ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: JAMES OGDEN MIDDLETON II

NUMBER: 06-DB-078 c/w 09-DB-007

RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

This is a disciplinary proceeding based upon two sets of formal charges filed by the Office of Disciplinary Counsel ("ODC") against James Ogden Middleton II ("Respondent"), Louisiana Bar Roll Number 17708. The charges were consolidated. In the first set of formal charges, which bears docket number 06-DB-078 and consists of nineteen counts, ODC alleges Respondent violated the following Rules of Professional Conduct ("Rules"): 1.3 (lack of diligence); 1.5(a) (charging/collecting an unreasonable fee); 1.6 (disclosure of confidential information); 1.9(a) (violating duties to former clients); 3.3 (failure to take reasonable remedial measures regarding a misrepresentation toward a tribunal); and 8.4(a) (violation or attempted violation of the Rules). In the second set of formal charges, which bears docket number 09-DB-007 and consists of one count, ODC alleges Respondent violated Rules 1.5(a) (charging an unreasonable fee); 8.4(a) (violation or attempted violation of the Rules); and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).[1]

Of the ten counts considered by the Hearing Committee assigned to the rehearing of this matter, the Committee concluded that Respondent violated Rule 1.5(a) in the Todd Travasos matter (Count XVIII of No. 06-DB-078) and Rule 1.5(b) in connection with the Earl Luneau matter (Count I of No. 09-DB-007). The Committee determined that a public reprimand was the appropriate sanction. The Committee also noted that the Respondent should not be required to pay the cost of the disciplinary proceedings given that, in their opinion, the ODC failed to find

[1] *See* the attached Appendix A for the text of the Rules.

clear and convincing evidence of misconduct in the vast majority of the charges brought against Respondent.

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 sanction recommendation of a public reprimand. The Board recommends that Respondent be assessed with the costs and expenses of the matter associated with the Travasos and Luneau matters.

PROCEDURAL HISTORY

ODC filed the first set of formal charges, docket number 06-DB-078, in this matter on December 29, 2006. On February 13, 2007, Dane S. Ciolino enrolled as counsel for Respondent. After being granted an extension of time in which to answer, Respondent filed an answer on March 21, 2007. In his answer, although he admitted certain facts relative to the client matters that form the basis of the formal charges, Respondent denied any misconduct. This matter was assigned to Hearing Committee No. 4. On March 3, 2009, ODC filed a second set of formal charges against Respondent, which were assigned docket number 09-DB-007. Pursuant to a motion to consolidate filed by ODC, Committee No. 4 issued an order on March 18, 2009, consolidating docket number 09-DB-007 with 06-DB-078. Respondent filed an answer to the second set of formal charges on April 12, 2009, in which he denied violating the Rules. On August 5, 2009, William M. Ross enrolled as co-counsel of record for Respondent.

Over the course of two years, Committee No. 4 heard fourteen days of testimony, with several additional days of testimony scheduled. However, before the hearing concluded, the public member of Committee No. 4 notified the Disciplinary Board that she could no longer serve on the Committee. On November 6, 2009, the Board appointed a new public member to the Committee to allow the matter to continue. On December 1, 2009, Respondent filed an

objection to the replacement of the public member and moved for a mistrial, arguing that Committee No. 4 would not be able to reach a proper judgment because the new public member would not have the benefit of personally observing the many days of testimony that had already taken place. On January 12, 2010, the Chairman of Committee No. 4 declared a mistrial and ordered that a hearing committee be "reconstituted for the purpose of conducting another evidentiary hearing." On January 22, 2010, ODC filed a motion to recuse Committee No. 4 and to have the matter assigned to a new hearing committee.

Respondent filed an opposition to this motion on January 29, 2010 arguing that the case should not be reassigned to a new hearing committee. On February 3, 2010, the Board issued an order directing the Board Administrator to assign a new hearing committee to conduct a hearing on the matter. The order stated that ODC's motion to recuse Committee No. 4 was denied as moot because the chairman and lawyer member of Committee No. 4 had reached the conclusion of their terms of service as hearing committee members and thus were not available to be appointed to a new hearing committee.

The Board Administrator reassigned this matter to Hearing Committee No. 38. However, ultimately, the chairman and lawyer member of Committee No. 38 were recused. Given the recusal of two members of Committee No. 38, on March 22, 2010, the Board reassigned this matter to Hearing Committee No. 19 (hereinafter "the Committee").

On March 31, 2010, a telephone status conference was held. Participating in the call were Timothy Maragos, Chairman of Committee No. 19; Dane Ciolino and William Ross, co-counsel for Respondent; and Damon Manning from the Office of Disciplinary Counsel. The parties discussed whether it would be appropriate for the ODC to introduce a majority of the transcripts from the first hearing in lieu of live testimony during the re-hearing of the matter.

Respondent stated his objection to this approach, arguing that the point of the mistrial was to allow a three member panel the opportunity to observe the live testimony of the witnesses in this matter. The chairman directed the parties to file briefs on the issue. ODC filed its brief on April 12, 2010. Respondent filed his reply brief on April 27, 2010.

On May 3, 2010, the chairman issued a ruling on the issue, in which he directed ODC to present live testimony at the rehearing. However, this ruling did not preclude ODC from introducing portions of the prior transcript for impeachment purposes or to refresh a witness' recollection. Nor did the ruling preclude the presentation of prior testimony of unavailable witnesses. On May 12, 2010, ODC filed an application for supervisory writs with the Supreme Court regarding the May 3, 2010 Committee Ruling. The Supreme Court denied ODC's writ on May 28, 2010.

Both parties filed pre-hearing memorandums on July 28, 2010, and participated in a pre-hearing telephone conference on July 30, 2010. The rehearing of this matter was conducted before Committee No. 19[2] on the following dates: August 9-11, 2010; November 1-2, 11-12, 22-23, 2010; December 7, 2010; January 13-14, 2011; February 17-18, 2011; and on March 17-18, 2011 for a total of 16 days of testimony. At the conclusion of the 16th day of testimony (March 18, 2011), the ODC had presented its entire case for 10 of the 20 total counts (including the single count from the consolidated case, 09-DB-007). The ODC then moved to submit the transcripts of testimony from the initial hearing along with the exhibits which had been offered during the first hearing. Specifically, the ODC offered transcript testimony in lieu of live testimony for:

Count 1 (Midori Bhati),
Count 2 (Dr. Michael Ritchey),

[2] Hearing Committee No. 19 was comprised of Timothy A. Margos (Chairman), Melissa L. Theriot (Lawyer Member) and Susan DesOrmeaux (Public Member).

Count 3 (Priscilla Babin),
Count 4 (Brent Caubarreaux),
Count 8 (Ravinderjit Brar),
Count 9 (Alis Van Doorn),
Count 10 (Dr. Piayon Kobbah),
Count 13 (Mary Bernard),
Count 14 (Mary McRae),
Count 17 (Jerry Weeks).

There was some testimony taken in the rehearing before Committee No. 19 as to Count 3 (Priscilla Babin) on Day 2, Count 4 (Brent Caubarreaux) on Day 3, Count 1 (Midori Bhati) and Count 8 (Ravinderjit Brar) on Day 6. Committee No. 19 refused to admit the transcript testimony from the previous hearing, and refused to consider the exhibits that were offered in the context of that prior testimony, for the reasons set forth in the Chair's May 3, 2010 ruling. The ODC proffered those transcripts and exhibits, but as they did not form part of the record before Committee No. 19, the Committee considered those counts abandoned. The ODC put on its complete case, with testimony and exhibits, for the following ten counts, for which findings and recommendations were made by the Committee:

Count 5 (Rick Griffith),
Count 6 (Mary Benjamin)
Count 7 (Dr. Joe Rankin)
Count 11 (Cindy Searcy),
Count 12 (Sam Eakin),
Count 15 (Beverly Morgan),
Count 16 (Elvira Welch),
Count 18 (Todd Travasos),
Count 19 (T. Mack Granger),
Count 1, docket number 09-DB-007, (Earl Luneau).

On June 7, 2011, ODC filed its post-hearing memorandum in which it reiterated its objection to the Committee's exclusion of the transcripts and exhibits from the first hearing, which pertain to the remaining counts, and specifically requested that the Board review the Committee's ruling on this issue. On June 7, 2011, ODC filed an addendum to its post-hearing

brief. Respondent filed a post-hearing memorandum on August 5, 2011. The Committee issued its detailed report on February 4, 2013, finding misconduct in two counts. Accordingly, the Committee recommended that Respondent be sanctioned with a public reprimand.

On March 25, 2013, the ODC filed its pre-argument brief with the Board, in which it urged the Board to recommend a minimum sanction of a one year and one day suspension. Respondent filed his pre-argument brief on April 9, 2013, in which he urged the Disciplinary Board to adopt the committee's report and sanction of a public reprimand. Oral argument took place on April 25, 2013 before Board Panel "C".[3] Deputy Disciplinary Counsel Damon Manning appeared on behalf of ODC. Respondent appeared with counsel Dane Ciolino and William Ross.

THE FORMAL CHARGES

Given the length of the formal charges, they are attached as Appendix B and Appendix C.

THE HEARING COMMITTEE REPORT

As noted above, Hearing Committee No. 19 heard sixteen days of testimony on the following dates: August 9-11, 2010; November 1-2, 11-12, 22-23, 2010; December 7, 2010; January 13-14, 2011; February 17-18, 2011; and March 17-18, 2011. The Committee filed its report on February 4, 2013. The Committee provided detailed factual findings and extensive analysis of the charges and record before them. Of the ten counts considered by the Hearing Committee assigned to the rehearing of this matter, the Committee concluded that Respondent violated Rule 1.5(a) in the Todd Travasos matter (Count XVIII of No. 06-DB-078) and Rule 1.5(b) in connection with the Earl Luneau matter (Count I of No. 09-DB-007). The Committee

[3] Board Panel "C" was composed of Edwin G. Preis, Jr. (Chairman), Tara L. Mason (Lawyer Member), and George L. Crain, Jr. (Public Member).

determined that a public reprimand was the appropriate sanction. Given the length of the Committee's report, the factual findings are not reproduced within the body of this recommendation. The 208 page report and appendixes are attached as Appendix D.

PRELIMINARY ISSUE REGARDING PROFERRED EVIDENCE

In advance of the rehearing of this matter, the Committee Chairman directed the parties to brief whether it would be appropriate for the ODC to introduce a majority of the transcripts and exhibits from the original proceeding (Middleton I) in lieu of live testimony in the second hearing (Middleton II). Respondent was opposed to ODC's request, arguing that the point of the mistrial in Middleton I was to allow a three member panel the opportunity to observe the live testimony of the witnesses in this matter.

On May 3, 2010, the chairman issued a ruling on the issue, in which he directed ODC to present live testimony rather than transcripts from the first hearing at the rehearing. However, this ruling did not preclude ODC from introducing portions of the prior transcript for impeachment purposes or to refresh recollection. Nor did the ruling preclude the presentation of prior testimony of unavailable witnesses. The Chair's May 3, 2010 ruling is available here as Appendix E.

On May 12, 2010, ODC filed an application for supervisory writs with the Supreme Court regarding the May 3, 2010 Committee Ruling. The Supreme Court denied ODC's writ on May 28, 2010. Although denied by the Supreme Court, based on Louisiana Supreme Court Rule XIX, Section 18(B)[4], ODC maintained its objection in its pre-argument brief filed on March 25, 2013 and requested that the Board review the ruling. In the May 3, 2010 order, the Chair

[4] Rule XIX, Section 18(B) states in pertinent part that, "No provision of the Louisiana Code of Evidence shall prevent the introduction of sworn testimony from administrative proceedings, civil or criminal trials, or hearings of a contradictory nature where the respondent has cross-examined or had the opportunity to cross-examine the witnesses whose testimony is sought to be introduced."

concluded that Rule XIX, Section 18(B) does not authorize the "wholesale use of transcripts" by the ODC in lieu of trying its case through live testimony. The Chair noted that such a procedure "would violate the Respondent's right to the entire process as envisioned by Rule XIX [and] would seriously undermine the purpose and function of the hearing committee." The Chair emphasized the role of the hearing committee as the trier-of-fact and the evaluator of witness credibility in the process. Importantly, the Chair was careful to point out that his ruling did not dictate that only live witnesses can be utilized at the hearing committee level. Nor did his ruling prohibit the ODC from offering transcribed testimony from the first hearing if a witness was unavailable or for other permissible evidentiary purposes, such as impeachment or to refresh a witness' recollection.

At the rehearing, the ODC proferred the transcripts and exhibits for ten of the twenty counts, but since they did not form a part of the record before the Committee, the Committee considered those counts to have been abandoned.

The issue of whether it was appropriate for the ODC to submit a cold record from the first hearing instead of re-trying the ten counts through live testimony was presented to the Supreme Court, and the Court, as noted above, did not reverse the Chair's decision disallowing it. Considering this, in addition to the well reasoned analysis provided in the Committee's May 3, 2010 ruling, the Board adopts the Committee's Ruling and Order regarding the use of transcripts in lieu of live testimony in this matter.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. The Standard of Review

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

Here, the Committee's extensive findings of fact are not manifestly erroneous, and the Board adopts these findings. Moreover, the Committee correctly found that the Respondent violated Rule 1.5(a) in the Todd Travasos matter (Count XIII of No. 06-DB-078) and Rule 1.5(b) in connection with the Earl Luneau matter (Count I of No. 09-DB-007). The Committee correctly found that ODC failed to prove by clear and convincing evidence the misconduct alleged in the remaining counts.

The two Rule violations found by the Committee are discussed below:

The Todd Travasos matter (Count XVIII of No. 06-DB-078)

ODC alleged that Respondent violated Rule 1.3 (lack of diligence) and Rule 1.5(a) (charging/collecting an unreasonable fee) with regard to his handling of the Todd Travasos matter. Rule 1.5(a) mandates that a lawyer shall not make an agreement for, charge, or collect an

unreasonable fee or an unreasonable amount for expenses. The Board adopts the Committee's finding and analysis that Respondent violated this Rule when he charged Mr. Travasos $11,393.18 for time spent remediating an error made by Respondent. Hearing Committee Report, pp. 88-102. In fact, Respondent does not object to the Committee's findings that he should not have charged Mr. Travasos for remedial work performed after Respondent failed to correct a child support judgment which contained errors unfavorable to his client. *See* Respondent's Reply Brief in Support of Report of Hearing Committee No. 19, p. 46. Respondent admits that his failure to rectify the incorrect judgment, when he had the opportunity to do so at a hearing on September 19, 2005, was "an incident of malpractice." 8/11/10 Hearing Transcript, Day 3, p. 56. Upon receiving the Committee's report issued February 4, 2013, wherein the Committee found him in violation of Rule 1.5(a), and recommended that he make restitution to Mr. Travasos, Respondent issued a check to Mr. Travasos on February 5, 2013 for $11,393.18 in fees and costs related to work performed amending the incorrect judgment. *See* Respondent's Reply Brief in Support of Report of Hearing Committee No. 19, p. 48; *and see* Exhibit A.

The Committee determined that Respondent did not violate Rule 1.3 (lack of diligence) in the Travasos matter. Hearing Committee Report, p. 97. It is undisputed that Respondent failed to correct a child support judgment which contained errors unfavorable to his client during a hearing. The Committee noted that there are many cases in which the Supreme Court has cautioned against automatically equating malpractice with an ethical violation, and determined that this isolated instance did not rise to the level of Rule 1.3 misconduct. The Board adopts the Committee's finding and likewise declines to find that Respondent failed his ethical duty to act with diligence and promptness in this isolated occurrence of admitted malpractice.

As such, the Board adopts the Committee's well reasoned finding that Respondent did not violate Rule 1.3, but did violate Rule 1.5(a) specifically due to the $11,393.18 billed to Mr. Travasos for remedial work performed by Respondent.

The Earl Luneau matter (Count I of No. 09-DB-007)

Regarding the Luneau matter, ODC alleges that Respondent violated Rule 1.5(a) (charging or collecting an unreasonable fee), Rule 8.4(c) (engaging in conduct involving dishonesty, deceit or misrepresentation) and Rule 8.4(a) (violating or attempting violate the Rules of Professional Conduct).

The Committee declined to find a violation of these three Rules. Although not specifically charged in the formal charges, the Committee determined that the evidence clearly and convincingly demonstrated that Respondent violated Rule 1.5(b).[5]

Rules 1.5(a) and (b): Rule 1.5(a) states, in pertinent part, that a lawyer shall not charge or collect an unreasonable fee and Rule 1.5(b) states that a lawyer shall communicate the basis or rate of the fee to the client, preferably in writing, before or within a reasonable time after commencing the representation. Here, ODC alleged that Respondent charged and collected an unreasonable

[5] In support of finding a rule violation which was not enumerated in the formal charges, the Committee cited *LSBA v. Keyes*, 567 So.2d 588 (La. 1990) ("In a bar proceeding, due process requires that an attorney be given notice of the misconduct for which the disciplinary authority seeks to sanction him, as well as an opportunity to explain his conduct or defend against the charges of misconduct."). The Committee noted, "We find that the charging language for this matter gives sufficient notice of the misconduct at issue and Respondent was provided adequate opportunity to explain and defend the conduct. In other words, the same conduct was always at issue. We simply find the conduct violated a different rule than that identified in the charge." *See* Hearing Committee Report, p. 130.

The Board agrees with the Committee that the language used in the formal charges of this matter gives sufficient notice of the misconduct at issue and that Respondent was given adequate opportunity to explain and defend the conduct. Under Court rules and precedent, the Board may find a violation of a Rule of Professional Conduct, even when the Rule is not specifically enumerated in the formal charges, if the charges have sufficiently put a respondent on notice of the potential violation. *See* Rule XIX, § 11(D); *In re D. Warren Ashy*, 98-0662 (La. 12/1/98), 721 So.2d 859; *Louisiana State Bar Ass'n v. Keys*, 567 So. 2d 588 (La. 1990). Here, the formal charges do contain specific allegations that Respondent changed the terms of his engagement agreement with Mr. Luneau into a contingency fee contract after the life insurance proceeds were already received by Mr. Luneau. Rule 1.5(b) requires that an attorney communicate this information to the client before or within a reasonable time after representation has commenced. Respondent clearly failed to do so. Accordingly, the Board finds that Respondent was properly put on notice of a potential Rule 1.5(b) violation.

fee by having the client sign a contingency fee agreement *after* the client had already signed an engagement agreement setting an hourly fee. In fact, it is undisputed that the contingency fee agreement was created by the Respondent and signed by the client *after* the client had already collected the life insurance proceeds.

On October 20, 2003, Earl Luneau retained Respondent to handle two matters: (1) the succession of his sister Alice Peacock; and (2) Mr. Luneau's claim as a named beneficiary of his sister's Hartford Life Annuity policy. *See* ODC Exhibits 4-C and 4-D. The engagement agreements signed by Respondent and Mr. Luneau provided that Respondent would be paid an hourly rate of $200 per hour and $60 per hour for his paralegal. *Id.* On September 22, 2004, Judge Randow ordered Hartford Life, Inc. to distribute the funds of the Hartford Life Annuity to Mr. Luneau. *See* ODC Exhibit 8. On December 29, 2004, the Luneaus met with Respondent to discuss fees owed to Respondent for work performed with regard to both the succession and life insurance policy matters. At that meeting, Respondent had Mr. Luneau sign a document entitled "Contingency Fee Agreement" which stated that Mr. Luneau would pay him approximately 25% of the total amount issued to Mr. Luneau by the Hartford Life Annuity Account No. 210148563. *See* ODC Exhibit 4-E.

The Committee concluded that Respondent violated Rule 1.5(b) by changing the fee arrangement after the matter was concluded and after the funds were already distributed to Earl Luneau. They found that although the contingency was memorialized in writing and signed by the client, this did not occur until the conclusion of the representation resulting in a higher fee recouped by Respondent.

The Committee concluded that Respondent did not violate Rule 1.5(a) because the amount charged was not unreasonable. The Committee found that the 25% contingency was

reasonable, had it been properly agreed upon upfront. They also found that Respondent's hourly charges ($2400) attributable to the Hartford insurance policy matter were reasonable.

The Committee's findings and conclusions regarding Rule 1.5(b) appear to be correct. Respondent admitted that he did not have the Luneau's sign a contingency fee agreement until December 29, 2004, after they had received the life insurance funds from Hartford Life, Inc. *See* Day 6 Hearing Transcript, p. 251. The Board adopts the Committee's finding that Mr. Middleton failed to comply with the requirement that the basis of a fee shall be communicated to the client "before or within a reasonable time after commencing the representation." Rule 1.5(b). Accordingly, the record supports the conclusion that Respondent violated Rule 1.5(b), but not Rule 1.5(a).

Rules 8.4(a) and (c): Rule 8.4(a) states that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct. Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, deceit, fraud, or misrepresentation. The Committee did not reference or make any specific findings regarding Rule 8.4(a) or (c). However, the Committee did find that Respondent intentionally changed the fee arrangement from an hourly fee to a contingency fee, in order to recoup fees owed to him for work previously performed on behalf of Earl Luneau's deceased sister, Alice Peacock. Hearing Committee Report, p. 130. The Committee found this to be an improper method used by Respondent to collect the total fee owed him, but they did not find that his conduct was dishonest, deceitful, fraudulent or misrepresentative. The Board likewise finds that Respondent did not violate Rule 8.4(c), as the record does not reflect that his actions, although ill advised, were dishonest, deceitful, fraudulent or misrepresentative. However, the Board does find a

technical violation of Rule 8.4(a), as Rule 8.4(a) states that a violation of any Rule inherently violates Rule 8.4(a).

Accordingly, the record supports a violation of Rule 1.5(b) in the Luneau matter and thereby a violation of Rule 8.4(a).

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.

Here, Respondent violated duties owed to two clients. The Committee found that Respondent's behavior was intentional. The Board finds that at a minimum, Respondent either knew or should have known that he overbilled Mr. Travasos when he charged him for remedying the error he made in failing to have the judgment corrected affording all the relief to which Mr. Travasos was entitled. Respondent also knowingly created a contingency agreement with the Luneaus *after* they had received the life insurance proceeds and *after* an hourly fee agreement had long been in effect. Respondent has made restitution to both clients, but actual harm did occur as neither client received restitution until this disciplinary proceeding was well underway.[6] Mr. Travasos was additionally harmed as he, as of the date of the hearing, was still paying

[6] Respondent issued a $5,897.62 refund check to Mrs. Luneau on December 6, 2010. Respondent issued a $11,393.18 refund check to Mr. Travasos on February 5, 2013.

portions of child support which were excused in the original judgment handed down in his child custody case. *See* Day 3 Hearing Transcript, pp. 121-122.

The Board adopts the following aggravating factors as found by the Committee: substantial experience in the practice of law[7] and selfish motives. The Board also adopts the mitigating factor found by the Committee: absence of a disciplinary history. The Board additionally finds in mitigation: good character and reputation, a cooperative attitude toward the proceedings, and delay in the disciplinary proceedings.

B. The ABA Standards and the Case Law

The Board finds that ABA Standards 4.12 and 7.2 applicable in this matter. ABA Standard 4.12 states that "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 a client." ABA Standard 7.2 states, "Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."

By charging Mr. Travasos for time spent remediating his own mistake, and by changing the fee structure used in the Luneau matter to a contingency fee long after the hourly fee arrangement was in place, Respondent violated a duty owed to two clients. The Committee recommended that Respondent be publically reprimanded for his misconduct. Considering the mitigating factors and applicable case law, the Board adopts the Committee's recommended sanction of a public reprimand. There are several cases which indicate that a public reprimand is the appropriate sanction for the Respondent's misconduct. As pointed out by the Committee, the matter of *In re Alvin Jones*, 08-0204 (La. 9/19/08) 990 So.2d 731 is on point. Mr. Jones was

[7] Respondent was admitted to the practice of law on October 10, 1986.

found to have overcharged his client for collecting insurance proceeds due to the client. He agreed to work on a contingency basis but attempted to collect an extra $2,000 beyond what he was owed under the contract. The aggravating factors included substantial experience in the practice of law, vulnerability of the client and dishonest or selfish motives. In mitigation, it was noted that respondent did not have a disciplinary history. Like Mr. Middleton, Mr. Jones charged a smaller rate at the outset of the representation but attempted to collect a larger than agreed-upon fee after the insurance settlement money was received. Noting that Mr. Jones had no prior disciplinary record, the Supreme Court issued a public reprimand and ordered him to pay restitution.

Similar issues were also present in the *Jessup* case, which was a reciprocal discipline matter. In *In re Jessup*, 05-1686 (La. 02/17/06), 922 So.2d 467, the respondent was licensed to practice law in Louisiana, Tennessee and Georgia. The misconduct at issue occurred in Tennessee. In Tennessee, Mr. Jessup began representing a client in a highly contested alimony case. He ultimately obtained a judgment that awarded his client $57,400 plus $12,500 in attorney's fees. Mr. Jessup had a contractual, hourly fee agreement with his client, which totaled approximately $41,000 in attorney's fees. The client paid approximately $17,500, and respondent sued her for the balance. The client filed a counter-claim alleging that Mr. Jessup's fee was excessive. Following a jury trial, a judgment was rendered against Mr. Jessup for charging an excessive fee. *Id.* at 468.

In February 2005, the Board of Professional Responsibility of the Supreme Court of Tennessee publicly censured Mr. Jessup for charging his client an excessive fee. Later, in October of that year, the Supreme Court of Georgia imposed a formal admonition upon Mr.

Jessup as reciprocal discipline. In February of 2006, the Louisiana Supreme Court issued a public reprimand as reciprocal discipline Mr. Jessup's misconduct in Tennessee. *Id.*

Considering the mitigating factors and case law cited above, it appears that the hearing committee's recommended sanction of a public reprimand is appropriate in this matter.

CONCLUSION

The Disciplinary Board adopts the hearing committee's findings of fact, findings concerning the Rule violations present and the recommended sanction. Accordingly, the Board recommends to the Court that the Respondent receive a public reprimand. Respondent has paid restitution to Mr. Travasos and Mr. Luneau. The Board recommends that Respondent be assessed with the costs and expenses of the matter associated with the Travasos and Luneau matters.

RULING

Considering the foregoing, the Board orders that Respondent, James Ogden Middleton II, be publicly reprimanded for his misconduct in this matter. The Board also orders that Respondent be assessed with the costs and expenses of the matter associated with the Travasos and Luneau matters.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Carl A. Butler
Stephen F. Chiccarelli
George L. Crain, Jr.
Tara L. Mason
R. Lewis Smith, Jr.
Linda P. Spain
R. Steven Tew

BY: _____
Edwin G. Preis, Jr.
FOR THE ADJUDICATIVE COMMITTEE

Jamie E. Fontenot – Dissents with reasons.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: JAMES OGDEN MIDDLETON II

DOCKET NO.: 06-DB-078 c/w 09-DB-007

Dissenting Opinion

I respectfully dissent from the recommendation of the Board that Respondent be assessed with the costs and expenses for the two matters [Travasos and Luneau]. I cannot in good conscience assess Respondent with the costs and expenses associated with the two violations, unless ODC is likewise responsible for the costs and expenses incurred by Respondent for the eight counts which they failed to prove.

While there is no specific provision which expressly authorizes a respondent to recover costs and expenses incurred in defending against formal charges, there is also nothing in the Rules which prohibits it. Rule XIX § 18(B), states that, **except as otherwise provided** in these rules, the Louisiana Code of Civil Procedure ("La. C.C.P.") applies in discipline cases. Louisiana Code of Civil Procedure Article 1920 is therefore applicable. It states:

> Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause.
>
> Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable.

In my opinion, equity dictates that if one party is susceptible of being assessed with costs and expenses, both sides should be.

Respectfully Submitted:

APPENDIX A

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.5 FEES

(a) A lawyer's fee shall be reasonable. 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) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(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 writing and 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 litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. 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 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 division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibilities for the representation;

(2) The client is advised of and does not object to the participation of all the lawyers involved; and

(3) The total fee is reasonable.

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

(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)(6). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

(3) 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.

(4) 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.

(5) 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.

Prior to its amendment on March 1, 2004, Rule 1.5 read as follows in subsection (f)(6):

> Payment of fees in advance of services shall be subject to the following rules: (f)(6) When the client pays the lawyer a fixed fee or a minimum fee for particular services to be rendered in the future under Rule 1.5(f)(2) and the funds are placed in the lawyer's operating account, and a fee dispute subsequently 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 the fee, if any. If the lawyer and the client cannot agree on the amount of unearned fee, the lawyer shall immediately refund to the client the amount, if any that the parties agree has not been earned, and the lawyer shall deposit into a trust account an amount which represents the portion of the fee which is reasonably in dispute. The funds shall be held in the trust account until the dispute is resolved, and the lawyer may not hold the disputed portion of the funds to coerce a client into accepting the lawyer's contentions. The lawyer should also suggest means for a prompt resolution of the dispute such as the Louisiana State Bar Association Fee Dispute Program or other similar arbitration.

RULE 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of

another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

RULE 1.9. DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RULE 3.3. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

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

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

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

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

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RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

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

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

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

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

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