ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: VINCENT J. DESALVO

NUMBER: 15-DB-029

RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

INTRODUCTION

This is a discipline matter based upon the filing of formal charges by the Office of Disciplinary Counsel ("ODC") against Vincent J. DeSalvo ("Respondent"), Louisiana Bar Roll Number 04900.[1] The charges, which consist of one count, allege a violation of Louisiana Rule of Professional Conduct 1.15(a) (safekeeping client/third party property).[2] Respondent admitted to the allegations in the charges. The Hearing Committee assigned to this matter found that Respondent violated the Rule 1.15(a) as charged and recommended that he be publicly reprimanded.

The Board adopts the findings, conclusions, and recommendation of the Committee. Accordingly, the Board will impose a public reprimand.[3]

PROCEDURAL HISTORY

ODC filed the formal charges on July 7, 2015. The charges state, in pertinent part:

> On September 22, 2014, ODC received an overdraft notice from BanCorp South Bank regarding the trust of Vincent J. DeSalvo. According to the notice, your trust account ending in xxxx4402 was overdrawn on September 18, 2014 in the amount of $1,004.00. After being placed on notice of this issue by ODC, you advised that the overdraft resulted from your inadvertently depositing a client's settlement funds into your operating account. You subsequent transferred sufficient funds to cover this error and no client harm resulted from this error.

[1] Respondent is currently eligible to practice law.
[2] Rule 1.15(a) states, in pertinent part: "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. …"
[3] The Board has the authority to impose a public reprimand pursuant to Louisiana Supreme Court Rule XIX, §2(G)(2)(b).

> Nevertheless, in connection with ODC's review of your bank records covering the period March of 2014 to September 2014, it was noted that there was evidence of conversion on nearly half of the settlement disbursements occurring during the reviewed time frame. It is noted that you were disbursing your clients their "net" settlement proceeds the same day they were endorsing the settlement check and closing the case. In most cases the client's check was being presented for payment one to three days prior to the deposit being made and credited to your trust account.
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> In response to the allegations of your regularly and improperly disbursing client settlement proceeds prior to the insurance company's check being deposited into the trust account, you reviewed the bank records and admitted that our findings were "absolutely correct." You went on to acknowledge that you personally sign all IOLTA account checks and prepare all IOLTA account deposit slips. You further admitted there was sometimes a delay in actually depositing the insurance company settlement checks into the trust account, prior to disbursing the client funds.
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> This evidence obtained by ODC and the Court's jurisprudence on this issue suggests that your procedure for disbursing client funds prior to the deposit of their settlement proceeds into your client trust account is a violation of Rule 1.15(a) of the Rules of Professional Conduct.

On July 20, 2015, Respondent filed an answer to the charges in which he admitted to the allegations.

This matter was heard by Hearing Committee Number 29 ("the Committee") on November 9, 2015.[4] The Committee heard the testimony of Respondent and received into evidence ODC Exhibits 1-17. The Committee made the following factual findings and conclusions:

1. Respondent improperly deposited into his operating account client funds totaling $74,281.92 for client, Brian Gibson, which resulted in his IOLTA account being over drafted. In addition, on three separate occasions respondent inadvertently deposited his fee and expense check into his IOLTA account instead of his operating account. No client or third party was harmed by these actions. [FN2. ODC 7.]
2. Upon auditing respondent's IOLTA account, ODC found that Respondent, on a number of occasions, improperly disbursed funds to his clients from his IOLTA account before the settlement funds were made available and, in some instances, before the funds had been deposited into the IOLTA account. The Committee, in reviewing ODC 10-14, notes the following clients who were disbursed settlement funds prior to those funds being deposited and/or made available:

[4] The Committee was composed of Valerie B. Bargas (Chairwoman), Edythe L. Koonce (Lawyer Member), and R. Thomas Brown (Public Member).

a. Jennie Cantrell (funds disbursed on 3/24/14; funds deposited on 3/28/14);
b. Erin Miller (funds disbursed on 3/20/14; funds deposited on 3/24/14);
c. Aurcha McKneely (funds disbursed on 4/2/14 and 4/3/14; funds deposited on 4/4/14);
d. Michelle McNeil (funds disbursed on 4/17/14; 4/16/14; and 4/24/14; funds deposited on 4/25/14);
e. Treg Johnson (funds disbursed on 4/23/14; funds deposited on 4/25/14);
f. Keira Johnson (funds disbursed on 4/23/14; funds deposited on 4/25/14);
g. Karen Lopinto (funds disbursed on 4/25/14; funds deposited on 4/30/14);
h. Rebecca Powell (funds disbursed on 5/5/14; funds deposited on 5/6/14);
i. Matrice White (funds disbursed on 5/13/14; funds deposited on 5/16/14);
j. Cleon Wilson (funds disbursed on 5/20/14; funds deposited on 5/22/14);
k. Jessica Hodge (funds disbursed on 5/29/14; funds deposited on 5/30/14);
l. Tracey Bourgeois (funds first disbursed on 5/30/14; funds deposited on 6/3/14) (second disbursement on 6/9/14; funds related to this second disbursement were deposited on 6/11/14);
m. Ireka Stewart o/b/o Alyana Stewart (funds disbursed on 6/10/14; funds deposited on 6/12/14);
n. Cleon Wilson (funds disbursed on 6/19/14; funds deposited on 6/20/14);
o. Christine Sullivan (funds disbursed on 7/10/14 and 7/11/14; funds deposited on 7/15/14);
p. Brian Gibson (see above, settlement funds incorrectly deposited in Operating rather than IOLTA account);
q. Lakeisha Mott (funds first disbursed on 8/11/14; funds deposited on 8/12/14) (second disbursement to this client was on 8/11/14 and deposit on this second disbursement, for client's minor child, was on 8/12/14);
r. Keith Smith (funds disbursed on 8/12/14; funds deposited on 8/15/14);
s. Bonnie Whitaker (funds disbursed on 8/18/14; funds deposited on 8/20/14);
t. Rhonda Termini (funds disbursed on 9/22/14 and 9/23/14; funds deposited on 9/26/14); [FN3. The details on the disbursements and deposits relating to findings "a" through "t" were obtained directly from respondent's correspondence. ODC-10.]
u. Gerryleigh Garcia (funds disbursed on 4/9/14; funds deposited on 4/10/14);
v. Christine Sullivan (funds disbursed on 7/11/14; funds deposited on 7/15/14);
w. Keith Smith (funds disbursed on 8/12/14; funds deposited on 8/15/14);
x. Bryan Romero (funds disbursed on 9/3/14; funds deposited on 9/4/14); [FN4. The details on the disbursements and deposits relating to findings "u" through "x" were found in ODC-11 and admitted by respondent in ODC-12.]

3. The Committee also found that there was at least one more trust account discrepancy due to the respondent inadvertently disbursing funds to a client that she previously received. Upon notice through the ODC's investigation, the respondent immediately transferred the requisite funds to his IOLTA account, $404.93, to fix the error. [FN5. ODC-13 and ODC-14.]

> The Committee found that the respondent was cooperative with the ODC's investigation and took full responsibility for his and his staff's poor accounting procedures in handling disbursements from his IOLTA account. The Committee further found that no client or third party suffered any harm by the respondent's violation of Rule 1.15.
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> The Committee found that respondent was negligent in his accounting practices especially with regard to disbursing funds prior to ensuring that all settlement funds had been deposited and were available in his IOLTA account.
> ***
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> Due to his negligently depositing the funds of one client, Brian Gipson, in his operating account, respondent violated Rule 1.15(a), which forbids the commingling of client funds with lawyer funds and further forbids conversion of client funds for the use of a third party.
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> Respondent also violated Rule 1.15 when he disbursed client funds prior to ensuring that the settlement funds had been credited to his IOLTA account. In so doing, respondent used other clients and/or third parties funds when the disbursement took place prior to the settlement funds being available.
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> The Committee believes that the respondent's actions were "negligent," rather than "knowingly" performed, as respondent had become, over time, less diligent in ensuring that all settlement funds were timely deposited in his IOLT A account. He relied on his clients to wait a day or two before depositing a disbursement check. [FN6. Transcript of Hearing, pp. 25.] Respondent, as noted in ODC-10, failed to timely bring his deposits to the bank. Furthermore, respondent had a credit line attached to both his operating and IOLTA accounts, through Bancorp, and did not believe "rolling conversions" of client funds was taking place when disbursements were made prior to settlement checks being deposited. [FN7. Transcript of Hearing, pp. 25-26.] Finally, respondent bad a strong desire to satisfy his clients and give them their money as quickly as possible. As a result, respondent did not handle disbursements as required by Rule 1.15.

Hearing Committee Report, pp. 4-8. As a sanction, the Committee recommended a public reprimand. In support of this recommendation, the Committee made the following findings:

> According to ABA Standard 4.1, when a lawyer has been found to have failed to preserve a client's property, and in absence of aggravating or mitigating circumstances, 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. However, a **reprimand** is generally appropriate when a

lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

"The purpose of disciplinary proceedings is not primarily to punish the lawyer, but rather to maintain the appropriate standards of professional conduct, to preserve the integrity of the legal profession and to deter other lawyers from engaging in violations of the standard of the profession" *In re: Laurent,* 835 So.2d 430, 433 (La. 1114/03). The Louisiana Supreme Court has determined that any discipline imposed be based upon the facts of each case, the seriousness of the offenses involved, and that all aggravating and mitigating factors be considered. *Id.*

The Committee recognizes that the respondent is a solo practitioner, who has been a Louisiana attorney since May 1, 1978. The respondent has one prior act of discipline involving a private reprimand for failure to supervise office personnel. The 1991 formal charges were brought as result of a complaint involving a direct mail advertisement sent by respondent's staff in violation of Rule 7.3. The Committee takes special note that the ODC has never previously brought charges against respondent for any IOLTA account violations.

As to the improper deposit of Mr. Gibson's settlement funds into his operating account, respondent would be subject to a public reprimand as the appropriate sanction. Mr. Gibson did not suffer any harm, but there certainly was potential for him to suffer harm. By negligently depositing Mr. Gibson's settlement check into his operating account, respondent violated duties to his client, the public, and the profession. However, respondent's conduct was negligent, at best, and he immediately took steps to correct the problem.

The more glaring offense, for which the respondent has been honest and forthright, involves the disbursement of settlement funds to clients and third parties prior to those funds being deposited or made available in respondent's IOLTA account. The appropriate sanction for respondent's conduct hinges on whether or not the Committee believes the respondent's actions were "negligent" or "knowing." The Committee finds the respondent's actions were negligent and, thus, a public reprimand, rather than a suspension, is the appropriate sanction.

Respondent testified that he had a credit line tied to his accounts with Bancorp, so no checks would be declined. As such, in his opinion, there was no potential for conversion of client funds and no client or third party was subject to injury. The reality is that respondent had become lax in timely depositing settlement funds in his IOLTA account. Therefore, rolling conversions were taking place because his credit line was never used to pay for checks presented on his IOLTA account where settlement funds had not yet been deposited. Respondent, however, did not view his practice as inappropriate since no clients or third parties ever suffered any harm and, in his opinion, would never have suffered any harm given his credit line.

The Committee agrees that no clients or third parties suffered any harm, but the Committee was more interested in what, if anything, the respondent had done to change his practices. Respondent, upon recognizing his errors, admitted fault, provided full disclosure to the ODC, and has changed his office practices in disbursements to clients. Respondent's practice in "early disbursements" was a mechanism to satisfy his clients' desire to have their money. He had no selfish

> motive. However, now, his staff is required to confirm that all settlement funds have cleared his IOLTA account before disbursements are allowed, and he recognizes and admits that the practice of "early disbursements" is a rule violation.
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> The Committee is mindful that the Louisiana Supreme Court has consistently recognized that commingling and conversion are two of the most serious offenses against attorneys. However, suspending respondent would punish him, rather than protect the profession. The ODC has identified multiple cases wherein the respondent agreed to the consent discipline of a six month suspension in support of its suggested sanction in the present case. Respondent does not consent to the discipline suggested by the ODC. Additionally, the Committee feels that the sanction of a six month suspension is not appropriate in this case. A more appropriate sanction is a public reprimand, given the Committee's finding that the respondent's actions were negligent rather than knowing. [FN8. *See In re: Mayeux,* 762 So.2d 1072 (2000).]
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> More importantly, the significant mitigating factors present in this case warrant a public reprimand, rather than a suspension. No actual harm resulted to the client or to a third party, respondent gained no personal benefit from his misconduct, respondent had no dishonest or selfish motive, and respondent was cooperative with the disciplinary proceedings, admitted fault, and changed his office practices to address the problem. There are two aggravating factors: respondent's prior discipline, which is unrelated to the conduct at issue, and the multiple instances of misconduct outlined in this report. However, the multiple incidences involve the same conduct, thus, the Committee does not believe the sanction should be increased, given the respondent's mindset and the number of mitigating factors listed above. [FN9. *In re: Mayeux,* 762 So.2d 1072 (2000).]

Hearing Committee Report, pp. 8-11.

On February 15, 2016, ODC filed an objection to the sanction recommended by the Committee. ODC argues that a fully-deferred six-month suspension, with probation, is warranted.

Oral argument of this matter was heard by Board Panel "A" on May 19, 2016.[5] Deputy Disciplinary Counsel Gregory L. Tweed appeared on behalf of ODC. Respondent appeared *pro se*.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

[5] Board Panel "A" was composed of Carrie LeBlanc Jones (Chairwoman), Linda G. Bizzarro (Lawyer Member), and R. Lewis Smith, Jr. (Public Member).

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. 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 (1/22/92).

A. The Manifest Error Inquiry

The factual findings of the Committee do not appear to be manifestly erroneous. The findings are supported by the record.

B. *De Novo* Review

The Committee's conclusion that Respondent violated Rule 1.15(a) is supported by its findings and the record.

II. The Appropriate Sanction

A. Rule XIX, §10(C) Factors

Louisiana Supreme Court Rule XIX, §10(C) states that when 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 a duty to his clients. His negligent mismanagement of this trust account did not cause any harm to his clients, but there was the potential for harm.

The Board adopts the following mitigating factors recognized by the Committee: absence of a dishonest or selfish motive; and full and free disclosure to the disciplinary board and a cooperative attitude toward proceedings. The Board also recognizes the mitigating factors of remoteness of prior disciplinary offenses[6] and timely good faith effort to make restitution or to rectify consequences of the misconduct. Furthermore, the Board also adopts the Committee's findings that Respondent did not personally gain from his negligence, his conduct did not cause actual harm, and he has amended his trust account management practices.

The Board adopts the aggravating factors recognized by the Committee: prior disciplinary offenses[7] and pattern of misconduct.[8] The Board also recognizes the aggravating factor of substantial experience in the practice of law.[9]

B. The ABA Standards and Case Law

The *ABA Standards for Imposing Lawyers Sanctions* suggests that public reprimand is the baseline sanction. Standard 4.13 states: "Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client."

However, ODC argues that suspension is the appropriate sanction based upon the case law of the Court. This argument has merit. ODC cites *In re Laurent* and several other cases in which the Court imposed a fully-deferred six-month suspension for misconduct similar to the facts of this

[6] Respondent's last disciplinary offense was in 1992.
[7] Respondent received a formal private reprimand in 1990 for violating the solicitation rules. *See* ODC Exhibit 15. Respondent received a public reprimand in 1992, by consent, for failing to adequately supervise a non-lawyer employee, who violated the solicitation rules. *See* ODC Exhibit 16.
[8] The Committee considered "multiple offenses" as an aggravating factor. However, based upon the Committee's findings, it appears that it intended to find "pattern of misconduct" as an aggravating factor.
[9] Respondent was admitted to the practice of law in Louisiana on April 28, 1978.

matter.[10] In *Laurent*, the Court imposed a six-month suspension, all deferred, based upon Mr. Laurent's misuse of his trust account. 2002-2163 (La. 1/14/03); 835 So.2d 430. Because of the low case volume of his practice, Mr. Laurent began keeping legal fees he had earned in his trust account so as to avoid penalties for dropping below the minimum account balance. Mr. Laurent would write checks on the trust account to pay his office expenses and personal debts. The Court found that this conduct was the result of improper practice management as opposed to any intentional or selfish motive, adding the following comment: "While this finding in no way excuses respondent's action, it will serve to ameliorate the harshness of the sanction." *Id*. at 433. The Court found the presence of the following aggravating factors: pattern of misconduct and failure to cooperate with ODC. The Court found the presence of the following mitigating factors: lack of actual client harm, lack of a prior disciplinary history, and remorse. In addition to the deferred suspension, the Court imposed a two-year period of supervised probation with conditions.

ODC's argument that suspension is appropriate is also supported by the Court's ruling in *In re Spears*. In *Spears*, the Court suspended Mr. Spears for one year and one day, all deferred, for trust account mismanagement. 2011-135 (La. 9/2/11); 72 So.3d 819. Over an extended period of time, Mr. Spears commingled his funds with those of his clients by leaving his attorney's fees in his trust account and by transferring funds to his trust account from his operating and personal accounts. Mr. Spears also converted client and/or third party funds when he overdrew his trust

[10] ODC cited several consent discipline matters, which will not be discussed here because the Court has held consent discipline orders have little precedential value:

> Because the sanction in consent discipline proceedings is arrived at by mutual agreement between respondent and the ODC, and is not necessarily the sanction this court would impose under the facts, it has limited precedential value in future cases. While this court has rejected sanctions in consent discipline proceedings which are too lenient, we have sometimes accepted sanctions in such proceedings which arguably could be considered too harsh because the parties have agreed to the sanction. [Citations omitted.]

In re Boudreau, 2000-3158 (La. 1/5/01); 776 So.2d 428, 431, n.3.

account and he failed to maintain adequate records regarding his trust account. The Court concluded that his actions were negligent. There was no evidence of actual harm to his clients or third parties, but there was the potential for significant harm. The Court recognized the following aggravating factors: prior disciplinary offenses (for misconduct unrelated to the type of misconduct is this matter), substantial experience in the practice of law, and multiple offenses. The Court, however, also recognized several mitigating factors: absence of a dishonest or selfish motive, timely good faith effort to make restitution or to rectify the consequences of the misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, character or reputation, remorse, and remoteness of prior offenses.

However, the facts of this matter are distinguishable from the cases above. Mr. Laurent, essentially, used his trust account as personal checking account. In *Spears*, the trust account mismanagement was combined with commingling and a failure to maintain proper trust account records. These elements are not present in this matter. Here, Respondent's misconduct is largely comprised of failing to ensure settlement funds had cleared his account before issuing checks to clients. Otherwise, the record indicates that he has proper trust accounting procedures in place and did not use his trust account for improper purposes.[11] Based upon these factors, it does not appear a period of monitoring is necessary (*i.e.* deferred suspension plus probation). Rather, Respondent has acknowledged his error and amended his practices. Accordingly, a public reprimand is the appropriate sanction in this matter.[12]

CONCLUSION

[11] The two other instances of misconduct noted by the Committee – depositing a settlement check in the trust account and issuing a disbursement twice – can be categorized as simple mistakes that, standing alone, would not warrant discipline.

[12] Even if a suspension was the baseline sanction in this matter based upon the *ABA Standards*, a deviation downward to public reprimand would be warranted based upon the mitigating factors.

The Board adopts the findings, conclusions, and recommendation of the Committee. Accordingly, the Board will impose a public reprimand and assess Respondent with the costs and expenses of this proceeding.

RULING

Considering the foregoing, the Board orders that Respondent, Vincent J. DeSalvo, be publicly reprimanded. The Board also orders that Respondent be assessed with the costs and expenses of this matter.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Linda G. Bizzarro
Laura B. Hennen
Carrie L. Jones
Dominick Scandurro, Jr.
Evans C. Spiceland, Jr.
Melissa L. Theriot
Walter D. White
Charles H. Williamson, Jr.

BY: _____
R. Lewis Smith, Jr.
FOR THE ADJUDICATIVE COMMITTEE