

ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE RICHARD R. FISHER
15-DB-055
RULING OF THE DISCIPLINARY BOARD

INTRODUCTION

This attorney disciplinary matter arises out of formal charges filed by the Office of Disciplinary Counsel (“ODC”) against Richard R. Fisher (“Respondent”), bar roll number 01360.¹ In the charges, the ODC alleged that Respondent violated Rule of Professional Conduct 1.15 (commingling).² Respondent stipulated to the facts.³ After conducting a hearing on mitigation, the hearing committee (“committee”) found Respondent engaged in misconduct and recommended the issuance of a public reprimand.

For the following reasons, the Board adopts the factual findings, legal conclusions and sanction recommendation of the committee. Accordingly, it issues this public reprimand. In addition, the Board orders that Respondent attend the L.S.B.A.’s Trust Accounting School within one year of the issuance of this public reprimand.

PROCEDURAL HISTORY

The formal charges were filed on October 14, 2015. Respondent filed an answer to the charges on February 22, 2016. A hearing was held on May 20, 2016. Deputy Disciplinary Counsel Robert S. Kennedy, Jr., appeared on behalf of the ODC. Ronald J. Miciotto appeared on behalf of Respondent. The committee’s report was issued on September 1, 2016.⁴ The ODC objected to the committee’s report only insofar as the recommended sanction, arguing that given

¹ Respondent is currently eligible to practice law.

² See the attached Appendix for the text of this Rule.

³ Hearing transcript, p. 2.

⁴ The committee was comprised of Zelda W. Tucker (Chair), Gregory H. Batte (Lawyer Member) and Margaret L. Caplis (Public Member).

Respondent's knowing misconduct, nothing less than a six-month deferred suspension would be appropriate. Oral argument was held before Panel "A" of the Board on November 10, 2016.⁵ Mr. Kennedy appeared on behalf of the ODC. Mary T. Amari appeared on behalf of the Respondent. The Respondent was present, as well. The Panel requested post argument briefs to address whether the imposition of conditions in conjunction with the issuance of a public reprimand is permitted. The ODC filed its Post Argument Brief on November 17, 2016. Respondent filed his Post Argument Brief on November 22, 2016.

FORMAL CHARGES

The formal charges read, in pertinent part:

On October 28, 2013, the ODC received a Notice of Overdraft from Chase Bank reflecting that on October 21, 2013 a check in the amount of \$64.31 drawn on Respondent's trust account ending in 3161 was returned for insufficient funds.

While he admittedly deposited client funds into his account, Respondent's checking account records also revealed that Respondent was routinely using his client trust account to pay personal debts, intermittently depositing personal funds into the account to cover personal or office expenses. He also acknowledged in his response to the complaint dated January 7, 2014 that he regularly deposited earned fees directly into his trust account and paid personal expenses. Respondent's acknowledged conduct indicates that he had engaged in commingling of his personal funds with those of his clients in violation of Rule 1.15.

Based on these facts, the ODC submits that the respondent has knowingly violated Rule of Professional Conduct 1.15 (Engaged in commingling of his personal funds with those of his clients).

REPORT OF THE HEARING COMMITTEE

The committee made the following factual findings:

Richard [R.] Fisher began practicing law in 1982 when he was hired by the U.S. Bankruptcy trustee for the Western District. Upon leaving that position, Mr. Fisher went into private practice focusing primarily on filing plaintiff bankruptcy petitions and has worked in that area for a period spanning thirty years. He is currently working for the Caddo Parish Public Defender's Office and has been since 2013. He testified that it is his intention to remain in public service and not maintain a private practice.

⁵ Panel "A" was comprised of Melissa L. Theriot (Chair), Dominick Scandurro, Jr. (Lawyer Member), and Evans S. Spiceland, Jr. (Public Member).

Mr. Fisher admitted that he maintained a trust account in 2013 and received the overdraft notice from Chase Bank on November 1, 2013. At that time, he had a private practice in Lincoln Parish and admitted that he had an overdraft for \$64.31 for a printer cartridge. He testified that he had deposited his own personal funds into the account to cover the check. He admitted that he knew that it was improper to deposit personal funds into the trust account to pay private debts but he felt that no client was harmed because he did not use client funds.

Mr. Fisher further testified that he did maintain a personal operating account at the time but the operating account had been closed by the bank for overdraft fees and he could not afford to reopen it so he used the trust account. Although he testified that he has no intention of returning to private practice, at the time of the hearing, he still had the same trust account open because it was his understanding that a lawyer was always supposed to have a trust account. However, he did not have an operating account because he no longer has a private practice.

Report of Hearing Committee #60, p. 4.

Relative to rule violations, the committee found that the Respondent violated Rule 1.15 when he deposited personal funds into his trust account and payed operating expenses from that account.

As to sanction, the committee wrote the following:

In this case, the admitted facts as outlined in the formal charges and exhibits offered into evidence are not in dispute and the parties agreed that the committee would hear testimony on the issue of mitigation. When considering the facts and evidence in this case, as well any aggravating and mitigating factors, the hearing committee does not find that the Respondent's actions rose to the level of disbarment or suspension. The committee finds that the Respondent knew that he was not to use his client trust account to pay operating expenses, however, he truly believed that his actions were justified since he had no client funds in the account. Therefore, the committee finds that the Respondent's actions were not intentional. Additionally, the committee finds that the actions of the Respondent did not cause any actual or potential injury or harm. At the time of this occurrence, the Respondent was essentially no longer in private practice. His operating account was closed and he had one case left to discharge in bankruptcy court. He had no client funds or fees. The money he deposited in the trust account came from the wages he was earning as an employee at his public service job. The Respondent was negligent in his operation of his client trust account, but there was no evidence that he used client funds or client property when he used the funds to pay personal and/or operating expenses. There was an absence of a dishonest or selfish motive. The evidence showed

that the Respondent deposited the overdraft amount and fees into the account timely to rectify the consequences of the misconduct and all parties agree that there was full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings. The committee also accepts the testimony of the witnesses that the Respondent has good character, is well liked in the legal community, and has a good reputation.

The hearing committee also considered the prior disciplinary record of the Respondent. Additionally, it became very clear that the Respondent, who had been in private practice for more than 30 years and had complied with the CLE requirements, had limited knowledge about the rules governing client trust accounts. For this aggravating circumstance, the committee felt that there was some potential for future harm if he continued in private practice. However, the hearing committee considered as a mitigating factor the Respondent's testimony that he did not intend to return to private practice. The hearing committee finds that the baseline sanction would be an admonition but considering the aggravating factors, would recommend a reprimand.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

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

Here, the committee’s findings of fact are supported by the record. Respondent stipulated to the facts as alleged. These facts are adopted by the Board.

B. *De Novo* Review

The committee correctly applied the Rules of Professional Conduct. The legal conclusions of the committee are supported by the stipulated facts. *See, In re Donnan*, 2001-3058 (La. 1/10/03), 838 So.2d 715.

SANCTION

Louisiana Supreme Court Rule XIX, Section 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.

The Louisiana Supreme Court also relies on the *ABA Standards for Imposing Lawyer Sanctions* ("ABA Standards") to determine the baseline sanction. *In re Quaid*, 94-1316 (La. 11/30/94); 646 So.2d 343, 350.

In violating Rule 1.15, Respondent violated a duty owed to clients. Depending on Respondent's state of mind, the *ABA Standards* indicate that discipline ranging from admonition to suspension may be the appropriate baseline sanction.⁶ The ODC has argued that Respondent acted knowingly, and therefore, the appropriate baseline sanction is suspension, citing the committee's finding that Respondent knew that it was improper to deposit personal funds into the

⁶ ABA Standard 4.1 is pertinent. It provides:

Absent aggravating or mitigating circumstances . . . the following sanctions are generally appropriate in cases involving the failure to preserve client property:

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 a client.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

trust account to pay private debts.⁷ The committee went on to find, however, that Respondent's handling of his trust account was negligent, inasmuch as he truly believed that his use of the account to pay office expenses, when no client funds were present in the account, was justified. The committee found several mitigating factors, including absence of dishonest or selfish motive, full and free disclosure to the disciplinary board and cooperative attitude to the proceedings. It was also impressed with the character witnesses who testified on Respondent's behalf. The committee found the aggravating factor of prior discipline.⁸ These factors are adopted by the Board.

Under the circumstances in the instant matter, the Board finds that Respondent's mishandling of his trust account was more negligent than knowing. No client was harmed, however the manner in which Respondent handled his account did create the potential for client harm. Substantial mitigating factors exist, and although Respondent's record of prior discipline is not insubstantial, given the entirety of the circumstances, the Board finds that a public reprimand, rather than suspension, is appropriate.

The case law further supports the imposition of a public reprimand. *In re Laurent*, 2002-2163 (La. 01/14/03); 835 So. 2d 430, involved facts similar to the instant matter. Mr. Laurent maintained a small practice consisting primarily of uncontested domestic matters and criminal misdemeanors. Due to the nature of his practice, he did not keep substantial funds in his client trust account at most times, often failing to satisfy the minimum account balance required by his financial institution. As a result, he began keeping legal fees he earned from completed cases he

⁷ Report of Hearing Committee #60, p. 4.

⁸ Respondent was suspended in 2009 for accepting a \$300 fee to represent a client in a bankruptcy matter at a time when he had been declared ineligible. The suspension was for one year, with all but ninety days deferred. Prior to that, he was admonished on four occasions: three times in 1995 and once in 2000. From 1992-2008, Respondent was declared ineligible on numerous occasions for failing to pay bar dues and the disciplinary assessment, and for failing to comply with MCLE and trust account reporting requirements.

handled in his client trust account so as to avoid payment of bank penalties and service charges. Mr. Laurent routinely wrote checks on his client trust account to satisfy his office expenses and personal debts. In the course of investigating an unrelated disciplinary complaint, the ODC became aware of Mr. Laurent's misuse of his trust account, eventually charging him with violations of Rules 1.15, 8.1(c) and 8.4(g) (failure to cooperate with the ODC). Respondent filed an answer admitting he commingled client funds, but denied it was willful and to the detriment of his clients. Additionally, he denied that he failed to cooperate with the ODC. Aggravating factors found by the Court included a pattern of misconduct and obstruction of the disciplinary process through the failure to cooperate in the investigation. In mitigation, the Court found a lack of actual client harm, lack of a prior disciplinary record and remorse. The Court noted that Mr. Laurent's misconduct resulted from improper practice management skills rather than any intentional or selfish motive. Under the circumstances, it found a fully deferred six-month suspension to be appropriate, subject to a two-year period of probation, in addition to other conditions.

In *In re DeSalvo*, 15-DB-029 (07/25/2016), the Board issued a public reprimand to an attorney who mishandled his client trust account. The ODC received notice that Mr. DeSalvo's trust account was overdrawn by \$1,004. The overdraft resulted due to his inadvertent deposit of a client's settlement funds into his operating rather than client trust account. Mr. DeSalvo quickly addressed the matter and no client harm was sustained. The ODC's investigation following notice of the overdraft revealed that Mr. DeSalvo was routinely disbursing client settlement funds prior to the deposit of settlement checks into his trust account. The committee found his actions to be more negligent than knowing, finding that over time, Mr. DeSalvo had become less diligent in ensuring that all settlement funds were timely deposited into his client

trust account. Significant mitigating factors existed, including the absence of a dishonest or selfish motive, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, remoteness of prior disciplinary offenses, and timely good faith effort to make restitution or to rectify the consequences of the misconduct. Aggravating factors included prior disciplinary offenses, a pattern of misconduct and substantial experience in the practice of law. Considering that Mr. DeSalvo did not personally gain from his negligence, his conduct caused no actual harm, and he amended his office practice to avoid future trust account errors, the Board found the committee's recommendation of a public reprimand to be appropriate.

As in *Laurent*, the conduct in the instant matter appears to have resulted from improper practice management skills rather than any intentional or selfish motive. Similar to the circumstances in *DeSalvo*, Respondent did not personally gain from his negligence and his conduct caused no actual harm. Unlike *Laurent*, wherein the Court imposed a fully deferred suspension, Respondent in the instant matter was fully cooperative with the ODC, lending support to the issuance of a public reprimand, rather than suspension. The existence of several mitigating factors reinforces reprimand as the appropriate sanction. Nevertheless, as a safeguard to protect the public, the Board believes that additional education on the handling of trust accounts would benefit the Respondent. Accordingly, it will order Respondent to attend the L.S.B.A.'s Trust Accounting School.

CONCLUSION

Considering the foregoing, the Board adopts the committee's findings of fact, conclusions of law and sanction recommendation. Accordingly, the Board will issue a public reprimand. In addition, the Board will order Respondent to attend the L.S.B.A.'s Trust Accounting School within one year of the issuance of the public reprimand. Finally, the Board

will order that Respondent pay all costs and expenses associated with these disciplinary proceedings.

RULING

The Board orders that Respondent, Richard R. Fisher, be publicly reprimanded. In addition, the Board orders that Respondent attend the L.S.B.A.'s Trust Accounting School within one year of the issuance of this public reprimand. Finally, the Board orders that Respondent pay all costs and expenses associated with these disciplinary proceedings.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

**Linda G. Bizzarro
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Sheila E. O'Leary
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Evans C. Spiceland, Jr.
Walter D. White
Charles H. Williamson, Jr.**

BY:


**Melissa L. Theriot
FOR THE ADJUDICATIVE COMMITTEE**

Pamela W. Carter – Concurs with reason.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: RICHARD FISHER

DOCKET NO. 15-DB-055

CONCURRENCE

Despite being clearly aware that his actions were in violation of the rules, per his prior history and admission, this attorney still opted to act with awareness of the consequences. I concur.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

By: _____

PAMELA W. CARTER
Adjudicative Committee Member

APPENDIX

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. A lawyer shall subject all client trust accounts to a reconciliation process at least quarterly, and shall maintain records of the reconciliation as mandated by this rule.
- (g) ...