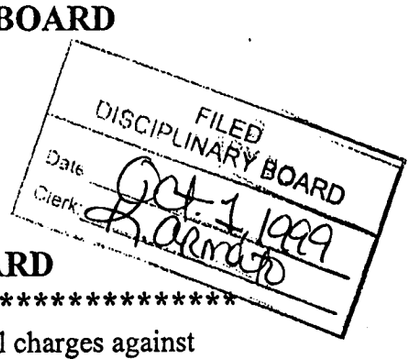
Original

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: EDMUND W. GOLDEN

NUMBER 97-DB-055



RULING OF THE DISCIPLINARY BOARD

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This is a disciplinary proceeding based on the filing of formal charges against Edmund W. Golden by the Office of Disciplinary Counsel.

PROCEDURAL HISTORY

Formal charges were filed against the Respondent on August 29, 1997. The Respondent filed an answer in proper person on September 25, 1997, basically denying the allegations of misconduct. Counsel enrolled to represent the Respondent on November 12, 1997. A hearing on the formal charges was originally scheduled for December 8, 1997. The Office of Disciplinary Counsel, (ODC hereinafter) filed a motion for discovery violations and sanctions on November 20, 1997 alleging the Respondent failed to provide the ODC with its list of prospective witnesses by the deadline. A motion to continue the hearing was filed by the Respondent on November 21, 1997. The Respondent filed an opposition to the ODC's motion for discovery violations and sanctions on November 25, 1997. The ODC also filed an opposition to the Respondent's motion to continue on November 25, 1997. On December 4, 1997, the Hearing Committee issued an order granting the Respondent's motion to continue the hearing that was scheduled for December 8, 1997.

The hearing was subsequently rescheduled for January 20, 1998. The respondent filed a second motion to continue on January 12, 1998 due to a heart attack suffered by the Respondent. There was no opposition by the ODC to the motion. The Hearing

Committee issued an order granting the motion on January 13, 1998. The hearing was rescheduled and held on May 13, 1998 before Hearing Committee #10. The Committee members were Martin Stern, acting Chairman, L. Gerome Smith, lawyer member and Dr. Constance Dolese, public member. The Committee issued its findings and recommendations on April 12, 1999 dismissing both counts of misconduct against the Respondent.

On May 27, 1999, a panel of the Disciplinary Board reviewed this matter. The Respondent was presented and represented by Mr. Kenneth C. Fonte. Mr. G. Fred Ours represented the Office of Disciplinary Counsel.

FORMAL CHARGES

The formal charges against the Respondent consist of two (2) counts. The first count alleges that the Respondent represented Christopher Andre and his parents, Orville and Ester Andre, in October 1984 in a personal injury case. At the time the Respondent represented the Andres he was also representing the Parish of Jefferson as an assistant Parish Attorney, assigned to work on Department of Public Works cases. When the suit was filed by the Respondent on behalf of the Andres, it named the Parish of Jefferson as defendant alleging the Parish was negligent in that it failed to properly barricade, light and mark tne street where construction was underway, and where the plaintiff Christopher Andre was injured. It was alleged that the Respondent failed to disclose to his clients that he represented the Parish of Jefferson on public works cases, and that this conflict of interest by the Respondent was conduct in violation of Rules 1.4, 1.7, 1.10,1.16(a)(b) and 8.4(a)(c) of the Rules of Professional Conduct.[1]

[1]The ODC later modified its allegation of conflict alleging that a waiver by the clients, if given would be improper because the Respondent was a government attorney and could not ethically seek a waiver.

Count II of the formal charges alleges that on October 4, 1991, the Respondent submitted a costs and expenses claim to the counsel disbursing the settlement proceeds in the Andre's case. The Respondent included in the claim an amount of $5,872.07 for costs expended by his former employer Wiedemann and Fransen, which was not the Respondent's expense. When the Respondent received the check in the amount of $39,038.74, for legal fees and costs, it included the $5,872.07 sum for Wiedemann and Fransen. It is alleged that the Respondent refused, failed or neglected to remit the funds to the successor of the Wiedemann & Fransen firm and instead commingled and converted the funds to his own use. It is alleged that the Respondent's conduct violated Rules 1.15(a)(b) and (c) and 8.4(a)(c) of the Rules of Professional Conduct.

FINDINGS OF HEARING COMMITTEE

Prior to hearing the merits of the case, the Hearing Committee (H.C. herein after) ruled on two evidentiary issues. The ODC wanted to introduce deposition testimony in lieu of live testimony of some witnesses even though the witnesses were subpoenaed and available for the hearing. The Respondent objected and cited Rule XIX, Section 18(B)[2] as controlling authority. The ODC also relied upon Rule XIX, Section 18(B), but stated that the provision does allow the sworn testimony even if the witnesses are available. The Committee decided that since neither of the parties provided cases controlling on the issue or briefs, the issue would be resolved in the following manner:

1) if a witness was subpoenaed and available, either side may call that witness for live testimony;

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[2] Rule XIX, sec. 18(B) provides, "Except as otherwise provided in these rules, the Louisiana Code of Civil Procedure and the Louisiana Code of Evidence apply in discipline and disability cases. No provision of the Louisiana Code of Evidence shall prevent the introduction of sworn testimony from social security hearings, trials, or hearings of a contradictory nature where the respondent has cross-examined the witness whose testimony is sought to be introduced."

2) if the witness testified live, their deposition testimony would not be allowed into evidence;
3) if neither side elected to call the witness for live testimony, then the deposition testimony of the witness would be allowed.

The H.C found the ODC's argument regarding Rule XIX, § 18(B) to be meritless. The Committee's interpretation of the Rule was that if the witness was subpoenaed and available, the deposition testimony of such witness is not allowed. The Committee stated, "the rule allows for the introduction of recorded testimony of an available witness only when the testimony is from a proceeding that is of a contradictory nature, such as a trial or hearing. By its terms, this does not seem to include deposition testimony."

The other preliminary issue decided by the Committee was the admissibility of expert testimony. The ODC wanted to introduce the deposition testimony of former Louisiana Supreme Court Justice, Pike Hall. Justice Hall's testimony was solely for the purpose of giving his expert opinion regarding the application of the rules of ethics. The Committee excluded the testimony of Justice Hall because it felt the application of the rules of ethics is the sole province of the H.C., the Disciplinary Board and ultimately the Supreme Court. The H.C. ruled that it is charged with the responsibility of receiving evidence and interpreting the Rules of Professional Conduct.

Considering the merits of the case, the H.C. dismissed both counts of alleged misconduct against the Respondent. The Committee found several undisputed facts of the case. Particularly they found that it was undisputed that the Respondent undertook the representation of the Andres while he was also employed as an assistant Parish attorney in Jefferson Parish. The Committee found the disputed issue as to count I of the formal charges was whether the Respondent disclosed the conflict of interest to the Andres. The Committee relied upon the testimony of the Respondent and the witnesses,

Michael Power and Christopher Lawler. The Committee determined that the conflict was disclosed to the Andres and the Parish of Jefferson, and a waiver was sought and obtained by the Respondent. The Committee felt that the testimony of the disinterested witnesses, (Powers and Lawler) was most credible. The Committee's findings of law were based primarily on Rule 1.7 of the *Rules of Professional Conduct* and the comments to the *ABA Annotated* ***Model Rules of Professional Conduct***, Rule 1.7(3d ed. 1996)[3]. They found that the Respondent properly withdrew from representing the Andres when he determined that the Parish would be a significant defendant in the litigation. Additionally, the Committee found that the ODC's argument that the conflict was not waivable because Mr. Golden was a part-time government employee was meritless. Since the ODC relied upon the Louisiana Code of Governmental Ethics as its authority, the Committee ruled it did not have the authority to enforce any rules other than the Rules of Professional Conduct. The Committee also noted, but did not decide, that to invoke the Code of Governmental Ethics against the Respondent may be unconstitutional because the Louisiana Supreme Court has sole authority to regulate the practice of law in Louisiana. Thus the Committee dismissed the charge as stated in Count I.

As to Count II of the formal charges, the Committee found that the Respondent did retain cost in the amount of $5,872.07 that were due the successors of the Weidemann and Fransen law firm. However, the Committee stated in their recommendations that this was a fee dispute between lawyers and such disputes between lawyers, which form the basis of civil litigation, are generally not appropriate as the basis for ethical complaints.

[3] "When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent."

LSBA v. Causey, 440 So.2d 125(La. 1983). The Committee recommended that the charge as stated in Count II also be dismissed against the Respondent.

DISCUSSION

Although the Board would perhaps have concluded differently had it been the trier of fact, the Hearing Committee decided that Respondent told both Mr. and Mrs. Andre, as well as the Parish Attorney of Jefferson Parish, about the conflict of interest and obtained all interested parties' consent to his representation. Insofar as the Andres are concerned, although they denied being informed of a conflict and giving any informed consent to the representation, the Hearing Committee's decision that such a knowing waiver was obtained by Respondent is not manifestly erroneous or clearly wrong.

The Hearing Committee concluded that an informed waiver from the Parish of Jefferson was also obtained by Respondent, based on his testimony that he informed the then Parish Attorney of his intent to name Jefferson Parish as a party defendant in the Andres' lawsuit and obtained consent to such representation. To corroborate Respondent's testimony, he produced an interoffice communication dated September 10, 1985 from Respondent to the Parish Attorney (now deceased), Hubert Vondenstein. Although serious doubts about the authenticity of this self-serving memorandum are present in the record, the Hearing Committee concluded that Respondent did indeed have conversations with Mr. Vonderstein and obtained his knowing waiver of the conflict, which factual finding the Board is powerless to disregard unless clearly wrong. Assuming without deciding that Respondent sought and obtained permission from the Parish Attorney for the suit against Jefferson Parish, the question remains as to whether

such a conflict by a government-employed attorney is waivable and, if so, whether the Parish Attorney had the authority to grant a waiver.

Although the burden is on the Office of Disciplinary Counsel to prove all essential elements of an alleged violation by clear and convincing evidence, it was the duty of Respondent to prove by a preponderance of the evidence that he informed all interested parties of his admitted conflict of interest and obtained all parties' informed consent to his representation. The record contains absolutely no proof whatsoever that the Parish Attorney for the Parish of Jefferson had authority to allow assistant Parish Attorneys to sue the Parish. It should here be noted that there is a conflict of authority concerning government entities consenting to conflicts of interest, as observed by the *Annotated Model Rules of Professional Conduct, 3d ed., page 11 8*:

> "The jurisdictions differ about whether a government entity's consent can cure a conflict of interest in the same way that a private client's consent can do so. Some jurisdictions, reasoning that a government lawyer may use, or suggest an ability to use, his or her position with the government entity to secure consent improperly, or to gain an improper advantage for a private client (and noting that the public interest is involved), adhere to a per se "government cannot consent" rule. *See, e.g., State ex rel. Morgan Stanley & Co. v. McQueen,* 416 S.E. 2d 55 (W. Va. 1992) (government inherently incapable of consenting to its law firm's concurrent representation of government employees who, though not named as parties, indirectly accused of acting contrary to government's interest). Other jurisdictions find this rationale paternalistic. *See, e.g., N.* Y. State Bar Assn, Comm. On Professional Ethics, Op. 629 (1.992) (modifying prior opinions and holding that when official empowered to consent and process of consent unassailable, government consent may cure conflict)."

Additionally, the Board agrees with the following quotation from *In Re: LaPinska*, 72 Ill. 2d 461, 381 N.E. 2d.700, 21 Ill. Dec. 373:

> "Moreover, an attorney who represents the public must be particularly wary of potential conflicts because he is measured not only by the honesty of his intentions and motives, but by the suspicion with which his acts may be viewed by the public. A public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptations of acting in any manner other than in the best interests of the public."

In view of the questionable practice of governmental entities consenting to conflicts of interest and because of the high duty imposed on governmental attorneys to avoid potential conflicts, woefully inadequate proof was offered by Respondent on the issue of consent by Jefferson Parish to the conflict of interest. Absent proof in the record that the governing body of Jefferson Parish consented to the conflict or that it authorized its parish attorney to do so, the Hearing Committee's contrary finding cannot be affirmed. Therefore, the Board recommends that Respondent be found to have violated Rule 1.7(a)(2) of the Rules of Professional Conduct.

Turning now to the second count of the formal charges (growing out of the collection by Respondent of $5,812.07 from the settlement proceeds of the Andres' case, which were costs expended by his former employer Wiedemann and Fransen), the Hearing Committee found that Respondent and the principals of the former firm Widemann and Fransen were involved in an ongoing dispute concerning the sharing of fees and costs on a number of files. As such, the Hearing Committee concluded that this was a fee dispute which under *LSBA v. Causey, 440 S.2d 125 (La. 1983)*, was not an appropriate basis for ethical complaints. Although it does appear to the Board that the Office of Disciplinary Counsel has proven by clear and convincing evidence facts which constitute a violation of Rule 1. 15, it also appears that under the jurisprudence disputes between lawyers concerning fees and costs are not considered appropriate as the basis for ethical complaints. *LSBA v. Causey, supra; In Re: Hackett*, 701 S.2d 920 (La. 1997).

Therefore, the Board recommends that the Hearing Committee's decision dismissing all charges growing out of count II of the formal charges be affirmed.

APPLICATION OF FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

Louisiana Supreme Court *Rule XIX §10C* 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.

We find that the Respondent violated his duty to his clients and the profession. Additionally, the Respondent's actions were knowing and negligent. The aggravating factors found are dishonest or selfish motives, refusal to acknowledge wrongful nature of conduct; substantial experience in the practice of law. The mitigating factors present were no prior disciplinary record and, upon eventual recognition of the conflict, the Respondent ceased working on the matter, though he never formally withdrew as counsel of record for the Andres. There was no showing by disciplinary counsel in the record of any actual harm to either client. The Andres' case was settled with their approval, and the Parish of Jefferson's portion of the settlement was minimal. Pursuant to the *ABA Standards For Imposing Lawyer Sanctions*, Standard 4.33, "reprimand is generally appropriate where a lawyer is negligent in determining whether the representation of a

client may be materially affected by the lawyer's own interests, or where the representation will adversely affect another client, and cause injury or potential injury to the client." In light of the absence of a waiver by the Parish of Jefferson coupled with the aggravating factors, a public reprimand would be the appropriate sanction to address the misconduct of the Respondent.

RULING

In finding that Mr. Golden violated Rule 1.7(a)(2), the Disciplinary Board **ORDERS** that a public reprimand be issued against the Respondent for engaging in misconduct; and that the charge in Count II of the formal charges be dismissed against the Respondent.

The Disciplinary Board further **ORDERS** that Respondent be assessed with all costs and expenses of these proceedings, with legal interest to commence running thirty days from the date of finality of this ruling.

LOUISIANA ATTORNEY DISCIPLINARY BOARD
John G. Beckwith, Sr.
Reginald R. Brown, Sr.
Burton E. Cestia, Jr.
Peter T. Dazzio
James L. Pate
Joseph L. Shea, Jr.
Jack O. Whitehead. Jr.

BY: _____
DONALD R. BROWN
FOR THE ADJUDICATIVE COMMITTEE

Robert E. Leake, Jr. – Dissents as to Count II

LADB No. 97-DB-055
Edmund W. Golden

Partial Dissent:

As to Count II, it seems that the disputed $5,872.07 was not retained by Respondent in trust, as it should have been, there being an adverse claim to the funds. Rule 1.15(b). I would find Respondent guilty of commingling. True, it's a dispute among lawyers and the client evidently suffered no prejudice. I see no reason to increase the sanction beyond a public reprimand, except that if the dispute over the fund is not ended I'd require those funds to be put in a trust account.

Robert E. Leake Jr.

ROBERT E. LEAKE, JR.