ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: TROY A. HUMPHREY

NUMBER: 12-DB-073

RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

This is a disciplinary proceeding based upon the filing of formal charges against Troy A. Humphrey ("Respondent") by the Office of Disciplinary Counsel ("ODC"). The charges consist of one count alleging multiple violations of the Rules of Professional Conduct. Specifically, Respondent is charged with violating Rule 1.5 (failing to properly deposit advanced fees into a client trust account); 1.15(a) (failing to safeguard client property and follow proper trust accounting procedures); Rule 1.16(d) (failing to return an unearned fee); and 8.4 (violating the Rules of Professional Conduct).

Following the formal hearing in the matter, the hearing committee concluded that Respondent violated Rules 1.16(d) and 8.4 of the Rules of Professional Conduct, but that there was insufficient evidence to establish that he also violated Rules 1.5 and 1.15(a) as alleged in the formal charges. Accordingly, the committee recommended that Respondent be publicly reprimanded. For the reasons stated below, the Board adopts the factual findings and legal conclusions of the hearing committee. The Board also adopts the committee's recommendation of a public reprimand as the appropriate sanction for Respondent's misconduct under the circumstances. Additionally, the Board recommends that Respondent be assessed with all costs and expenses of these proceedings. Notably, ODC voiced no objection to the Hearing

Committee's findings and sanction recommendation in light of the evidence and limited testimony presented at the hearing.[1]

PROCEDURAL HISTORY

Formal charges, consisting of one count, were filed by ODC against Respondent on October 24, 2012. The charges stem from a complaint filed by his former client, Reginald D. Winfield, and allege that Respondent violated Rules 1.5, 1.15(a), 1.16(d), and 8.4[2] of the Rules of Professional Conduct.

The formal charges were served upon Respondent via certified mail at his primary registration addresses on November 13, 2012. After being granted an extension of time in which to file a response, Respondent filed his answer to the formal charges on December 31, 2012.

On April 30, 2013, ODC filed its pre-hearing memorandum in which it recommended that Respondent be suspended from the practice of law, with a portion of the suspension being deferred and some period of actual suspension being imposed. Respondent filed his pre-hearing memorandum on May 6, 2013, in which he denied violating the Rules of Professional Conduct and urged that no sanction be imposed in the matter. Thereafter, on May 16, 2013, attorney Joseph A. Prokop, Jr. enrolled as counsel of record for Respondent.

The formal hearing in this matter was held on May 21, 2013 before Hearing Committee #02 ("Committee"). James W. Standley, IV, appeared on behalf of ODC, and Respondent appeared and was represented by Mr. Prokop. ODC introduced various exhibits, which were introduced and admitted into the record as Exhibits ODC1 – ODC9. Respondent also introduced a number of exhibits, which were admitted as Exhibits TAH1 – TAH12. Only two witnesses testified at the hearing— Gerald Albares, investigator for ODC, and Respondent. Although

[1] The Complainant, Reginald D. Winfield, did not testify at the formal hearing. Only the testimony of Respondent and ODC's investigator, Gerald Albares, was presented.

[2] The text of the Rules is contained in the attached Appendix.

various attempts were made to secure the testimony of Mr. Winfield, the Complainant, he did not testify at the hearing.

The Committee issued its report on December 6, 2013. Based upon the limited testimony presented at the hearing and the documentary evidence, the Committee determined that Respondent violated Rules 1.16(d) and 8.4 of the Rules of Professional Conduct, but that there was insufficient evidence to establish that he also violated Rules 1.5 and 1.15(a) as alleged in the formal charges. Accordingly, the Committee recommended that Respondent be publicly reprimanded for his misconduct.

On December 23, 2012, ODC filed its pre-argument brief in which it indicated that it did not object to the findings or sanction recommendation of the Committee given the limited testimony presented at the hearing. On December 28, 2012, Respondent filed his pre-argument brief, in which he indicated that he did not object to the Committee's findings or sanction recommendation.

Oral argument in the matter was heard on March 13, 2014 before Panel "B" of the Disciplinary Board. Mr. Standley appeared on behalf of ODC, and Mr. Prokop appeared on behalf of Respondent who was also present.

FORMAL CHARGES

The formal charges were filed on October 24, 2012 and are reproduced, in pertinent part, as follows:

FACTS

> On January 25, 2012, the Office of the Disciplinary Counsel received the complaint of Reginald D. Winfield (Complainant), who had hired Respondent to defend him in a civil action in November of 2006. Winfield had paid a $1,500.00 retainer, to be billed at a rate of $150.00 per hour.

Despite accepting Winfield's funds, Respondent failed to indicate to Winfield that he had filed an answer in the underlying litigation, which caused Winfield to believe that he was at risk of having a default judgment entered against him. Winfield attempted to reach Respondent to ascertain the status of the litigation but was unable to do so, as Respondent failed to return his calls. As a result of this, Winfield was forced to retain another attorney at the last minute. Thereafter, the matter was ultimately dismissed on summary judgment in Winfield's favor.

Since that time, Winfield sought unsuccessfully to have Respondent return the $1,500.00 advanced to him in connection with his representation in the underlying litigation. Winfield indicates that he was lenient with Respondent in this effort, as Respondent's brother is a personal friend of Winfield's. The agreement that the fee was a retainer fee to be billed at the rate of $150.00 per hour is evidenced by Respondent's letter to Winfield of November 10, 2006.

In June of 2011, Winfield made a final attempt to secure a refund of the sum in question. Winfield claims that Respondent fully acknowledged owing him $1,500.00 and agreed to make monthly payments of $150.00. Respondent made his first payment on or about June 24, 2011. However, no further payments were made prior to Winfield's filing of the complaint.

In his letter of April 11, 2012, Respondent acknowledges his acceptance of a $1,500.00 retainer to represent Winfield in the underlying litigation on or about November 10, 2006. He indicates that, prior to filing responsive pleadings, he was informed that Winfield had engaged another attorney who then began working on the matter.

Respondent indicates that he next heard from Winfield on or about January 24, 2007. Respondent indicates that he attempted to contact Winfield but that he was only able to leave a message. Respondent claims not to recall any conversation with Winfield during this period.

On March 2, 2011, Respondent claims that Winfield contacted him and requested a refund of the fees paid. Respondent states that he contacted Winfield thereafter and agreed to "attempt to send him at least $150.00 each month until the amount of $1,500.00 had been paid." Respondent acknowledges sending $150.00 to Winfield on or about June 29, 2011.

Respondent claims that Winfield contacted him via electronic mail on September 7, 2011 regarding this matter, having not received any further payments from Respondent. Respondent concedes that he did not remember to forward any further payments to Winfield as promised.

Upon receiving the certified letter from the Office of the Disciplinary Counsel, Respondent claims that he intended to take immediate steps to forward the balance of $1,350.00 to Winfield. Respondent contacted Winfield on April 3, 2012 and informed him that he had placed a check for $1,350.00 in the mail to him, apologizing for the delay. Respondent states, "I understand my obligations as an attorney and am aware that my actions may have caused problems to Mr. Winfield."

On May 21, 2012, Respondent appeared and rendered his sworn statement in this matter. During the course of this statement, Respondent was asked to produce copies of his client trust account records relating to his deposit of Winfield's retainer into his client trust account.

Respondent indicates that he did file an answer on November 17, 2006, but that he was also made aware of his termination on that date. As such, he did not file any additional pleadings in the matter. As such, he claims that a portion of the $1,500.00 paid is an unearned fee.

Respondent further testified that the check tendered to Winfield in April of 2012 for the $1,350.00 balance was drawn on a "general fund account" and not on a client trust account.

Respondent could not directly state whether the funds had been placed in his client trust account. Further, despite Respondent's initial contention that he had earned a portion of the $1,500.00 paid, Respondent indicates that he agreed to refund the entire $1,500.00.

As Respondent failed to provide the trust account information promised, a subpoena was issued on July 30, 2012, compelling his appearance at the Office of the Disciplinary Counsel on August 14, 2012. Despite being instructed to provide these items in the subpoena, Respondent appeared on August 14, 2012 without such documentation.

Respondent explained that he was told that his account information had been purged by Capital One (formerly Hibernia

National Bank) and that he was unable to locate any copies of his bank statements from the time period in question.

Respondent then conceded that he did not remember if these funds were deposited into a client trust account or not. Despite his acknowledgement that the letter of November 10, 2006 clearly stated that the agreement was for a $1,500.00 retainer to be billed at $150.00 per hour, Respondent stated that the agreement was that the $1,500.00 was actually a flat fee. Respondent indicated that he does not believe that the unearned portion of the fee remained in his trust account as it should have.

It would appear that Respondent has commingled client funds with his own, in that he is unable or unwilling to produce any documentation to show that the $1,500.00 paid by Winfield was deposited into a client trust account. Further, and more troubling, is the undisputed fact that Respondent did not refund any portion of the fee paid until June of 2011, almost five years after the termination of the representation, thus depriving Winfield of these funds during that period of time. Had Respondent properly maintained these client funds, they would have remained in his client trust account and could have been tendered to Winfield appropriately upon his termination. This significant delay in refunding an unearned fee constitutes a conversion of client funds.

Respondent's conduct constitutes violations of Rules 1.5, by failing to properly deposit advance fees into a client trust account; 1.15, by failing to safeguard client property and follow proper trust accounting procedures; 1.16(d), by failing to return an unearned fee; and 8.4, by violating the Louisiana Rules of Professional Conduct. As such, it would appear that the imposition of sanctions is appropriate.

THE HEARING COMMITTEE'S REPORT

As noted above, the Committee issued its report on December 6, 2013. The Committee found as follows:

FINDINGS OF FACT

It is well settled that the parties to a contract are the proper individuals to provide testimony and/or evidence regarding the intent and purpose of said contract Mr. Humphrey was steadfast that the $1500.00 he was paid pursuant to the contract was a flat

fee. ODC provided no tangible evidence, whatsoever, to counteract this assertion other than its interpretation. This is wholly insufficient to convince this Committee that Mr. Humphrey's assertion is incorrect, especially in light of the fact that the alleged victim did not choose to participate and provide enlightenment as to their discussion at the time of the execution. Additionally, the language of the contract appears to the Committee to support Mr. Humphrey's assertions, especially the phrase "the fee to get that point" and the fact that Respondent explained in the contract that if the matter went to trial that it would then be based purely on an hourly rate. More importantly, nothing in the contract discusses the procedure for billing or charging against a retainer or whether Mr. Winfield is responsible for providing additional money if the alleged retainer was exhausted, both of which would be essential information in a retainer type agreement.

Accordingly, this Committee finds that there is a lack of evidence to support a determination that this contract or agreement between Mr. Winfield and Mr. Humphrey was one for a retainer and thus, there can be no evaluation of a violation under the Rules of Professional Conduct, Rule 1.5 (failing to properly deposit advanced fees into a client trust account) or Rule 1.15 (failing to safeguard client property and follow proper trust accounting procedures).

This Committee, however, does find troubling the fact that Respondent was unable to provide a valid excuse for not reimbursing Mr. Winfield in a timely manner. Respondent voluntarily agreed to return the $1500.00 fee despite the fact that he was entitled to some portion thereof, arguably. After several discussions with Mr. Winfield, Mr. Humphrey agreed to repay Mr. Winfield the $1500.00 in installments of $150.00/month and made the first payment on June 29, 2011. He failed, however, to make any other payment despite repeated requests by Mr. Winfield. His only excuse for this failure to be diligent was that he failed to calendar the task and was more focused on his new job with the State. In fact, Mr. Humphrey did not pay Mr. Winfield the remaining balance of $1350.00 until April 12, 2012, well after this matter had been initiated, and almost six (6) years after he was engaged to represent Mr. Winfield.

CONCLUSIONS OF LAW

ODC has not provided sufficient evidence to convince this Committee that [R]espondent has committed a violation of Rules 1.5 and 1.15 in that there is nothing to substantiate the allegations

> that the fee as agreed in the contract of November 10, 2006 was a retainer and not a flat fee. However, there is overwhelming evidence and admissions by Respondent that he was not diligent in his responsibility to ensure that an unearned fee was returned in a reasonable amount of time to his client, Mr. Winfield. Accordingly, the Committee finds that Respondent has violated Rule 1.16(d) (failing to return an unearned fee), which in turn means a violation of Rule 8.4.

Once the Committee found that Respondent had engaged in professional misconduct, it undertook consideration of the factors set forth in Rule XIX, § 10(C). Although it did not elaborate on its consideration of these factors, the Committee appears to have considered Respondent's lack of prior disciplinary history as a factor in mitigation.

The Committee relied upon Standards 4.12 and 4.13 of the ABA's *Standards for Imposing Lawyer Sanctions* to determine that the baseline sanction for Respondent's misconduct is a public reprimand "and the maximum sanction is suspension from practice."[3] The Committee also cited various cases as follows to support its recommendation that Respondent be publicly reprimanded:

> A thorough review of the case law regarding the failure to return an unearned fee reveals that the Louisiana Supreme Court finds a failure to return an unearned fee without any other substantial misconduct on the part of the Respondent usually warrants public reprimand. *(In re Mouton,* 610 So. 2d 787 (La. 1992); *see also, In re David F Post,* 2008-1678 (La. 11/10/08); 993 So.2d 1207). However, where the Respondent's failure to return the fee is intertwined with some sort of additional misconduct *(i.e.* incompetent representation, failure to communicate, loss of client's claim due to inaction, failure to return file, etc...) as well as prior disciplinary issues, suspension of some type is warranted. *(In re Cunningham,* 2003-1608 (La. 12/3/03), 861 So. 2d 135, 136; *see also, In re Slaughter,* 2001-0151 (La 2/16/01), 778 So. 2d 1138). Though there were some underlying allegations of a failure to properly communicate with client and failure to provide material to ODC as requested, the ODC did not bring these matters as formal charges but attempted to use them as support for their allegations of commingling and conversion which we stated more fully above have not been proven with competent evidence.

[3] Report of the Hearing Committee # 02, p. 7.

Report of the Hearing Committee # 02, p. 8.

ANALYSIS

I. The Standard of Review

The powers and duties of the Disciplinary Board are defined in § 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Rule XIX, § (2)(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 petitions for reinstatement, 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 a *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/1992).

A. Manifest Error Inquiry

Here, the Committees findings are supported by the record and are not manifestly erroneous.

B. *De Novo* Review

An independent review of the record reveals that the Committee correctly applied the Rules of Professional Conduct to determine that Respondent violated Rules 1.16(d) and 8.4 of the Rules of Professional Conduct but that he did not violate Rules 1.5 and 1.15(a) as additionally alleged. Each of these allegations is addressed below:

Rule 1.5: According to Rule 1.5(f):

> (1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account.
>
> (2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

Here, the Committee found that Respondent was paid a flat fee of $1,500 for the representation of Mr. Winfield. Whether it was indeed a flat fee or a retainer paid to Respondent, the funds became the property of Respondent at the time they were received. Thus, the funds were permitted to be deposited into Respondent's operating account and were not required to be held in trust. Accordingly, the Committee correctly concluded that Respondent did not violate Rule 1.5 by failing to properly deposit advanced fees into his client trust account.

Rule 1.15(a): Rule 1.15(a) pertains to the safekeeping of property belonging to a client. Since the funds became the property of Respondent at the time they were received, he was not bound by Rule 1.15(a). Thus, the Committee correctly concluded that Respondent did not violate this Rule.

Rule 1.16(d): Rule 1.16(d) states that, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred." The record in this matter establishes that Respondent failed to reimburse Mr. Winfield in a timely manner. Although he voluntarily agreed to return the $1,500.00 fee, despite the fact that he may have been entitled to some portion thereof, Respondent had only repaid $150.00 by the time the formal charges were filed on January 25, 2012. Respondent did not pay Mr. Winfield the

remaining balance of $1,350.00 until April 2, 2012,[4] even though Mr. Winfield requested a refund a year earlier on March 2, 2011 and contacted Respondent about repayment again in September 7, 2011.[5] Therefore, the Committee correctly concluded that Respondent violated Rule 1.16(d).

Rule 8.4(a): Rule 8.4(a) provides that it is professional misconduct for a lawyer to "[v]iolate 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." As the record clearly establishes that Respondent violated Rule 1.16(d) of the Rules of Professional Conduct, ergo he also violated Rule 8.4(a).

Based on the forgoing, the Board adopts the Committee's findings of fact as well as the Committee's conclusions that Respondent violated Rules 1.16(d) and 8.4(a)[6] of the Rules of Professional Conduct.

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.

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[4] *See* Hearing Transcripts, p. 65 and Respondent's Exhibit TAH-12.
[5] Respondent's Exhibits TAH-8 and TAH-11.
[6] Although the Committee did not specify with respect to Rule 8.4 that it found only a violation of subjection (a), this appears to be the case based upon the Committee's parenthetical reference to "violating the Rules of Professional Conduct."

Here, Respondent knowingly violated his duty to his client when he failed to return an unearned fee. Respondent's conduct injured his client by depriving him of funds he was entitled to receive.

The record supports, as an aggravating factor, Respondent's substantial experience in the practice of law (having been admitted in 1994). In mitigation, the record supports a finding that Respondent had no prior disciplinary history.

B. The ABA Standards and Case Law

Standard 4.12 of the ABA's *Standards for Imposing Lawyer Sanctions* is relied upon in determining the appropriate sanction in this matter. According to Standard 4.12, suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to the client.

The ABA's *Standards for Imposing Lawyer Sanctions* suggest that the baseline sanction for Respondent's misconduct is suspension. The Committee recommended a public reprimand as the appropriate sanction, citing various cases to support its recommendation.[7] While a review of the applicable case law indicates that the Committee's sanction recommendation is on the lower end of the spectrum, it is an appropriate sanction for Respondent's misconduct under the circumstances. For example, in *In re Brigandi,* 02–2873 (La.4/9/03), 843 So.2d 1083, the Court publicly reprimanded the respondent for failing to render an accounting to his client, failing to place the disputed portion of a fee into a trust account, and failing to promptly refund the unearned portion of the fee. Citing *Brigandi,* the Court imposed an actual suspension of thirty days (one-year suspension with all but thirty days deferred) in the matter of *In re Torry* in which the respondent failed to promptly refund unearned fees in three legal matters, failed to place

[7] *In re Mouton,* 610 So. 2d 787 (La. 1992); *see also, In re: David F Post,* 2008-1678 (La. 11/10/08), 993 So.2d 1207).

client and disputed funds in a trust account, and failed to fully cooperate with the ODC in one investigation. 2010-0837 (La. 10/19/10), 48 So. 3d 1038.

Based on the cases highlighted above, the Committee's recommendation is in line with the applicable jurisprudence. Given the parties' concurrence with the Committee's sanction recommendation, the Board adopts the Committee's recommendation that Respondent be publicly reprimanded for his misconduct in this matter.

CONCLUSION

The Board adopts the factual findings and legal conclusions of the Committee. Specifically, the Board concludes that Respondent violated Rules 1.16(d) and 8.4(a) of the Rules of Professional Conduct, but that there is insufficient evidence to establish that he violated Rules 1.5 and 1.15(a) as additionally alleged in the formal charges. The record in this matter shows that Respondent knowingly engaged in misconduct by failing to return unearned fees, thus depriving his client of funds the client was entitled to receive.

With respect to sanction, the Board adopts the Committee's recommendation of a public reprimand and further recommends that Respondent be assessed with all costs and expenses of these proceedings.

RULING

For the foregoing reasons, the Board hereby rules that Respondent, Troy A. Humphrey, be publicly reprimanded for engaging in professional misconduct. The Board further orders that Respondent be assessed with all costs and expenses of these proceedings pursuant to Rule XIX, § 10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Carl A. Butler
John T. Cox, Jr.
George L. Crain, Jr.
Tara L. Mason
R. Lewis Smith, Jr.
Linda P. Spain
R. Steven Tew

BY: Carrie L. Jones
Carrie L. Jones
FOR THE ADJUDICATIVE COMMITTEE

Anderson O. Dotson, III – Recused.

APPENDIX

RULE 1.5. FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall

provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive;

(2) the total fee is reasonable; and

(3) each lawyer renders meaningful legal services for the client in the matter.

(f) Payment of fees in advance of services shall be subject to the following rules:

(3) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account.

(4) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

(5) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(6) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be

placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(7) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

RULE 1.15. SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Except as provided in (g) and the IOLTA Rules below, funds shall be kept in one or more separate interest-bearing client trust accounts maintained in a bank or savings and loan association: 1) authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government; 2) in the state where the lawyer's primary office is situated, if not within Louisiana; or 3) elsewhere with the consent of the client or third person. No earnings on a client trust account may be made available to or utilized by a lawyer or law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account or obtaining a waiver of those charges, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Every check, draft, electronic transfer, or other withdrawal instrument or authorization from a client trust account shall be personally signed by a lawyer or, in the case of electronic, telephone, or wire transfer, from a client trust account, directed by a lawyer or, in the case of a law firm, one or more lawyers authorized by the law firm. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a client trust account. On client trust accounts, cash withdrawals and checks made payable to "Cash" are prohibited.

(g) A lawyer shall create and maintain an "IOLTA Account," which is a pooled interest-bearing client trust account for funds of clients or third persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(1) IOLTA Accounts shall be of a type approved and authorized by the Louisiana Bar Foundation and maintained only in "eligible" financial institutions, as approved and certified by the Louisiana Bar Foundation. The Louisiana Bar Foundation shall establish regulations, subject to approval by the Supreme Court of Louisiana, governing the determination that a financial institution is eligible to hold IOLTA Accounts and shall at least annually publish a list of LBF-approved/certified eligible financial institutions. Participation in the IOLTA program is voluntary for financial institutions.

IOLTA Accounts shall be established at a bank or savings and loan association authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government or at an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Louisiana

which shall be invested solely in or fully collateralized by U.S. Government Securities with total assets of at least $250,000,000 and in order for a financial institution to be approved and certified by the Louisiana Bar Foundation as eligible, shall comply with the following provisions:

(A) No earnings from such an account shall be made available to a lawyer or law firm.

(B) Such account shall include all funds of clients or third persons which are nominal in amount or to be held for such a short period of time the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(C) Funds in each interest-bearing client trust account shall be subject to withdrawal upon request and without delay, except as permitted by law.

(2) To be approved and certified by the Louisiana Bar Foundation as eligible, financial institutions shall maintain IOLTA Accounts which pay an interest rate comparable to the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA Accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA Account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non-IOLTA customers, but the eligible institution may elect to pay a higher interest or dividend rate on IOLTA Accounts.

(3) To be approved and certified by the Louisiana Bar Foundation as eligible, a financial institution may achieve rate comparability required in (g)(2) by:

(A) Establishing the IOLTA Account as:

(1) an interest-bearing checking account; (2) a money market deposit account with or tied to checking; (3) a sweep account which is a money market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or (4) an open-end money market fund solely invested in or fully collateralized by U.S. Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution

that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000. "U.S. Government Securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

(B) Paying the comparable rate on the IOLTA checking account in lieu of establishing the IOLTA Account as the higher rate product; or

(C) Paying a "benchmark" amount of qualifying funds equal to 60% of the Federal Fund Target Rate as of the first business day of the quarter or other IOLTA remitting period; no fees may be deducted from this amount which is deemed already to be net of "allowable reasonable fees."

(4) Lawyers or law firms depositing the funds of clients or third persons in an IOLTA Account shall direct the depository institution:

(A) To remit interest or dividends, net of any allowable reasonable fees on the average monthly balance in the account, or as otherwise computed in accordance with an eligible institution's standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;

(B) to transmit with each remittance to the Foundation, a statement, on a form approved by the LBF, showing the name of the lawyer or law firm for whom the remittance is sent and for each account: the rate of interest or dividend applied; the amount of interest or dividends earned; the types of fees deducted, if any; and the average account balance for each account for each month of the period in which the report is made; and

(C) to transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors.

(5) "Allowable reasonable fees" for IOLTA Accounts are: per check charges; per deposit charges; a fee in lieu of minimum balance; sweep fees and a reasonable IOLTA Account administrative fee. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Fees or service charges that are not "allowable reasonable fees" include, but are not limited to: the cost of check printing; deposit stamps; NSF charges; collection charges; wire transfers; and fees for cash management. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on

other IOLTA Accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA Accounts.

(6) A lawyer is not required independently to determine whether an interest rate is comparable to the highest rate or dividend generally available and shall be in presumptive compliance with Rule 1.15(g) by maintaining a client trust account of the type approved and authorized by the Louisiana Bar Foundation at an "eligible" financial institution.

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION

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(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

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;

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

(g) Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.