get to the bottom" of a decision.

[45]

Here, in the *Seebreeze Litigation*, Respondent was afforded the same due process rights provided to litigants in the Court of Chancery. When Respondent's opposing counsel alleged that Respondent had been involved in a "sham transaction designed to evade an order of the Court,"[173] Respondent had an opportunity to present his arguments at two evidentiary hearings.[174] During these hearings, the Vice Chancellor rejected the Respondent's arguments and held that Respondent and his client had entered into a sham transaction.[175] Statements made at these hearings by Respondent and the Vice Chancellor were transcribed and available to Respondent.[176] Respondent also had an opportunity to appeal the Vice Chancellor's rulings, but did not. Instead of appealing to the Delaware Supreme Court, Respondent filed disciplinary complaints against the Vice Chancellor with the Delaware Supreme Court and his opposing counsel with the ODC.[177]

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[173] *See supra* at 13-14.

[174] *Id.* at 14.

[175] *See* Petition Exs 9 and 10.

[176] *See supra* at 14.

[177] *See supra* at 16-17.

Further, even if the Board Chair assumes that Respondent could assert allegations to overcome the judicial privilege (which he does not hold), Respondent's allegations against the Vice Chancellor are insufficient to obtain discovery. For the reasons discussed *infra*, Respondent fails to make a threshold [46] showing of credible evidence that a constitutional claim exists to permit Respondent to obtain discovery.[178]

Similarly, to the extent that the Vice Chancellor Subpoena can be construed as seeking an inquiry into facts observed by the judge in a prior proceeding, such an inquiry is not permitted in this matter.[179] Although observed facts may be discoverable, it is granted only in the rarest of circumstances.[180] Here, Respondent does not identify any observed fact in a prior proceeding that is either relevant or highly pertinent to the Petition's allegations. Further, even if he did, Respondent's statements about the property transfer were made on the record.[181]

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[178] As discussed *infra*, courts recognize that discovery may be obtained from prosecutors in a limited circumstances that are normally protected by the prosecutorial privilege. In such cases, to obtain discovery, a claimant must make a threshold showing of credible evidence that a prosecutor violated a constitutional right. The Board Chair is not aware that this precedent applies to judicial privilege. But, even if precedent exists, Respondent fails, for many of the reasons discussed *infra*, to make the required threshold showing of a violation of a constitutional right to obtain discovery front the Vice Chancellor. *See infra at* 73-92.

[179] *See supra* at 41-42.

[180] *Id.*

[181] *See State ex rel Carroll v. Junker*, 482 P.2d 775, 781 (1971) (if there is a record of a judicial hearing, it should be accepted without further judicial explanation) (*Carroll* cited by *McCool*, 657 A.2d at 281).

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3. The Vice Chancellor Subpoena improperly seeks Vice Chancellor's medical records.

Respondent's subpoena seeking the Vice Chancellor's medical records is equally unavailing. As discussed *supra*, the Petition makes Respondent's statements and conduct relevant, not the Vice Chancellor's mental process or mental state.[182]

Respondent argues relevance by asserting that the Vice Chancellor referred the matter to the ODC. He contends that discovery into the Vice Chancellor's "medical records, doctor prescriptions, diagnoses, and prognoses regarding any condition(s) that [the Vice Chancellor] sought or received treatment or medication for in the time period July 1, 2014 through December 31, 2015" is now relevant and any privilege protecting those materials is now waived.[183] He claims that "[t]he Vice Chancellor's actions were based upon reasons other than the merits, leading to the strong suspicion that he was suffering from a physical ailment or the side effects of medication that caused his irritability, memory lapses, and emotional excesses that lead to, and formed the foundation for, his complaint to the ODC against [Respondent]."[184]

This claim, however, is nothing more than another way to seek to discovery into the Vice Chancellor's mental process. And, as discussed *supra*, Respondent's

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[182] *See supra* at 10-11.

[183] *See e.g.* Opp. at 95.

[184] *Id.* at 95-96.

[48] quest for discovery about the Vice Chancellor mental process is barred under judicial privilege.[185]

Further, the Delaware Rules of Evidence protects medical records as privileged and confidential. Delaware Rule of Evidence 503(b) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's mental health provider, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the mental health provider, physician or psychotherapist, including members of the patient's family.

No exception applies that permit Respondent to circumvent the privilege.

Nor are the Vice Chancellor's medical files public records. They are private, irrelevant to the pending disciplinary proceeding, and protected from disclosure as any such disclosure would constitute an impermissible invasion of his privacy.[186] Requiring the production of private medical records under these circumstances could have a chilling effect on a judge's performance of his duties. A judge "should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer."[187]

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[185] *See supra* at 44-45.

[186] 29 *Del. C.* § 10002(l)(1).

[187] Del. Judges' Code of Judicial Conduct R. 2.15.

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F. The 5 Justices Subpoenas seeking irrelevant and privileged information is not discoverable.

On October 21, 2020, the 5 Justices Subpoenas were served on the current members of the Delaware Supreme Court to appear for depositions. The subpoenas did not specify or proffer the matters on which Respondent seeks to question them. Nor do they contain any information regarding the relevance of the anticipated information sought.

1. The 5 Justices Subpoenas do seek relevant information.

As discussed *supra*, the Petition makes Respondent's statements and conduct relevant. It generally does not make members of the judiciary, such as the 5 Justices' conduct relevant.[228] Therefore, the 5 Justice Subpoenas, on their face, do not show relevance.

a. Discovery on the 2020 Motion to Dismiss is not relevant.

In the Opposition Brief, Respondent seeks discovery from the 5 Justices based on their alleged conduct related to the January 2020 Motion to Dismiss.[229] In an [59] effort to establish relevance, Respondent argues that he needs the Justices' depositions because the ODC made the 5 Justices necessary witnesses.[230]

Respondent points to the Petition's allegations concerning Respondent's statements made in his January

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[228] *See* [*supra*] at 10-11.

[229] *See id.* at 29-32.

[230] Opp. at 68, 89-90.

2020 Motion to Dismiss that allegedly support Counts IV and V. The Petition alleges that Respondent stated that (a) the "Vice Chancellor hoped to harm [Respondent] based on a doctored up record and referral to the ODC," (b) "[t]he wildly unfounded bluster and bombast of the Vice Chancellor notwithstanding. Spewing uncivil screed, without any basis in fact or law, does not [make a case]," and (c) '[i]f the ODC proceeds against [Respondent] in this matter, he intends to place the ODC, the Past CDC, and the Vice Chancellor on trial for their improper actions and failures to act."[231]

The Petition also alleges that Respondent stated in the January 2020 Motion to Dismiss that "[t]he Delaware Supreme Court 'failed to even consider' Respondent's motion and 'sided with ODC's cowardly, evasive 'Withdraw' of the baseless [Interim Petition] instead of dismissing it as required by the DLRDP.'"[232] And, the Petition asserts that Respondent stated that "[i]t seems that when it comes [60] to disciplinary proceedings, to quote George Orwell: 'some animals are more equal than others.'"[233]

Respondent asserts that he "wishes to inquire into whether any of the 5 Justices even opened the Federal Express envelope and/or even read the Motion to Dismiss" containing these statements.[234] He argues that this information is "highly relevant" to his "defense that there was never anything submitted to a 'tribunal' which could give rise to the charge alleged in the Petition."[235] Respondent argues that "[i]t is essential,

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[231] *See supra* at 30-31.

[232] *Id.* at 25-30.

[233] *Id.* at 25.

[234] *Id.* at 31.

[235] *Id.* at 31-32.

not just necessary, that [Respondent] be permitted to take their depositions, lest he be denied the right to a fair proceeding in violation of his Constitutional Due Process rights."[236]

Respondent fails to provide any legal authority for the proposition that actual receipt and review by the 5 Justices is required to maintain a violation of Rules 3.5(d) and 8.4(b) under Counts IV and V. To the contrary, these Rules focus on Respondent's conduct, not the 5 Justices' conduct.

b. Discovery on the Interim Petition 2020 is not relevant.

Respondent also argues that deposing three of the Justices who were members of the Court's Panel that considered the Interim Petition and issued the Withdrawal [61] Order is necessary because Respondent's own statements in the January 2020 Motion to Dismiss were "founded upon the decision of those three members of the Supreme Court."[237] However, this conclusory argument does not make discovery of the 5 Justices' conduct relevant because, as discussed previously, the Petition primarily focuses on Respondent's statements and conduct, not the 5 Justices conduct. Other than his broad constitutional assertions, Respondent provides no explanation as to why the three Justices who issued the Withdrawal Order are now necessary witnesses or what he wishes to depose them about.[238]

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[236] Opp. at 91.

[237] *See supra* at 25.

[238] *See* Opp. at 90-91.

2. The 5 Justices Subpoenas seek discovery on the Justices' mental process.

To the extent that Respondent suggests that he is requesting discovery on the 2020 January Motion to Dismiss, the Interim Petition and the Withdrawal Order to learn the underlying reasons for their decisions, such a request invades the 5 Justices mental process. And, as discussed *supra*, is barred.[239]

* * *

Date: February 22, 2021

/s/ Randolph K. Herndon
Board Panel Chair

[239] *See supra* at 39-42.

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE:	) CONFIDENTIAL)))
RICHARD L. ABBOTT, Respondent.	) BOARD CASE NO.) 112512-B

VOLUME II

Hearing held in the above matter, taken pursuant to notice at the Leonard L. Williams Justice Center, 500 North King Street, Courtroom 6A, Wilmington, Delaware 19801, on Tuesday, November 9, 2021, beginning at 9:30 a.m., before Patrick J. O'Hare, RPR, Notary Public.

BEFORE: RANDOLPH K. HERNDON, ESQ., CHAIRPERSON
JEFFREY A. YOUNG, ESQ.
GARY W. FERGUSON

* * *

[Testimony of David J. Weidman]

* * *

[487]

* * *

Q. What is your relationship with Vice Chancellor Glasscock?

A. I had practiced in front of Vice Chancellor Glasscock since I have been a lawyer when he first became a master. I had several matters in front of him, and then after he became a Vice Chancellor, I have had several cases in front of him.

So, my relationship with Vice Chancellor Glasscock is purely professional. I have never had any social relationship with Vice Chancellor Glasscock.

Q. Are you in any professional associations that he is a member of?

A. No.

Q. Was he a member of the Sussex County Bar Association when you were in the '90s?

A. I don't recall.

Q. And are you in any types of [488] private clubs or organizations that he's also a member?

A. No.

Q. And you live in Lewis, Delaware; correct?

A. I do.

Q. And so does the Vice Chancellor; correct?

A. Yes. To the best of my knowledge, yes.

Q. In fact, I think he only lives one or two neighborhoods away from you.

A. I believe he lives in a subdivision that's within a mile from my subdivision.

Q. So, let's get -- oh, sorry. I forgot some of the other background points.

You said that you regularly practice in the Court of Chancery; correct?

A. Yes.

Q. And you said -- I think you said that you represent clients from Sussex [489] County; correct?

A. Yes, of course.

Q. So, you may represent other clients that aren't residents or businesses in Sussex County?

A. I may. It's very infrequent that I represent any clients outside of Sussex County.

Q. So, who do your cases in the Court of Chancery get assigned to?

A. I don't know that process. Are you asking me the people that I practice in front of?

Q. Correct.

A. I have practiced in front of, as I said, Vice Chancellor Glasscock, I practiced in front of current Master Griffin, I've practiced in front of previous Master Ayvazian, I practiced in front of previous Chancellor Chandler, and I think that's probably it unless there's somebody I left out since 1996.

Q. All of those judicial officers [490] that you just named are geographically located, in terms of their office, in Georgetown, Delaware; correct?

A. I don't know.

Q. You don't know whether Master Patricia Walter Griffin has an office in Georgetown?

A. If you want me to assume, I would assume she has an office in Georgetown. I believe her secretary might be Upstate, and I don't know if she maintains an office Upstate.

I don't know where Master Ayvazian's office was located. I know that Vice Chancellor Chandler's

office was located downstate. You asked me if all of them were located in Sussex County.

Q. So, then, let's take it this way: Former Chancellor Chandler had chambers on the second floor of the Court of Chancery Courthouse on the circle in Georgetown; correct?

MS. VAVALA: Objection, [491] relevancy, Your Honor.

Your Honor made a point of trying to establish that we're focused on the facts of this case. What relevancy does where former Vice Chancellor -- former Chandler's office is have to the facts of this case?

MR. ABBOTT: I'm just trying to establish that he practices, it sounds like, solely in front of members of the Court of Chancery or masters of the Court of Chancery located in Georgetown. That is all.

MS. VAVALA: And respectfully, Your Honor, he's already said I don't know where some of these offices are. So, again, what does it matter where Chandler's office or where the other office was.

CHAIRMAN HERNDON: And the objection was relevancy. What's the relevancy statement?

MR. ABBOTT: Just to show that he's a Sussex County lawyer and [492] that's it.

CHAIRMAN HERNDON: And, therefore, what?

MR. ABBOTT: Nothing.

CHAIRMAN HERNDON: There's a fact, but how is that fact probative to this case? That's what my question --

MR. ABBOTT: Well, I think it --

CHAIRMAN HERNDON: Excuse me. Excuse me, Mr. Abbott.

MR. ABBOTT: -- goes to the favoritism that Mr. Weidman was shown by Vice Chancellor.

CHAIRMAN HERNDON: Okay. I'll overrule the objection.

When I ask for relevancy statement, I want a tie to the theory of the case.

MR. ABBOTT: Thank you.

BY MR. ABBOTT:

Q. All right. So, just cutting to the chase: Would you agree with me that Chancellor Chandler and [493] subsequently Vice Chancellor Glasscock had chambers in the Court of Chancery Courthouse on the circle in Georgetown?

A. Yes.

Q. And would you agree with me that Master Griffin replaced Master Ayvazian?

A. Yes.

* * *

[536]

* * *

Q. All right. Let's turn to 43.

A. (Witness complies.)

Q. Do you recall this letter?

A. I do.

Q. And do you recall stating or alleging that I made a misrepresentation to the Court?

A. Yes, I alleged that you made false representations in a sworn pleading.

Q. And you also said Mr. Abbott needs to be referred to the Office of Disciplinary Counsel; didn't you?

A. I'm going to take a moment to look at it.

Q. Go right ahead.

A. No, I did not say that.

Q. All right. Let's turn to Page [537] 2, line 3.

A. It actually begins on Page 1.

Q. I'm looking at line 3 on Page 2 where it says, quote, referral to the Office of Disciplinary Counsel, close quote.

A. Yes, but you're picking a part of the sentence that begins on Page 1 of the letter.

Q. All right. Well, then, why don't you read the whole sentence.

A. Your question to me was, I believe that it said, the Court needed to make a referral. It says -- my letter says, as part of the relief requested, I will be asking the Court to find that Mr. Abbott has violated Rule 3.3 of the Delaware Rules of Professional Conduct by making false representations to this Court resulting in a referral to the Office of Disciplinary Counsel.

Q. And you raised that because you were trying to deflect attention from [538] your own procurement -- fraudulent procurement of a Court order; correct?

A. That is false.

Q. In the next sentence you say, I made fictitious representations, do you see that?

A. Yes.

Q. And then you say, that they are an embarrassment to the Delaware Bar?

A. Your fictitious representations about me are an embarrassment to the Delaware Bar.

Q. That's what you were alleging?

A. Yes.

Q. And you then say, and reflect poorly upon Mr. Abbott's ability to comport himself with the professionalism expected of a Delaware lawyer.

A. Yes.

Q. So, you're an expert in professionalism?

A. After practicing 26 years in the Delaware Bar, I could say that, if [539] somebody wanted to call me as an expert about professionalism in the Delaware Bar, I could testify most likely, if they wanted me to, as an expert on how Delaware lawyers are supposed to comport themselves with civility practicing law in this state.

Q. So -- oh, let's talk about civility. So, you think it's civil to allege that a lawyer has committed an unethical act by bringing the truth to the attention of the Court of Chancery?

A. The premise of your question relies on your assertion that you brought truth to the Court of Chancery. What you brought to the Court of Chancery in your allegations about me were completely false.

* * *

[651]

* * *

Q. And Exhibit 58, please?

A. Yes.

Q. Part of your purpose in personal attacks on me in this document were to try to get the Vice Chancellor worked up, so to speak, or exercised; correct?

A. That is false.

* * *

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE:	) CONFIDENTIAL)))) BOARD CASE NO.
RICHARD L. ABBOTT, Respondent.	) 112512-B)

VOLUME III

Hearing held in the above matter, taken pursuant to notice at the Leonard L. Williams Justice Center, 500 North King Street, Courtroom 6A, Wilmington, Delaware 19801, on Tuesday, November 10, 2021, beginning at 9:30 a.m., before Patrick J. O'Hare, RPR, Notary Public.

BEFORE: RANDOLPH K. HERNDON, ESQ., CHAIRPERSON
JEFFREY A. YOUNG, ESQ.
GARY W. FERGUSON

* * *

[Testimony of Marshall Jenney]

* * *

[943]

* * *

Q. And as a result of that, the case was dismissed?

A. Yes, sir.

Q. Now, the dismissal of the case had had great significance, did it not?

A. Yeah.

Q. I mean, otherwise, the case would have remained pending; correct?

A. Yes, sir.

Q. And a year later or two years later --

MS. VAVALA: Objection, Your Honor. Is he asking for a legal conclusion from this witness? If so, it's not appropriate.

MR. ABBOTT: I'm just asking what his understanding was.

MS. VAVALA: It's not the question that you asked. You suggested a few answers.

MR. ABBOTT: It's leading questions. I'm on cross-examination.

[944]

CHAIRMAN HERNDON: What was the question again, Mr. Court Reporter?

(Record read.)

I'm going to overrule the objection. Let Mr. Abbott ask the next question.

We should probably be getting close to a break. You might want to end at a logical area of your cross.

MR. ABBOTT: If I could just finish this one question.

CHAIRMAN HERNDON: That's fine.

MR. ABBOTT: And I don't know if there will be one follow-up, but one or two questions.

CHAIRMAN HERNDON: You never know what you're going to get.

MR. ABBOTT: Very good, yes, sort of like the movie, life is like a box of chocolates.

BY MR. ABBOTT:

Q. So, Mr. Jenney, by the case [945] ultimately being dismissed -- I'm sorry, if the case was not ultimately dismissed, then a year or two later, the association could have come back and filed new motions demanding that you comply yet again with the 2014 consent order; correct?

A. Yes, sir, and that was my greatest fear, you know, if it were to run with the land and stay, and this was never disclosed to me by the previous attorney, you know, in this agreement, it didn't even cross my mind because I was thinking trim the trees, replant them, have them grow back, but then it was like this continuous running-with-the-land issue and the potential for devaluation, which was not a good deal for me.

Q. So, it sounds as if my legal representation of you ended up with a better result than we could have even originally imagined?

A. It was excellent. It was the [946] best legal representation money can buy.

MR. ABBOTT: All right, I'm at a great breaking point, Mr. Herndon.

CHAIRMAN HERNDON: We will break for about ten minutes. Thank you.

(Recess held.)

BY MR. ABBOTT:

Q. Let me know when you're ready, Mr. Jenney.

A. Ready.

Q. We're coming down to the homestretch here. I think that you mentioned on direct testimony with Mr. White that you had a joint bank account with your wife, Erin?

A. Yes, sir.

Q. All right. So, the bills were paid from your joint funds?

A. Yes.

Q. I mean, you never told me who pays the bills for 317 and 318, did [947] you?

A. No, sir.

Q. You didn't tell me whoever hired the contractors to do work at 317 or 318?

A. No, sir.

Q. You didn't tell me who paid the taxes for 317 or 318; correct?

A. No, sir.

* * *

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

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF DELAWARE	) **CONFIDENTIAL**)))
RICHARD L. ABBOTT, Respondent.	) BOARD CASE NO.) 112512-B)

**RECOMMENDATION OF PANEL OF BOARD
ON PROFESSIONAL RESPONSIBILITY
ON THE DISCIPLINE OF
RICHARD L. ABBOTT, ESQUIRE**

INTRODUCTION

* * *

[5]

The Panel finds that ODC has not established by clear and convincing evidence that Respondent violated Rules 3.4(c) and 8.4(a) and therefore recommends no disciplinary action for these allegations. Rule 3.4(c) provides a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." Although it is a close issue and subject to much Panel discussion, the Panel determines that the ODC has not established that Respondent caused Jenney to disobey a Chancery Court order.

When Respondent informed the Court in a March 16, 2015 letter ("Properties Transfer Letter") that his client had transferred properties to his wife

(the "Properties Transfer"), there was no violation of the then current Court obligations: Jenney was not required to trim trees and shrubs until April 22, 2015 (8 weeks from a February 25 Court Order which Order was reaffirmed in a March 3, 2015 Bench Ruling). Although the Panel determines that Respondent and Jenney attempted to disobey the Court obligations by crafting the Properties Transfer, a sham transaction, to avoid Court orders and rulings, they were not successful in their attempt to disobey because the Court took action to stop Jenney and Respondent's fraudulent conduct. As such, Respondent did not violate Rule 3.4(c).

[6]

Rule 8.4(a) provides that "[i]t 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 Panel finds that Respondent violated the principal provisions of Rule 8.4(a) because he facilitated Jenney's attempt to disobey the terms of the Consent Order and the March 3 Bench Ruling by executing the Properties Transfer. However, Respondent maintains that an "open refusal" exception provided in Rule 3.4(c) applies to Rule 8.4(a).

As noted *supra*, Rule 3.4(c) provides an exception to the prohibited act of disobeying an obligation under the rules of a tribunal: "except for an open refusal based on an assertion that no valid obligation exists." The Panel finds that for a lawyer to make an appropriate "open refusal" under Rule 3.4(c), best practice requires a lawyer to be candid and not make misrepresentations to a Court about the refusal. As discussed *infra*, Respondent's conduct in executing the sham transaction and making misrepresentations about it

to the Court falls far short of "best practice" to comply with the spirit of Rule 3.4(c) open refusal exception.

However, the Panel finds (and views it as a close call) that Rule 3.4(c)'s "open refusal" exception, as written, does not expressly impose the requirement of total candor with and/or of refraining from making misrepresentations to the Court. Obviously, the preferred method of an open refusal by most respected practicing lawyers involves notifying the Court of all pertinent information, such as notifying [7] the Court that a party does not intend to comply with an order or ruling pending an appeal. Although this method may be implicit in Rule 3.4(c), the Panel reads the Rule as written and declines to impose this standard in Rule 3.4(c). The Panel makes this determination because, in part, other Rules explicitly require a lawyer to be candid and not make misrepresentations to the Court. For example, Rule 8.4(c), as discussed in the next paragraph, requires a lawyer not to make misrepresentations to a Court.

The Panel finds that ODC presented clear and convincing evidence that Respondent violated Rule 8.4(c) by making misrepresentations to the Court contained in the March 16, 2015 Letter. Respondent made two material misrepresentations in this letter. First, Respondent misrepresented that Jenney "no longer ha[d] any ownership interest in the [P]roperties." This statement was a misrepresentation because Jenney, in fact, continued to hold defacto ownership of the Properties. The Properties Transfer was a sham transaction for the sole purpose of avoiding a Consent Order and the March 3 Bench Ruling.

In the sham transaction, legal title was transferred from Jenney to his wife with the understanding that it would be reconveyed to Jenney after the litigation

was over. After the transfer, Jenney maintained the same level of ownership control over the Properties. Consistent with the legal strategy devised by Respondent, shortly after [8] the litigation ended in August 2015, Jenney caused the Properties to be reconveyed to himself two months later in November 2015.

* * *

[96]

IV. Respondent violated Rule 8.4(c) by engaging in misrepresentations to the Court in the March 16 Properties Transfer Letter.

Rule 8.4(c) provides "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[368] Rule 8.4(c) applies to both negligent and intentional misrepresentations.[369] The Panel finds that clear and convincing evidence shows that Respondent violated Rule 8.4(c) by making misrepresentations to the Court contained in the March 16, 2015 Properties Letter.[370]

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[368] [Rule 8.4(c).]

[369] *See*, *e.g.*, *In re Woods*, 143 A.3d 1223, 1124-25, 1126 (Del. 2016) (lawyer violated Rule 8.4(c) by making negligent misrepresentations on his certificate of compliance); *In re Doughty*, 832 A.2d 724, 734-35 (Del. 2003) (lawyer's negligent misrepresentations can form the basis for a charge under Rules 8.4(c)).

[370] *See* Ex. 57. Respondent's argument that "ODC has not asserted that [Respondent] committed any violation of Rule 3.3 [involving the duty of candor]. . . [constitutes] an admission that [Respondent] was at all times forthright, truthful, and honest to the Vice Chancellor" is not persuasive. *See* Resp Memo. at 38. ODC chose to charge Respondent with violations under Rule 8.4(c) relating to misrepresentations to the Court. The Panel is not aware of any requirement under the Rules that ODC must bring charges against Respondent under Rule. 3.3 in order to make a charge under Rule 8.4(c).

Respondent's March 16, 2015 Properties Transfer Letter to the Court made two material misrepresentations. First, Respondent misrepresented to the Court that Jenney "no longer ha[d] any ownership interest in the [P]roperties."[371] Second, Respondent made a misrepresentation by stating a half-truth that Jenney's [97] obligations were "purely *in personam* obligations" under the Settlement Agreement while failing to disclose Consent Order Paragraph 17 provisions.[372]

A. Respondent misrepresented to the Court by stating that Jenney no longer had any ownership interest in the Properties.

The Properties Transfer Letter stated that the Deeds "transferring title" from [] Jenney to Erin [] . . . were recorded on March 13, 2015 and, "[a]s a result, []Jenney "no longer has any ownership interest in the [P]roperties."[373] These statements were misrepresentations because the Properties Transfer was a sham transaction; Jenney continued to hold defacto ownership rights in the Properties and intended in the near future to reconvey legal title back to himself.

1. Respondent advised Jenney on the Properties Transfer that contemplated a transfer of legal title on a temporary basis for the sole purpose of avoiding Jenney's obligations to trim trees and shrubs.

When proposing the legal strategy, Respondent advised Jenney that he could "advise the Court" that Jenney was "no longer the title owner" and that the

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[371] *Id.*

[372] *Id.*

[373] *Id.*

case was "now moot."[374] Respondent also informed Jenney that he could "just wait a few years and then have Erin convey the parcels back to [Jenney], at which time [98] Seabreeze would likely do nothing (and if they did they would probably have to file a new case against [Jenney].)"[375]

Jenney understood that Respondent's advice on the Properties Transfer was for the sole purpose of avoiding the obligations of the Consent Order. Jenney testified that the Properties Transfer was "necessary to try to end the litigation" because [Seabreeze counsel] would never allow it to end."[376] Jenney also testified that the only "pro" supporting the Properties Transfer was that the transfer would require a "a legal reboot, you know, that [Seabreeze] would have to start their case over."[377] Jenney did not view the transfer was "anything more than that."[378]

Jenney also understood Respondent's advice that the Properties Transfer would be temporary: Jenney could reconvey the Properties back to himself after the litigation ended.[379] Jenney testified that, at the time of the March 13 Properties Transfer, he "maybe, most likely" would transfer the Properties back to himself within six months.[380]

[99]

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[374] *See supra* at 21-22.

[375] *Id.*

[376] *See supra* at 22-24.

[377] *See supra* at 23.

[378] *Id.*

[379] *See supra* at 22.

[380] *Id.*

2. Jenney maintained ownership control over Properties after Properties Transfer.

Consistent with this intention, after the Seabreeze Litigation ended in mid-August 2015, Jenney "decided to put the [P]roperties back in [his] name."[381] By November 18 2015, less than eight months after the Properties Transfer, Jenney completed his plan to reconvey the Properties.[382] Jenney explained that he wanted to refinance his loans on the Properties that had remained in his name to obtain a lower rate.[383] To Jenney, reconveyance of the Properties was "just a convenience factor."[384] Further, Jenney testified that the Properties were his "to start with and, you know, at some point, I wanted to do it."[385]

Similarly, during the short time that the Deeds named Erin as title owner, Jenney continued to retain the same amount of control over the Properties. Erin had no control over them. Jenney testified that "after the deeds were recorded conveying the properties to Erin, [Jenney] had just as much control over the Properties as [he] had before the deeds were recorded to Erin.[386] Jenney also testified that "no one "else ma[d]e these decisions."[387]

[100]

Consistent with this testimony, for 317 Salisbury Street, Jenney stated that he paid the taxes, bills,

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[381] *See supra* at 30-31.

[382] *Id.*

[383] *Id.*

[384] *Id.*

[385] *Id.*

[386] *See supra* at 29-31.

[387] *Id.*

maintenance, hired contractors as necessary; made all decisions and payments on the property; and collected rent.[388] Similarly for 318 Salisbury Street, Jenney remained the person who made decisions relating to this property.[389] Jenney also testified that he was the person responsible for (a) paying all bills for property taxes, utilities, and maintenance costs (including grass-cutting) and (b) hiring contractors to service the property.[390]

B. Respondent misrepresented to the Court by stating a half-truth that the Settlement Agreement obligations were "purely *in personam*" obligations.

The Panel also finds that Respondent's statement to the Court that Jenney's obligations were "purely *in personam* obligations" under the Settlement Agreement was a misrepresentation because it was a half-truth. Respondent selectively referenced the Settlement Agreement but failed to disclose the Consent Order. As discuss *supra*, the Consent Order had incorporated the terms of the Settlement Agreement and Paragraph 17 expanded Jenney's personal obligations to trim the trees and shrubs to include Jenney's successors, heirs and assigns.[391]

[101]

Respondent was aware of Paragraph 17 of the Consent Order. In his March 9 Email to Jenney,[392] Respondent recognized that the Consent Order

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[388] *See supra* at 29-30.

[389] *See supra* at 30.

[390] *Id.*

[391] *See supra* at 12-13.

[392] *See supra* at 25-26.

expanded the Settlement Agreement's *in personam* obligations.[393] Respondent predicted that Seabreeze counsel would inevitably challenge the transfer and rely on Paragraph 17. Respondent downplayed this challenge to Jenney stating that he hoped that the Vice Chancellor would "want[] to get rid of the matter and shoot[]" this challenge down.[394] Despite knowing and understanding the likely impact of Paragraph 17 on the Properties Transfer and Seabreeze's "inevitable" challenge to it, Respondent choose not to reference the Consent Order in the March 16 Properties Transfer Letter.[395]

Respondent's failure to reference the Consent Order was intentional. When preparing the March 16 Properties Transfer Letter, Respondent had initially referenced the Consent Order in his March 9 Draft Properties Transfer Letter.[396] In the draft, Respondent wrote that Jenney would be "unable to carry out the purely *in personam* obligations under the Settlement Agreement and Consent Order.[397]

[102]

However, in the letter submitted to the Court, Respondent deleted his reference to the Consent Order.[398] What remained in the March 16 Properties Transfer Letter was a misleading half-truth: Respondent's statement that Jenney was "relieved of the purely *in personam* obligations under the Settlement

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[393] *Id.*

[394] *Id.*

[395] *Compare* Ex. 237 *with* Ex. 57; *see also supra* at 27-28.

[396] *See supra* at 28-29.

[397] *See supra* at 24-25.

[398] *See supra* at 27-29.

Agreement" without stating that the Consent Order would also be binding on Jenney's successors, heirs [and] assigns."[399]

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[120]

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3. Respondent "Message In A Bottle" argument that Respondent did not directly attack the Vice Chancellor and Delaware Supreme Court in their own courtroom has no legal merit.

Respondent proffers a "Message In A Bottle" argument saying that unless a tribunal is aware of the undignified and derogatory statements made about it, there is no violation of Rule 3.5(d).[477] Here, Respondent argues that because the "Supreme [121] Court and Vice Chancellor had no knowledge of any of [Respondent] statements," they as "human beings" cannot "perceive degradation, discourtesy, or disruption based on written statements" they do not see."[478]

Respondent's argument is wrong. Rule 3.5(d) prohibits a lawyer from "engaging in undignified and discourteous conduct that is degrading to a tribunal."[479] The text of Rule 3.5(d) does not limit this prohibition of a lawyer's degrading conduct that is aimed only to the tribunal before which the lawyer is then appearing. The underlying policy for Rule 3.5(d) is not to protect the subjective feelings of judiciary members made to them during a proceeding, but to protect the

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[399] *See supra* at 29.

[477] Resp. Memo. at 31-32, 35-36, 41, 44 and 56.

[478] *Id.* at 32.

[479] DRLPC 3.5(c).

trust and confidence of the judicial system by barring a lawyer's undignified, and discourteous statements about the judiciary.[480]

Delaware authority holds that when undignified and discourteous statements degrading to a tribunal are made to an appellate court about a lower court, then such statements violate Rule 3.5(d). In *In re Shearin*, the Delaware Supreme Court affirmed the Board's finding that a lawyer's "castigating" statements to the Delaware [122] Supreme Court that a Vice Chancellor had been bribed in an underlying Chancery Court proceeding violated Rule 3.5(c):[481]

> [In the appeal to the Delaware Supreme Court], Shearin filed a reply brief "castigating the trial judge in personal terms and suggesting there were rumors he had been bribed by her opposing party."
>
> * * *
>
> Specifically, the brief filed by Shearin accused the trial judge of the following: "Unfortunately, refusing to consider the evidence was not the only time the vice chancellor wandered beyond the bounds of judicial propriety; [H]is hostility to Shearin at every hearing was so apparent that observers in the courtroom, including newspaper reporters, repeatedly commented on it and asked Shearin whether she believed the rumors that the vice chancellor had been bribed to favor Plaintiffs; Among practicing lawyers in Wilmington, [Vice Chancellor] is reputed to have a quick temper...."
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> The Board found that these statements went "beyond 'undignified or discourteous' conduct, and

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[480] *See In re Abbott*, 925 A.2d 482, 488 (Del. 2007).

[481] *In re Shearin*, 721 A.2d 157, 162 (Del. 1998). Rule 3.5(c) was a predecessor to Rule 3.5(d).

> [were] offensive and, in a non-litigation setting, probably libelous." Thus, the Board concluded that Shearin violated Rule 3.5(c).[482]
>
> [123]

The Delaware Supreme Court accepted the Board's recommendation holding that it was "satisfied that the record before [it] supports the findings of fact and the conclusions of law made by the Board in this case."[483]

Similarly, in *In re Abbott*, the Delaware Supreme Court relied on Louisiana Supreme Court and Indiana Supreme Court holdings when discussing a Rule 3.5(d) violation.[484] The Court held that lawyers violate Rule 3.5(d) when making disparaging statements to appellate courts about a lower court's decision and/or opinion.[485] It discussed the public policy of insisting on civility that partly underlies the Rules of Professional Conduct noting that such rules exist to promote "trust and confidence" in the legal system:

> As "officers of the court," lawyers are an integral part of the institutional administration of justice. Adherence to the rule of law keeps America free.

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[482] *Id.*

[483] *Id.* at 165. Respondent argues that the Supreme Court's acceptance of a Board's recommendation is "non-precedential or of little persuasive value due to the unique and peculiar facts and circumstances of each case." Resp. Memo. at 79-80. The Panel considered Respondent's argument and determines that Respondent has not presented facts or circumstances showing that *In re Shearin* should be disregarded.

[484] *In re Abbott*, 925 A. 2d at 485-87.

[485] *See id.* at 486-87 citing *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962, 2007 WL 79231 (Utah 2007); *In re Simon*, 913 So. 2d 816, 819 (La. 2005); and *In re Wilkens*, 782 N. E. 2d 985, 986 (Ind. 2003).

> Public's respect for the rule of law requires the public's trust and confidence that our legal system is administered fairly not only by judges but also by "officers of the court."
>
> Civil behavior towards the tribunal and opposing counsel does not compromise an attorney's efforts to diligently and [124] zealously represent his or her clients. "Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process."[486]
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> * * *
>
> As this Court stated more than fifteen years ago, "[s]imply put, insulting conduct toward opposing counsel, and disparaging a court's integrity are unacceptable by any standard."
>
> Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric. The use of such rhetoric crosses the line from acceptable forceful advocacy into unethical conduct that violates the Delaware Lawyers' Rules of Professional Conduct. "Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone."[487]
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> [130]
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[486] *In re Abbott*, 925 A. 2d at 488 (footnote omitted).

[487] *Id.* at 488-89 (footnotes omitted).

i. Respondent fails to show a factual basis for claims against the Vice Chancellor.

Respondent fails to establish a factual basis supporting his claims of judicial misconduct by the Vice Chancellor.[507] Respondent merely makes conclusory assertions that the Vice Chancellor (a) "doctored-up" the record[508] (b) "disliked" and had "personal animus" against Respondent,[509] (c) "started this whole mess in the first place by filing a bogus Complaint,[510] and (d) engaged in "judicial misconduct."[511] Similarly, Respondent makes unsupported allegations that the Vice Chancellor was emotionally unhinged when he made these rulings.[512] Further, he alleges in conclusory fashion that the Vice Chancellor inappropriately favored Seabreeze counsel over Respondent showing bias.[513]

[131]

These conclusory assertions do not satisfy Respondent's burden to show facts to support his claim of judicial misconduct. As discussed *supra*, far from doctoring-up the record relating to the Properties Transfer, the Vice Chancellor relied on the factual record that showed that Respondent and Jenney engaged in a sham transaction.[514] The Vice Chancellor's

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[507] *See e.g.*, Resp. Memo. at 35, 43, 51, 59, 70-73.

[508] *Id.* at 35.

[509] *Id.* at 43, 51 and 59.

[510] *Id.* at 59.

[511] *Id.* at 70.

[512] *See e.g.* Ex. 239 ¶ 14.

[513] Resp. Memo. at 2-3, 55.

[514] *See supra* at 32-38.

findings were fully supported by the factual record and not based on an inappropriate favor of Seabreeze counsel over Respondent. Similarly, the factual record does not show that the Vice Chancellor was emotionally unhinged or suffered from any emotional infirmity. The Vice Chancellor's findings at the April 2015 Contempt Hearing, May 2015 Reconvened Contempt Hearing and June 11 Letter Decision were well reasoned and fully and fairly supported.

Specifically, so that the Panel's findings are clear, at the April 2015 Contempt Hearing, the Vice Chancellor found that "there was contempt of [his] bench order" and Consent Order.[515] The Court cogently explained that the behavior of Jenney and Respondent was unacceptable because Jenney, on advice of Respondent, "entered into a sham transaction to frustrate the specific performance of an agreement."[516] [132] There is *no* evidence that the Vice Chancellor fabricated the record or acted with personal bias or animus when making these findings.

Similarly, in the May 2015 Reconvened Contempt Hearing, the Vice Chancellor properly reconfirmed that the Properties Transfer was a "sham transfer of the property solely to avoid enforcement of a court order."[517] The Court determined that both Respondent and Jenney could be held responsible for the costs and fees associated with contempt proceedings.[518] On June 11, 2015, the Vice Chancellor appropriately restated that the Properties Transfer was a "sham transaction" and that "the transfer itself was a

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[515] *See supra* at 35-36.

[516] *Id.*

[517] *See supra* at 37.

[518] *See supra* at 37-38.

vexatious litigation tactic and was a contemptuous attempt to avoid enforcement" of a court order.[519] There is no evidence that the Vice Chancellor fabricated the record or acted with personal bias or animus when making these findings.

Further, the Panel finds that Respondent fails to show facts that the Vice Chancellor's referral of Respondent to the ODC[520] was inappropriate. The Vice Chancellor's referral of Respondent to ODC was made after Jenney testified that the sham transaction resulted from Respondent's advice and was designed to avoid a [133] court order.[521] During the May 2015 hearing, the Vice Chancellor stated that he was referring the matter to ODC because of the sham transaction and Respondent's conduct.[522] The Vice Chancellor's findings were verified at the November 2021 Hearing which showed that Respondent advised Jenney to engage in sham transaction to avoid a court order and then misrepresented to the Court about it.[523] The Panel finds no facts supporting Respondent's claims that the Vice Chancellor's referral of Respondent to ODC was based on a "doctored-up" record, a dislike or animus of the Respondent or emotional instability.

Instead, the factual record shows that Respondent's conduct is consistent with conduct that the Delaware Supreme Court has found to violate Rule 3.5(d). As

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[519] *See supra* at 38-39.

[520] *See* Ex. 73.

[521] *See supra* at 32-36.

[522] *Id.* at 38.

[523] *See supra* at 97-100.

previously quoted *supra*,[524] but worthy of emphasis, *Shearin* and *Abbott* are particularly apt here:

> The Board found that these statements went "beyond 'undignified or discourteous' conduct, and [were] offensive and, in a non-litigation setting, probably libelous." Thus, the Board concluded that Shearin violated Rule 3.5(c).[525]

* * * *

[134]

> As this Court stated more than fifteen years ago, "[s]imply put, insulting conduct toward opposing counsel, and disparaging a court's integrity are unacceptable by any standard."
>
> Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric. The use of such rhetoric crosses the line from acceptable forceful advocacy into unethical conduct that violates the Delaware Lawyers' Rules of Professional Conduct. "Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone."[526]

Respondent also alleges that Seabreeze counsel "lied more than a dozen times"[527] to the Vice Chancellor and "committed Lawyer Misconduct by falsely procuring 2 Court Orders and causing needless waste of considerable party and judicial resources."[528] Respondent

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[524] *See supra* at 122-24.

[525] *Shearin*, 721 A.2d at 162.

[526] *In re Abbott*, 925 A.2d at 488-89 (footnotes omitted).

[527] Resp. Memo. at 2-3.

[528] *Id.* at 55.

suggests that the Vice Chancellor's failure to refer Seabreeze counsel to ODC for misconduct while referring Respondent to ODC shows the Vice Chancellor's bias against Respondent.[529] The Panel carefully reviewed the transcripts and the communications presented during the Hearing among Respondent, Seabreeze counsel and the Court and determines that Respondent failed to present a factual basis showing that the Vice Chancellor [135] mistreated Respondent in favor of Seabreeze counsel when the Vice Chancellor referred Respondent to the ODC, but not Seabreeze counsel.

Consequently, Respondent failed to show any factual basis to support his claim that his statements about the Vice Chancellor are True and Protected Opinions to support his affirmative defense under the 1st Amendment.

ii. Respondent fails to show a factual basis for claims against the Delaware Supreme Court.

Similarly, Respondent fails to establish a factual basis showing judicial misconduct by the Delaware Supreme Court.[530] Instead, Respondent makes

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[529] *See e.g.*, *id.*

[530] *See e.g.*, Resp. Memo at 1-2, 59-60, 69-70. In his post-hearing memo, Respondent made little effort to support his constitutional arguments with factual support. Instead, at times, Respondent referenced the Panel to documents outside the Resp. Memo. and requested the Panel to incorporate them by reference. For example, for claims against the Delaware Supreme Court, Respondent states that his "legal points establishing the illegality of [a Supreme Court Order in App. Ex. C] and related matters . . . found at App. Exs. D and F (which are incorporate herein by reference)." *See* Resp. Memo at 70. Such attempts, as discussed *supra*, to incorporate entire documents into a post-hearing brief is an inappropriate attempt to exceed the page limits on briefing,

conclusory assertions that the Delaware Supreme Court acted inappropriately with (a) 2016 Supreme Court Jenneys' Complaint Dismissal,[531] (b) 2019 Supreme Court [136] Writ Dismissal[532] and (c) 2019 Supreme Court Withdrawal Order.[533] As discussed *supra*, Respondent charged the Delaware Supreme Court with (a) "looking a blind eye to corruption that has infected the ODC's dealings in this matter,"[534] (b) siding with "ODC's cowardly, evasive 'Withdraw,'"[535] and (c) applying different standards to lawyers alleging that "when it comes to disciplinary proceedings, to quote George Orwell: 'some animals are more equal than others' claims."[536]

These attacks on the Delaware Supreme Court amount to nothing more than an inappropriate expression of dissatisfaction to adverse rulings. Respondent fails to satisfy his burden to show a factual basis that the Delaware Supreme Court encouraged ODC and others involved in the Delaware Disciplinary System to engage in corruption.

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which is not permitted under Delaware authority. *See generally Washington v. State*, 164 A.3d 56 (Table) at *2 (Del. 2017.) However, even after a review of these submissions, the Panel determines that Respondent fails to provide a factual basis to support his constitutional arguments relating to his intemperate and reckless attacks against the Delaware Supreme Court.

[531] *See generally supra* at 59-60.

[532] *See generally supra* at 60-61.

[533] *See generally supra* at 63.

[534] *See supra* at 69, 74.

[535] *See supra* at 74-75.

[536] *See supra* at 75.

July 11, 2022.

/s/ _____
Randolph K. Herndon
Panel Chair

/s/ _____
Gary Ferguson
Panel Chair

/s/ _____
Jeffrey A. Young
Panel Chair