

LOUISIANA ATTORNEY DISCIPLINARY BOARD**IN RE: MICHAEL THOMAS JOSEPH, JR.****NUMBER: 16-DB-004****RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD**
-----**INTRODUCTION**

This is an attorney discipline matter based upon the filing of formal charges by the Office of Disciplinary Counsel (“ODC”) against Michael Thomas Joseph, Jr. (“Respondent”), Louisiana Bar Roll Number 32880.¹ The charges allege violations of the following Rules of Professional Conduct (“Rule(s)”): Rule 1.15(a) (safekeeping property), Rule 1.15(d) (receiving client or third-party funds), Rule 1.16(d) (termination of representation), Rule 8.1(c) (failure to cooperate with ODC), Rule 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).² The Hearing Committee assigned to this matter concluded that Respondent violated Rules 1.15(a) and 8.4(a) in Count I, and recommended that he be given a public reprimand and attend an LSBA approved trust accounting program. ODC does not object to the findings, conclusions, and recommendation of the Committee.

For the following reasons, the Board adopts the findings, conclusions, and recommendation of the Hearing Committee. Accordingly, the Board will impose a public reprimand.

PROCEDURAL HISTORY

¹ Respondent is currently eligible to practice law.

² See attached Appendix for the text of these Rules.

ODC filed formal charges against Respondent on February 1, 2016. The formal charges state, in pertinent part:

Investigation File No. 31057

Complainant – ODC

The ODC received notice from Chase Bank that Respondent's client trust account ending in 4499 was insufficient for payment when check #5847 in the amount of \$3,700 was presented for payment and returned. Notice of the overdraft was forwarded to Respondent with instructions to submit a written explanation of the circumstances as well as documents needed for ODC to conduct its investigation, including bank statements, check images, and disbursement sheets. The notice was returned stamped "return to sender/unclaimed/unable to forward." On November 5, 2013, the ODC received Respondent's reply, with supporting documents. He explained that he paid doctors and clients before settlement checks cleared his account, thus causing the overdraft.

During the course of the investigation regarding the aforementioned overdraft, the ODC received other notices from Chase Bank regarding overdrafts in Respondent's Client Trust Account ending in 4499. On August 14, 2014, check #1016 in the amount of \$20.00 was presented for payment and returned due to insufficient funds. On July 10, 2014, check #1019 in the amount of \$47.00 was presented for payment and returned due to insufficient funds. Respondent submitted a response dated August 28, 2014 wherein he claims that the overdrafts were a result of his secretary issuing checks from the wrong check book.

After reviewing the information submitted, ODC's auditor determined that additional information was needed in order to complete the audit. On October 8, 2014 and again on December 22, 2014, the ODC forwarded notice to Respondent instructing him to forward documents needed to complete the audit. Due to Respondent's failure to respond to ODC's request, on March 6, 2015, a subpoena was issued to JPMorgan Chase Bank, NA for documents pertaining to Respondent's Client Trust Account that were needed to complete the audit. After several attempts to serve Respondent with notice of the bank subpoena, ODC investigator successfully hand delivered notice to Respondent on April 22, 2015, at 10001 Lake Forest Blvd. Ste. 502 New Orleans, LA 70127.

A second audit review was conducted and it was determined that additional information was needed in order to complete the audit. On July 16, 2015, the ODC forwarded notice to Respondent at both his primary and preferred mailing addresses, instructing him to identify clients associated with particular checks that were issued from his Client Trust Account, provide settlement statements for particular clients, and identify clients related to transfers from the trust account ending in 0670. Return receipt cards were returned with signatures indicating receipt of the notice.

As a result of Respondent's failure to respond, a subpoena was issued commanding Respondent to appear at the ODC on November 10, 2015 with a

copy of all information requested in the July 16, 2015 correspondence. ODC investigator attempted to serve Respondent with subpoena at both his primary and preferred addresses but was unable to locate Respondent at either address. [ODC alleges violations of Rules 1.15(a), 8.1(c), and 8.4(a).]

Investigation File No. 33208

Complainant – Yamil Cedeno Flores

An ethical complaint was filed by Mr. Flores on behalf of Hicks Chiropractic Health Center. Mr. Flores states that Hicks Chiropractic treated Respondent's client, Luis Rivera, for injuries he sustained as a result of a motor vehicle accident. Mr. Flores states that his office executed an assignment of benefits form that was signed by Mr. Rivera in which payment for the services were to be paid directly to his office. According to Mr. Flores, his office contacted State Farm regarding the payment and was informed that the check for medical services, dated January 18, 2014, was forwarded to Respondent and made payable to Respondent, Mr. Rivera, and Hicks Chiropractic Health. Mr. Flores maintains that his office has yet to receive the \$3,040 owed for medical services provided to Mr. Rivera.

Notice of the ethical complaint was forwarded to Respondent on June 12, 2015 at his primary bar registration address; certified mail with return receipt request. On June 17, 2015, the ODC received the return receipt card bearing a signature though illegible, as indication that the notice of the ethical complaint was received. Respondent was instructed to forward a written response to the complaint of the ODC fifteen (15) calendar days of receipt of the notice.

As a result of Respondent's failure to respond to the ethical complaint, a subpoena was issued wherein he was commanded to appear at the ODC on November 10, 2015 with a copy of his original file and a response to the ethical complaint. ODC investigator attempted to serve Respondent at both his primary and preferred addresses listed with the Louisiana State Bar Association. The investigator was not able to locate Respondent at either address. [ODC alleges violations of Rules 1.15(d), 1.16(d), 8.1(c), 8.4(a), and 8.4(c).]

By letters dated February 4, 2016, the formal charges were mailed via certified mail to Respondent's primary registration address and preferred address.³ The mailing to Respondent's primary registration address was received on February 8, 2016. Respondent failed to file an answer to the charges within the time period allowed by Louisiana Supreme Court Rule XIX, §11(E)(3). Accordingly, on May 4, 2016, ODC filed a motion to deem the factual allegations as

³ Respondent's primary registration address is 7008 Neptune Ct., New Orleans, LA 70126. Respondent's preferred address is 10001 Lake Forest Blvd., Ste. 502, New Orleans, LA 70127.

proven. By order of May 13, 2016, the factual allegations contained in the formal charges were deemed admitted.

On July 7, 2016, Respondent filed a motion to recall the order deeming the charges admitted. By order dated July 8, 2016, the Hearing Committee Chair granted the motion and ordered that the matter be set for hearing.

The hearing of this matter was held on October 14, 2016 before Hearing Committee No. 24 (the "Committee").⁴ Deputy Disciplinary Counsel Yolanda Cezar appeared on behalf of ODC. Respondent appeared pro se. The Committee heard testimony by Respondent and admitted into evidence ODC Exhibits 1-4.

The Committee issued its report on October 18, 2016. The Committee findings were:

With respect to Count 1, the committee finds ODC proved by clear and convincing evidence that respondent violated Rule 1.15(a) by allowing overdrafts to occur in his trust account. Finding such a violation carries with it a concomitant violation of Rule 8.4(a). Respondent did not dispute the facts underlying these violations. As to count 2, the committee finds that, although the underlying facts may not have been disputed by respondent, his conduct does not rise to a violation of Rule 1.15(a)⁵ or 1.16(d). Respondent did not guarantee the chiropractor's bill. Respondent attempted to reimburse the chiropractic clinic, but the clinic insisted that State Farm make checks payable to the clinic only. The committee believes this is a dispute between Mr. Rivera, the clinic and State Farm.

Because Respondent did not contest the facts of the case, the primary objective of the hearing was to determine the appropriate sanction. In doing so, the Committee concluded:

The ODC acknowledges there is no evidence that there was any actual or potential injury to any of respondent's clients. Indeed, in its pretrial memorandum, ODC recommends a "lenient" sanction. ODC cited no aggravating factors, and cited respondent's (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; and (c) inexperience in the practice of law as mitigating factors. Thus, in this case, public admonition is a baseline, and is the minimum sanction available once formal charges are filed and a rules violation found.

⁴ Hearing Committee No. 24 consists of Darryl Joseph Foster (Committee Chair), Carl Edward Hellmers (Lawyer Member), and Harry Gelpi Barkerding (Public Member).

⁵ This is a typographical error. It should state "1.15(d)."

On November 21, 2016, ODC filed a Notice of No Objection to the Hearing Committee Report. In its brief to the Board, ODC contends that a lenient sanction is warranted.

Oral argument of this matter was heard on February 16, 2017 before Board Panel “B”.⁶ Deputy Disciplinary Counsel Yolanda Cezar appeared on behalf of ODC. Respondent did not appear.

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

The factual findings of the Committee are manifestly erroneous and are supported by the record. Respondent did not contest the facts of this matter before the Committee.

B. De Novo Review

⁶ Board Panel B was composed of Melissa L. Theriot (Chairperson), Linda Bizzarro (Lawyer Member), and Evans C. Spiceland, Jr. (Public Member).

The Committee correctly applied the Rules of Professional Conduct and properly concluded that Respondent violated Rule 1.15(a) and Rule 8.4(a). Additionally, the Committee correctly determined that Respondent did not violate Rule 1.15(d) or Rule 1.16(d) with respect to Count 2, as that count pertains to a billing issue between Respondent, his client, and the chiropractor clinic. Moreover, there is no evidence that shows a failure by Respondent to take reasonable steps to protect a client's interests upon termination of representation sufficient to qualify as a violation of Rule 1.16(d). Additionally, although the formal charges included an alleged violation of Rule 8.1(c) by failing to cooperate with ODC, the facts do not demonstrate that Respondent did so. Respondent stopped practicing law and moved out of his office. Although he indicated at the hearing that he changed his address on the Supreme Court website, his mailing address was not changed. Because of this mistake, ODC had an incorrect address and subsequently received no response from Respondent after filing formal charges. Once this was discovered, Respondent demonstrated a willingness to comply with ODC. Hearing Transcript, p. 19. The Committee correctly concluded that Respondent violated only Rules 1.15(a) and 8.4(a). ODC does not object to these conclusions.

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 the profession by failing to correctly maintain his client trust account. His actions regarding his trust account were negligent, and while they caused no actual client injury, as conceded by ODC, they nonetheless created the potential for injury. There are no aggravating factors present in this matter. There are a few mitigating factors: absence of a prior disciplinary record, absence of a dishonest or selfish motive, and inexperience in the practice of law.⁷

B. The ABA Standards and Case Law

The *ABA Standards for Imposing Lawyer Sanctions* suggests that public reprimand is the appropriate sanction in this matter. Standard 4.13 provides: “Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. Additionally, Standard 4.14 provides: “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.” On the contrary, Standard 4.12 states that “[s]uspension 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.” A suspension would not be appropriate because Respondent did not act knowingly and there was no client harm. Instead, due to the lack of actual injury, the small amount of potential injury, and the isolated nature of the misconduct, a reprimand is more appropriate.

The Court’s jurisprudence is in agreement that a minor instance of trust account mismanagement that results in no actual harm warrants a lenient sanction. In *In re Laurent*, an attorney was given a fully-deferred six-month suspension after depositing fees and other money into his trust account and routinely using that account to pay office expenses. 2002-B-2163 (La.

⁷ Respondent was admitted to the practice of law in Louisiana on April 29, 2010.

1/14/03), 835 So.2d 430, 433. Additionally, the attorney failed to cooperate with ODC's investigation. *Id.* at 431. The Court determined that the misconduct was the product of poor management skills rather than any intentional or selfish motive. *Id.* at 433. Similarly, in *In re Wilson*, a lawyer received a fully-deferred one-year-and-one-day-suspension for gross mismanagement of a trust account, commingling personal and client funds, and failure to deliver third party medical funds withheld from client settlements. 2012-B-0579 (La. 6/15/12), 90 So.3d 1018, 1022-23. The Court noted that where commingling causes no actual harm, a fully deferred suspension is appropriate. Like both cases, Respondent here improperly managed his account, but no clients were harmed. However, the present matter concerns an isolated instance of trust account mismanagement as opposed to a pattern and practice of mismanagement that was present in *Laurent* and *Wilson*. Furthermore, Respondent no longer operates a law practice, instead teaching high school science. Hearing Transcript, at p. 17-18. As such, a fully-deferred suspension with monitoring would have little practical effect. Instead, a public reprimand would serve the same end of maintaining appropriate standards of professional conduct and preserving the integrity of the profession.

In *In re Mayeaux*, Mr. Mayeaux was given a public reprimand after depositing settlement funds in the incorrect account in order to negotiate medical charges with a third-party but no actual harm resulted. 99-B-3549 (La. 5/16/00), 762 So.2d 1072, 1075-76. Because the account used by Mr. Mayeaux fell below the amount of the deposited settlement funds, he was also found to have converted client funds. *Id.* at 1075. However, Mr. Mayeaux's intention in his actions were to decrease medical charges that would otherwise leave his client with almost no recovery. *Id.* Mitigating factors were absence of a dishonest or selfish motive, cooperative attitude towards the proceedings, character and reputation, and remorse. *Id.* at 1076. There was one

aggravating factor: prior disciplinary offenses. *Id.* Similarly, *In re DeSalvo*, the Board imposed a public reprimand based upon a technical “rolling conversion” of funds. Ruling of the Board, 15-DB-029 (7/25/16). Mr. DeSalvo would disburse settlement funds before the settlement checks cleared the bank. The following mitigating factors were present: absence of a dishonest or selfish motive, full and free disclosure to the disciplinary board and a cooperative attitude toward proceedings, remoteness of prior disciplinary offenses, and timely good faith effort to make restitution or to rectify consequences of the misconduct. The following aggravating factors were present: prior disciplinary offenses, pattern of misconduct, and substantial experience in the practice of law. Here, Respondent’s misconduct is similar to that in *Mayeaux* and *DeSalvo*, but less egregious in amount and kind. In one instance, Respondent’s account had insufficient funds to cover a check because he disbursed the check before the settlement checks cleared the bank. Additionally, two other small checks were written by Respondent’s secretary out of the incorrect account. There is no indication that Respondent’s trust account issues stemmed from anything other than inexperience.

CONCLUSION

The Board adopts the factual findings, conclusions, and recommendation of the Committee. Accordingly, the Board will impose a public reprimand with the condition that Respondent attend Trust Accounting School offered by the LSBA by the end of 2017 and report his attendance to ODC.

RULING

Considering the foregoing, the Board orders that Respondent, **Michael Thomas Joseph, Jr.**, be publicly reprimanded. The Board also orders Respondent to attend Trust Accounting School offered by the LSBA by the end of 2017 and report his attendance to ODC. Finally, the Board orders that Respondent be assessed with the costs and expenses of this matter in the manner described above.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

**Linda G. Bizzarro
Pamela W. Carter
Anderson O. Dotson, III
Sheila E. O'Leary
Danna E. Schwab
Melissa L. Theriot
Walter D. White
Charles H. Williamson, Jr.**

BY:



**Evans C. Spiceland, Jr.
FOR THE ADJUDICATIVE COMMITTEE**

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 ...

Rule 1.16. Declining or Terminating Representation

(a) ...

(b) ...

(c) ...

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

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) ...

(b) ...

(c) Fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.

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) ...

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