ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: LARRY ENGLISH

NUMBER: 17-DB-005 c/w 17-DB-009

CORRECTED RULING OF THE DISCIPLINARY BOARD

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INTRODUCTION

This is a disciplinary matter based upon the consolidation of two sets of formal charges filed by the Office of Disciplinary Counsel ("ODC") against Larry English ("Respondent"), Louisiana Bar Roll Number 22772.[1] The two cases which have been consolidated are case number 17-DB-005 and case number 17-DB-009. ODC alleges that the Respondent violated the following Rules of Professional Conduct in case number 17-DB-005: 1.4, 1.5(f)(5), and 8.1(c). ODC further alleges that the Respondent violated the following Rules of Professional Conduct in case number 17-DB-009: 1.5(f)(5) and 1.15.[2]

PROCEDURAL HISTORY

Case Number 17-DB-005

The formal charges in case number 17-DB-005 were filed on February 10, 2017. The Respondent filed a motion for extension of time to file a response to the formal charges on March 1, 2017 in which he requested a one-hundred-twenty-day extension of time to respond to the formal charges. The Respondent also maintained in his motion that: (1) the facts of the formal charges dated back to 2009 and 2010; (2) ODC delayed over seven years in serving the formal charges on him; (3) he currently resided in New York and had to locate the files which were stored in Louisiana; and (4) he had never seen the complaints filed against him in Counts I and II.

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[1] Respondent is currently eligible to practice law.
[2] See the attached Appendix for the text of these Rules.

ODC filed its response to the Respondent's motion for extension of time on March 3, 2017 in which it maintained that: (1) all complaints underlying the formal charges were filed with ODC in 2011 and served on the Respondent via certified mail; (2) the Respondent was never advised by ODC that the disciplinary investigations were closed or otherwise terminated; (3) ODC was cognizant of the extended interval between receipt of the complaint and the filing of formal charges and had forwarded its entire investigative file in each complaint to the Respondent to facilitate his written response to the formal charges; and (4) an extension of thirty to forty-five days was a more reasonable period of time for the Respondent to file an answer the formal charges. On March 7, 2017, the Chair of Hearing Committee No. 17, Claude W. Bookter, granted the Respondent's motion for extension of time, allowing him an extension of forty-five days in which to respond to the formal charges.

The formal charges in 17-DB-009 were filed on March 14, 2017. On April 5, 2017, the Respondent filed a second motion for extension of time to file a response to the formal charges in case numbers 17-DB-005 and 17-DB-009 and an incorporated motion to consolidate the two cases. In this motion, the Respondent argued that: (1) ODC had waited five years to serve the formal charges in 17-DB-009 on him; (2) in September of 2016, all files related to these two cases were shredded; (3) the documentation forward to him by ODC in case number 17-DB-005 was insufficient for him to draft a response to the formal charges, necessitating the need for him to undertake extensive efforts to assemble evidence to adequately answer the formal charges; and (4) a one-hundred-twenty-day extension of time to answer both sets of formal charges was necessary.

On April 17, 2017 the Respondent filed his answers and peremptory exceptions in case numbers 17-DB-005 and 17-DB-009. On April 20, 2017, Mr. Bookter granted the Respondent's

second motion for extension of time, allowing the Respondent an additional sixty days to file a response to the formal charges in case numbers 17-DB-005 and 17-DB-009. Mr. Bookter denied, without prejudice, the Respondent's motion to consolidate the two cases, as the committee had not yet been assigned case number 17-DB-009.

ODC filed a motion to consolidate the two cases on April 25, 2017. The cases were consolidated by an order signed April 28, 2017 by Mr. Bookter. In addition to the exceptions filed by the Respondent, numerous pre-hearing motions were filed by the parties and addressed by Mr. Bookter, Stephen V. Callaway, the lawyer member of Hearing Committee No. 17, or Pamela W. Carter, Chair of the Adjudicative Committee of the Board. The hearing of this matter was held on March 1-2, 2018 before Hearing Committee No. 17.[3] Deputy Disciplinary Counsel, Robert S. Kennedy, Jr., appeared on behalf of ODC. The Respondent appeared on his own behalf and was assisted by co-counsel Bridgett Brown.

The hearing committee issued its report on August 21, 2018, recommending that all charges brought against the Respondent be dismissed. ODC filed an objection to the hearing committee's report on September 10, 2018, in which it objects only to various findings of fact in Count III of case number 17-DB-005 (the Kirksey matter) and the committee's finding in relation to this count that the Respondent fully complied with Rule 1.5(f)(5).[4] On October 10, 2018, the Respondent filed a pre-argument brief in which he requests that that the hearing committee's findings in this matter be upheld by the Board. Respondent also alleges that Deputy Disciplinary Counsel Kennedy knowingly made false charges against him in the formal

[3] Members of Hearing Committee No. 17 included Mr. Bookter. (Chair), Mr. Callaway (Lawyer Member), and John M. LeGrand, Jr. (Public Member). Because the hearing in this matter was held prior to the effective date of recent changes to La. Sup. Ct. Rule XIX, the Board has applied the version of the rule in existence prior to May 15, 2019.

[4] As ODC moved to dismiss Counts I and II of case number 17-DB-005 at the hearing, it does not object to the hearing committee's determination that these counts should be dismissed. Moreover, ODC does not object to the committee's determination that the alleged Rule 1.4 violation charged in Count III of case number 17-DB-005 should be dismissed or to the committee's determination that Count I of case number 17-DB-009 should be dismissed.

charges in violation of Rule of Professional Conduct 3.3(a) and that ODC's alleged misconduct should be treated as a mitigating factor. Respondent further objects to the hearing committee's characterization of him at the hearing as a "difficult witness" in an "irritated state" and its characterization of his testimony as going off on "tangents that were not relevant to the charges brought against him." *See* Respondent's Brief, p. 4. ODC's pre-argument brief, in which ODC addresses the hearing committee's findings as to the alleged violation of Rule 1.5(f)(5) found in Count III of case number 17-DB-005, was filed on October 11, 2018. On October 12, 2018, ODC filed a motion to extend the deadline for filing its reply to the Respondent's brief. This motion was granted by the Adjudicative Committee Chair and Chair of Panel "B," Ms. Carter, on October 15, 2018, giving ODC until November 1, 2018 to file its reply brief. On November 1, 2018, ODC filed its reply brief in which it argues that the Respondent's claims that Mr. Kennedy intentionally misled or deceived the hearing committee are without merit and that Respondent's claim that Mr. Kennedy engaged in professional misconduct in this disciplinary case is not a recognized mitigating factor under ABA Standard 9.32.

Oral argument before Panel "B" of the Disciplinary Board was held on November 15, 2018.[5] Deputy Disciplinary Counsel Robert S. Kennedy, Jr. appeared on behalf of ODC. The Respondent appeared on his own behalf.

FORMAL CHARGES

The formal charges in 17-DB-005 read, in pertinent part:

COUNT I

> (Complaint No. 27993) The complainant, Patricia Taylor, retained the respondent on or about October 27, 2010 to defend her son, DeMarcus Taylor, on armed robbery charges pending in Caddo Parish. The agreed-upon fee was a $6500 fixed fee to be paid in installments and the complainant ultimately paid at

[5] Members of Panel "B" included Ms. Carter (Chair), Dominick Scandurro, Jr., (Lawyer Member), and Evans C. Spiceland, Jr. (Public Member).

least $4500 of the total fee. On March 3, 2011 respondent made an oral motion to withdraw from the client's case, advising the court that he intended to relocate to the state of New York. The court permitted respondent to withdraw as requested. Respondent did not notify the client or Mrs. Taylor of his decision. At the point of respondent's representation he had taken no meaningful or significant action on the client's behalf to justify retention of the fee.

The client's case was ultimately concluded by representation of the Caddo Indigent Defender's office, and several dispositive motions were handled by that office including a Motion for Preliminary Examination, a Motion to Suppress and a Motion to Quash.

After the complaint was filed, the respondent was served with a copy by certified mail at his Louisiana law office address which was returned marked "return to sender, unclaimed, unable to forward." ODC also forwarded a copy of the complaint by certified mail to respondent's bar registration address in New York City, which was returned with a similar notation from the United States Postal Service.

By his acts and omissions, the respondent has knowingly violated RPC 1.4 by failing to communicate with his client and RPC 1.5(f)(5) by failed to return the unearned portion of the fee. He has also violated RPC 8.1(c) by failing to accept mail from the disciplinary authorities and cooperate in their investigation of the complaint.

COUNT II

(Complaint No. 27814) On March 9, 2009, Patricia Dupree executed an attorney-client contract with the respondent to have him represent Randall George on charges of simple burglary and simple burglary of an inhabited dwelling pending in Caddo parish. The client paid the agreed-upon fixed fee of $1500 that same day.

Minute entries reflect that respondent appeared in court with the accused on November 15, 2010 and the case was fixed for a judge trial on January 11, 2011. The case was later continued to January 19, 2011. In the interim on January 12, 2011, the defendant appeared with appointed counsel from the Caddo Parish Indigent Defender's Office. On February 3, 2011, the defendant withdrew his former plea of not guilty and pleaded guilty to the charges.

The prisoner later filed a complaint which ODC forwarded to the respondent's Louisiana address on May 16, 2011, which was returned by the postal service with the notation "return to sender, unclaimed-unable to forward." ODC also sent a copy of the complaint by certified [mail] to respondent at his bar registration address in New York City which was returned with a like notation.

By his acts and omissions, the respondent has knowingly violated RPC 1.5(f)(5) by failing to return an unearned fee and RPC 8.1(c) by failing to cooperate with disciplinary authorities in their investigation of the complaint.

COUNT III

(Complaint No. 29079) The complainant, Pamela Kirksey, retained respondent in November 2010 to file and complete the succession of her mother, Bezely Nash. The respondent was paid the agreed-upon $1500 fixed fee. The respondent filed incomplete and error-laden pleadings, and failed to communicate with the client regarding the matter. In July 2011, the complainant discharged the respondent and demanded that $1000 of the fee be returned. The respondent refused and did not submit the matter to fee arbitration or an alternate court proceeding as required by rule; rather he unilaterally refunded only $500 to the client and refused to communicate further about the matter, simply relocating his practice to the state of New York.

By his acts and omissions respondent has violated RPC 1.4 by, *inter alia,* failing to advise his client that he was leaving the jurisdiction; and RPC 1.5 (f)(5) by failing to provide the client with an alternate forum to resolve the fee dispute between the parties.

The formal charges in 17-DB-009 read, in pertinent part:

COUNT I

In October of 2009, you were retained to represent John Jason Lindsay in Caddo Parish on a charge of First Degree Vehicle Negligent Injury (R.S. 14.39.2). In connection with the representation you caused to be removed $1,700.00 from the accused's bank account at Capital One Bank and appropriated same for your own use.

Although you thereafter enrolled as counsel of record for Mr. Lindsay and filed pro forma motions on his behalf, you failed to appear at scheduled court hearings and never performed any meaningful legal services sufficient to earn the fee which you collected. As a consequence, the client discharged you on February 11, 2010.

At the time you collected the fee you were relocating your law practice to the state of New York and well knew that you would not be able to fulfill the terms of your contract.

By your acts and omissions, you have knowingly and intentionally violated Rule of Professional Conduct 1.5(f)(5) *(unearned fee);* and Rule of Professional Conduct 1.15 *(conversion).*

THE HEARING COMMITTEE'S REPORT AND THE PARTIES' RESPONSES

The hearing committee issued its report on August 21, 2018. The committee initially pointed out that ODC did not present any evidence as to Counts I and II of case number 17-DB-005, and the committee dismissed these counts for failure to prosecute. As to Count III of case

number 17-DB-005 and Count I of case number 17-DB-009, the committee found that the evidence presented did not support the charges brought against the Respondent and should, therefore, be dismissed.

As explained above, in its objection to the hearing committee's report, ODC only objects to various factual findings of the committee in Count III of 17-DB-005 (the Kirksey matter) and to its finding that Respondent did not violate Rule 1.5(f)(5) in connection with this charge. More specifically, ODC challenges the committee's finding that the Respondent's fee had been earned, given that he never made any serious effort to file and pursue Ms. Kirksey's legal matter, her mother's succession. ODC points out that the Respondent admittedly filed no pleadings on Ms. Kirksey's behalf prior to being terminated and that the succession had to be filed and completed by successor counsel. Additionally, given the committee's finding that the Respondent never deposited any of the disputed fee into his client trust account and the corresponding acknowledgement by the Respondent that he never initiated fee arbitration, ODC objects to the committee's determination that the Respondent fully complied with Rule 1.5(f)(5). Conversely, the Respondent maintains that the hearing committee's findings should be adopted by the Board.

The hearing committee's findings as to the alleged Rule 1.5(f)(5) in Count III of case number 17-DB-005 violation are as follows:

> The evidence in the Kirksey charges on RPC 1.5(f)(5) charges is CLEAR AND CONVINCING as to the following:
>
> (1) That a Fee Dispute first arose on March 11, 2011, at 9:40 PM, when Ms. Kirksey sent an e-mail to the Respondent terminating him and demanding a refund of the $1,500 she had paid. (ODC #1, page 5, page 11 and 25; Respondent #1, page 15; and Hearing Committee #1, page 15).
> (2) Respondent responded to such fee dispute on March 15, 2011, at 12:05 PM, when he sent Ms. Kirksey an e-mail with an attached PDF of a letter that he mailed to her on March 14, 2011. (Respondent #1, page 17; Hearing Committee

#1, page 15; and letter Respondent #3). That in the March 14, 2011, correspondence the Respondent offers an explanation for any delays; states that the documents forwarded to her require only her signature to move forward and the succession is ready to be submitted to the court; continues with his offer to reduce the fixed fee by refunding $500.00 and complete the succession; informs her she does have a right to terminate his services at any time, but he has earned a substantial portion of the fee and has a right to be compensated for time spent on the file; states that he is prepared to refund $750.00 to her; and tells her that if that is unacceptable she may arbitrate the fee through the Louisiana State Bar Association.

(3) The parties have a telephone conversation on March 15, 2011, and discuss the termination e-mail and agree that Respondent will refund to Ms. Kirksey $500.00 for delay in filing, and Respondent will proceed with his efforts to probate the will and complete the succession. (ODC #1, pages 4, 5, 10, and 25; Respondent #1, page 17; and Hearing Committee #1, page 16). The Hearing Committee is of the opinion that during the course of that telephone conversations [*sic*] the March 14, 2011 letter (Respondent #3)[6] and the options presented therein to Ms. Kirksey were discussed and that those discussions included the option presented to Ms. Kirksey in that letter to terminate Respondent's services and receive a $750.00 refund, or if that was unacceptable arbitrate through [the] Louisiana State Bar Association. If Ms. Kirksey remained adamant on her stated intentions to terminate and if they could not agree on a refund amount, then Respondent would have been required to deposit $750 into his Trust Account and either he or Ms. Kirksey would have to pursue arbitration through the Louisiana State Bar Association. The evidence is clear and convincing that Respondent knew how to proceed with arbitration through the Bar Association, but that was not required because the parties resolved the matter amicably and Respondent refunded the $500.00 (Ms. Kirksey received on or about April 5, 2011 as evidenced by ODC #1, pages 9 and 23; Respondent #1, page 23; and Hearing Committee #1, page 19) and Respondent continued with his efforts to probate the will and complete the succession.

(4) That a second Fee Dispute arose on July 22, 2011, at 10:50 PM, when Ms. Kirksey sends another e-mail to Respondent complaining about the lack of progress and telling Respondent: "your services are no longer needed." In said e-mail she demands the refund of $1000.00 (she received the delay in filing refund on or about April 5, 2011) and states: "If my money is not refunded in 10 business days, I will file this case in small claims court." Ms. Kirksey does not have this e-mail, but Respondent does and it is Respondent #1, Page 29. (Hearing Committee #1, page 25).

(5) Respondent sends an e-mail response to Ms. Kirksey on the very same day at 11:10 PM and therein gives Ms. Kirksey his phone #, explains that the difficulties with Ms. Johnson and the possibilities of sisters fighting over who is the executor could turn a $1,500 succession into $5,000 litigation. States that he is in Louisiana and will attempt to meet with Ms. Johnson, but if he cannot meet with

[6] The Board notes that the date on this letter is March 14, 2010; however, the parties agree that the date of this letter contains a typographical error and that the letter was actually written on March 14, 2011.

her and she gets a lawyer and challenges, it could be expensive. He ends by stating: "Believe it is costing me time and money also." (Respondent #1, page 30; Hearing Committee #1, page 25). This e-mail was preceded on the same date, July 22, 2011, by an earlier e-mail to Ms. Kirksey sent at 3:09 PM (ODC #1, pages 17 and 32; Respondent #1, page 3, and Hearing Committee #1, page 24) wherein Respondent sends to Ms. Kirksey his final letter to Ms. Johnson (Respondent #7, ODC #1, page 33); and ODC #11) and explains the difficulties with Ms. Johnson stating that she now wants her lawyer to look at the petition, that he does not believe that she has a lawyer and is just being difficult and that the matter could be expensive.

(6) Apparently Ms. Kirksey does not respond to Respondent's efforts to keep the matter on track and on August 9, 2011 at 1:01 PM, the Respondent sends Ms. Kirksey an e-mail that states: "Can you do a phone conference." (ODC #1, page 17, Respondent #1, page 30; and Hearing Committee #1, page 26). There are no further e-mails in evidence after that August 9, 2011, date.

(7) On August 5, 2011, Respondent sends Ms. Kirksey a letter wherein he, again, states that he would like to set up a conference call, and he is prepared to discuss all aspects of this case. He, again, explains the [*sic*] some of the difficulties he has encountered in the case. He specifically states: "As to your refund request, I have done significant work on this case." (ODC #2, page 040; Respondent #6).

(8) The Respondent on cross by ODC regarding the fee dispute testified: "In the case of Nash, she and I reached an agreement and I gave her back $500 and I agreed to finish the case. That was what our agreement was. I honored that agreement. She terminated it. By the evidence in this record, I more than earned a thousand dollars in this case. I don't work for free." Volume IV (pages 47-49). And, Respondent: "There was no disputed fee. I earned my fee; okay." Volume IV (pages 50-51).

The hearing committee is of the opinion that the evidence is CLEAR AND CONVINCING that the Respondent complied with the requirements of RPC 1.5(f)(5) on March 11, 2011, and again on July 22, 2011, August 9, 2011, and August 15, 2011. The parties amicably resolved the first fee dispute on March 15, 2011, after Ms. Kirksey had been given all disclosure required by Rule 1.15(f)(5). The second fee dispute was not amicably resolved, but Ms. Kirksey had already been given all of her rights as to disputed fees in the March 14, 201 [letter] (no dispute was actually prepared and sent on March 14th and March 15th), and Respondent and the Hearing Committee agree that by that date, July 22, 2011, Respondent had earned in excess of the $1,000 and there was, therefore, no reasonable amount in dispute to deposit into his trust account.

The Hearing Committee recommends that the charges filed by the ODC that Respondent violated RPC 1.5(f)(5) be dismissed and denied, and that NO Sanctions be imposed against Respondent for the alleged violation of that Rule.

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. Rule XIX, Section 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 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).

The Board finds that the hearing committee properly dismissed Counts I and II in case number 17-DB-005 and Count I in case number 17-DB-009. The Board also finds that the committee properly dismissed the Rule 1.4 allegation as to Count III in case number 17-DB-005. Addressed below is the only remaining charge in this matter, which alleges that the Respondent violated Rule 1.5(f)(5) as alleged in Count III of 17-DB-005.

A. The Manifest Error Inquiry

As to the alleged Rule 1.5(f)(5) violation in Count III of case number 17-DB-005 (the Kirksey matter), the hearing committee's findings of fact listed above are not manifestly erroneous, save its finding that "Respondent had earned in excess of the $1,000 and there was, therefore, no reasonable amount in dispute to deposit into his trust account." Hrg. Comm. Rpt., p. 55. The committee offered no specific facts to support the conclusion that the Respondent had

earned the entire $1,000 fixed fee, only noting that the "Respondent and Hearing Committee agree that by that date, July 22, 2011, Respondent had earned in excess of the $1,000." The committee's finding on this point ignores the ethical obligation of the lawyer in a fixed fee representation to complete all, or substantially all, of the client's legal matter to earn the entire fee.

The evidence shows that the Respondent performed limited work with little success during the nine-month period he was employed to complete the succession of Bezely Lee Nash. Emails submitted into evidence indicate that the Respondent spoke with Ms. Kirksey's sister, Ms. Johnson, on the telephone several times and wrote to her on three occasions about whether she would join with Ms. Kirksey in being appointed as a co-executrix and in petitioning the court to probate her mother's will. However, the letters were written late in the representation, which ran from November of 2010 until July 22, 2011. The first letter was written on March 11, 2011, the second letter was written on April 5, 2011, and the third letter was written on July 12, 2011. At the time of his termination on July 22, 2011, the Respondent had been unable to secure Ms. Johnson's acceptance of her appointment as co-executrix of the estate. Respondent nevertheless failed to file to the petition to probate, despite his representation to Ms. Kirksey that the petition could be filed with the notation that Ms. Johnson did not accept her appointment as co-executrix.

The evidence detailing the communication between the Respondent and Ms. Kirksey also shows the lack of progress made by the Respondent in the succession proceeding. The Respondent and Ms. Kirksey primarily communicated through email messages, many of which included repetitive, but necessary, requests from Ms. Kirksey to the Respondent to correct typographical errors in the petition for probate and her requests for status updates as to whether Ms. Johnson had agreed to serve as co-executrix. The record also shows that the Respondent

wrote Ms. Kirksey only two letters, both addressing her desire to terminate his legal services, and that he had several telephone conversations with her, including a telephone discussion about her intention to terminate his representation in March of 2011.[7] Ultimately, the Respondent never filed a pleading with the court to probate Bezely Lee Nash's will. ODC Exhibit 12. Based upon the quality and limited amount of work that the Respondent had performed by the date he was finally terminated, the Board cannot conclude that the Respondent earned the entire $1,000 fee. Therefore, the committee's finding that the Respondent had earned in excess of the $1,000 fee, and that there was no reasonable amount to deposit in his trust account, is rejected by the Board.

Moreover, the following undisputed facts are relevant as to whether a fee dispute existed pursuant to Rule 1.5(f)(5) following the Respondent's termination in July of 2011:

1. The original $1,500 paid by Ms. Kirksey to the Respondent was a fixed fee. February 7, 2018 Minute Entry of Stephen Callaway, Lawyer Member, Hearing Committee No. 17; Hrg. Tr., Vol. 1, p. 79.

2. On March 11, 2011, Ms. Kirksey sought to terminate the Respondent and demanded a return of the original $1,500 fee. ODC Exhibit 1, pp. 5, 11, 25; Respondent Exhibit 1, p. 16.[8] Respondent re-negotiated the fee agreement, reducing the fixed fee from $1,500 to $1,000 because of Ms. Kirksey's dissatisfaction with his work effort. Respondent Exhibit 1, p. 17; Respondent Exhibit 3. In an effort to persuade Ms. Kirksey to allow him to complete the succession, the Respondent refunded $500 of the fee on April 5, 2011, and promised to complete the succession. Ms. Kirksey agreed to allow the Respondent to resume work, conditioned upon his promise to complete the succession. Respondent Exhibit 1, pp.17, 19, 23; ODC Exhibit 1, p. 2.

3. By July 22, 2011, the Respondent still had not filed any pleadings or made any identifiable effort to move the succession through the court system. In an e-mail,

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[7] These letters include a letter dated March 14, 2010 (which the parties agree was actually written on March 14, 2011) and a letter dated August 15, 2011. The petition for probate and subsequent corrected drafts were emailed to Ms. Kirksey at various times throughout Respondent's representation.

[8] The record indicates that Ms. Kirksey initially indicated her desire to terminate the Respondent's representation on March 7, 2011, but delayed in doing so until after she received the revised probate documents, with which she was unsatisfied, from the Respondent on March 11, 2011. Respondent Exhibit 1, pp. 13-16.

Ms. Kirksey terminated his services and demanded a refund of the fee, which at that time was $1,000. Respondent Exhibit 1, pp. 29-30.

4. The Respondent did not refund the fee, or any portion thereof, or initiate fee arbitration after he was terminated on July 22, 2011. Hrg. Tr., Vol. IV, p. 61-62. He did not place the disputed fee, or any portion thereof, in his trust account. Hrg. Tr., Vol. IV, pp. 50-51.

5. Moreover, after Ms. Kirksey terminated the Respondent on July 22, 2011, the Respondent did not remind her that she had the right to go to fee arbitration, and the March 14, 2011 letter which referenced her right to fee arbitration was not re-sent to her. Hrg. Tr., Vol. II, p. 74.

6. Ms. Kirksey was forced to hire successor counsel to file and complete the succession. Ms. Kirksey was required to pay a second legal fee totaling $5,985.97 to a successor lawyer. ODC Exhibit 4(b).

B. *De Novo* Review

In conducting its *de novo* review of the hearing committee's application of the Rules of Professional Conduct, the Board must consider the language of Rule 1.5(f)(5), which provides:

> (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.

When Ms. Kirksey terminated the Respondent's services on July 22, 2011, she requested that the Respondent refund the remaining $1,000 fee to her. In response, the Respondent wrote several email messages to her, followed by a letter dated August 15, 2011 concerning the case. In this letter, the Respondent writes, in part:

> As to your refund request, I have done significant work on your case. Quite frankly I did not charge the fee that other lawyers would charge because I knew your family. I have found myself in the middle of a family dispute that has greatly complicated this case. Again, I am prepared to discuss all aspects of this case.

ODC Exhibit 2.

When questioned at the hearing about whether he ever put any portion of the disputed fee in his trust account, the Respondent testified that "[t]here was no disputed fee. I earned my fee; okay." Hrg. Tr., Vol. IV, pp. 50-51.

The Board finds that once Ms. Kirksey demanded a refund of the $1,000 fee and the Respondent responded in his August 15, 2011 letter that "he had done significant work on [Ms. Kirksey's] case" and did not return the amount requested, a fee dispute existed. Under Rule 1.5(f)(5), at this point, the Respondent should have immediately refunded to Ms. Kirksey any amount which they might have agreed had not been earned, and Respondent was required to deposit into his trust account an amount representing the portion reasonably in dispute. Additionally, Respondent should have again suggested a means for prompt resolution of the fee dispute such as mediation or arbitration, including arbitration with the LSBA's Fee Dispute Program. Instead, he ignored the fact that a fee dispute existed. By failing to return any fees determined to be unearned, failing to place any disputed funds in trust, and failing to suggest that the matter be submitted to fee arbitration or mediation, the Respondent violated Rule 1.5(f)(5).

II. The Appropriate Sanction

A. Rule XIX, Section 10(C) Factors

Louisiana Supreme Court Rule XIX, Section 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, the Respondent has violated a duty owed to his client, Ms. Kirksey. His conduct was knowing and intentional. Ms. Kirksey has been harmed in that she never received the opportunity to participate in fee arbitration or mediation concerning the $1,000 fee and has possibly been deprived of funds owed to her since 2011. Aggravating factors present include substantial experience in the practice of law (admitted in 1994), refusal to acknowledge the wrongful nature of his misconduct, prior disciplinary offense[9] and indifference to making restitution. Mitigating factors include delay in disciplinary proceedings[10] and remoteness of prior offense. Moreover, the Board finds that the Respondent's claim that Deputy Disciplinary Counsel engaged in professional misconduct in the prosecution of this case is without merit, and additionally, notes that prosecutorial misconduct (which, again, is not found to be present in this matter) is not a recognized mitigating factor under ABA Standard 9.32.

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[9] Respondent received a diversion in 2005 in connection with another matter involving a fee dispute. ODC Exhibit 13. Hrg. Tr., Vol. IV, pp. 36-41.

[10] The record indicates that as to case number 17-DB-005, Ms. Taylor's complaint was filed in 2011 (no specific date given) (Count I), Mr. George's complaint was filed in 2011 (no specific date given) (Count II), and Ms. Kirksey's complaint was filed on March 19, 2012 (Count III). The formal charges in case number 17-DB-005 were not filed until February 10, 2017. As to case number 17-DB-009, Mr. Lindsay's complaint was filed on April 22, 2010; the formal charges were not filed until March 24, 2017. The hearing committee pointed out as to the Kirksey complaint that: (1) Respondent had all of his records, including the records of the Succession of Bezely Lee Nash, destroyed approximately six months prior to the formal charges being filed; (2) Respondent's memory of his employment by Ms. Kirksey and the difficulties encountered during his employment was either non-existent or poor; and (3) even though Respondent was able to recover his emails and attachments thereto from Google mail and had the records produced by ODC in connection with the Kirksey complaint, he had no records at the time the formal charges were filed. Hrg. Comm. Rpt., p. 41. Some of these circumstances caused Respondent's testimony to be speculative at times as to what was said in telephone conversations with Ms. Kirksey or as to what was relayed in other communications with her or with ODC. Hrg. Tr., Vol. III, pp. 51- 52; Hrg. Tr., Vol. IV, pp. 67-68.

B. The ABA Standards and Case Law

The ABA *Standards for Imposing Lawyer Sanctions* suggest that a sanction ranging from a public reprimand to a suspension is appropriate in this matter. Standard 4.63, provides that "reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to a client." Standard 7.2 provides that "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."

Here, by failing to acknowledge that a fee dispute existed and by failing to provide Ms. Kirksey with the information regarding fee arbitration following his July 22, 2011 termination, the Respondent neglected to provide her with complete information concerning her demand for a refund. This caused injury to her in that she never received the opportunity to participate in fee arbitration or mediation and has possibly been deprived of funds owed to her since 2011. By failing to follow the directives of Rule 1.5(f)(5), the Respondent also knowingly engaged in conduct that violated a duty he owed as a professional, again causing injury to Ms. Kirksey.

Louisiana jurisprudence also indicates that a sanction ranging from a public reprimand to a deferred suspension has been imposed in cases similar to this matter. For example, in *In re Brigandi*, 2002-2873 (La. 4/09/03), 843 So.2d 1083, the respondent was paid a $3,000 flat fee to handle a criminal matter. Although the respondent was discharged prior to the case going to trial, he failed to provide a timely, accurate accounting, failed to place the disputed portion of the fee in his trust account, and failed to refund the unearned portion of the fee to his client. Eventually, Mr. Brigandi instituted a concursus proceeding and deposited $2,500 of the fee into the registry of the court. *Id.* at pp. 1-2, 843 So.2d at 1084-85. The Louisiana Supreme Court

found that Mr. Brigandi's conduct caused actual harm to his client by depriving the client of funds for a lengthy period of time. *Id.* at p. 6, 843 So.2d. at 1088.

In mitigation, the Court recognized Mr. Brigandi's absence of a prior disciplinary record and inexperience in the practice of law. The Court further concluded that his misconduct was primarily the product of inexperience in dealing with professional obligations, rather than the result of any conscious desire to violate the ethical rules. For his misconduct in this one count only, the Court determined that Mr. Brigandi should receive a public reprimand. *Id.* at p.9, 843 So.2d at 1089.

Like Mr. Brigandi, Mr. English has failed to maintain disputed fees in his trust account, which caused actual harm by depriving his client of the opportunity to participate in fee arbitration or mediation for a lengthy period of time. Mr. English's conduct, however, was knowing and intentional, instead of negligent as seen in *Brigandi*. Mr. English also has prior discipline, and Mr. Brigandi had no prior disciplinary history.

Next, in *In re Donald*, 2013-2056 (La. 11/1/13), 127 So.2d 918, the Court suspended Mr. Donald for six months, fully deferred, subject to a one-year period of supervised probation, for collecting a $600 fee from a client to cancel a judgment then failing to complete the task. Mr. Donald ignored his clients' request for a refund and failed to offer them the option of participating in the LSBA's Fee Dispute Resolution Program. The Court found that his conduct was knowing, and possibly intentional. The following aggravating factors were present: a prior disciplinary record (diversion), a dishonest or selfish motive, refusal to acknowledge the wrongful nature of the conduct, substantial experience in the practice of law, and indifference to making restitution. The following mitigating factors were present: personal or emotional problems, full and free disclosure to the Disciplinary Board, a cooperative attitude toward the

proceeding, and remoteness of the prior disciplinary offense. *Id.* at pp. 5-8, 127 So.2d at 921-11. The Respondent's misconduct is much like that found in *Donald,* and several of the aggravating factors are also similar, including prior discipline. More mitigating factors were found in *Donald* than in the instant matter.

The Board recognizes that the facts of this matter are more similar to the *Donald* case than to the *Brigandi* matter; however, given the mitigating factors present in this matter -- the remoteness of the Respondent's prior disciplinary offense in 2005 and the delay in bringing these charges -- the Board finds that a public reprimand is an appropriate sanction, subject to the condition that the Respondent submit the fee dispute in the Kirksey matter to fee arbitration with the LSBA's Fee Dispute Resolution Program. Any failure of the Respondent to comply with this condition may be grounds for reconsideration of this matter and prosecution of formal charges against the Respondent. Rule XIX, Section 10(B). The Respondent will also be assessed with all costs and expenses of these proceedings in accordance with Rule XIX Section 10.1.

CONCLUSION

The Board adopts the hearing committee's findings that Counts I and II of case number 17-DB-005, Count I of case number 17-DB-009, and the alleged Rule 1.4 violation found in Count III of case number 17-DB-005 should be dismissed. The Board does not adopt the committee's finding that the alleged Rule 1.5(f)(5) violation found in Count III of case number 17-DB-005 should be dismissed. Instead, the Board finds that the Respondent violated Rule 1.5 (f)(5) as alleged in this count and orders that Respondent be publicly reprimanded for his misconduct, subject to the condition that the Respondent submit the fee dispute in the Kirksey matter to fee arbitration with the LSBA's Fee Dispute Resolution Program. Any failure of the Respondent to comply with this condition may be grounds for reconsideration of this matter and

prosecution of formal charges against the Respondent. Rule XIX, Section 10(B). The Respondent is also assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

RULING

The Board orders that Respondent, Larry English, be publicly reprimanded for his misconduct, subject to the condition that Respondent submit the fee dispute in the Pamela Nash-Kirksey matter (Count III of case number 17-DB-005) to fee arbitration with the LSBA's Fee Dispute Resolution Program. Any failure of the Respondent to comply with this condition may be grounds for reconsideration of this matter and prosecution of formal charges against the Respondent. Rule XIX, Section 10(B). The Respondent is also assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Pamela W. Carter
Sheila E. O'Leary
Dominick Scandurro, Jr.
Danna E. Schwab
Melissa L. Theriot
Charles H. Williamson, Jr.

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

Brian D. Landry - Dissents with reason.
Linda G. Bizzarro - Dissents with reason.

LOUISIANA ATTORNEY DISCPLINARY BOARD

In re: Larry English

Docket No. 17-DB-005 c/w 17-DB-009

DISSENT

I agree with the finding of the majority of the Board that the hearing committee erred in failing to find a violation of Rule 1.5(f)(5). However, I am unable to join in the recommendation of the Board of public reprimand as the proposed discipline, as suspension appears to be the appropriate sanction. In recommending the sanction of a suspension, rather than a public recommend to the Supreme Court in this matter, I rely on *In re Donald*, 2013-2056 (La. 11/1/13), 127 So.2d 918.

In *Donald*, the Court suspended Mr. Donald for six months, fully deferred, subject to a one-year period of supervised probation, for collecting a $600 fee from a client to cancel a judgment then failing to complete the task. Mr. Donald ignored his clients' request for a refund and failed to offer them the option of participating in the LSBA's Fee Dispute Resolution Program. The Court found that his conduct was knowing, and possibly intentional. The following aggravating factors were present: a prior disciplinary record (diversion), a dishonest or selfish motive, refusal to acknowledge the wrongful nature of the conduct, substantial experience in the practice of law, and indifference to making restitution. The following mitigating

factors were present: personal or emotional problems, full and free disclosure to the Disciplinary Board, a cooperative attitude toward the proceeding, and remoteness of the prior disciplinary offense. The Respondent's misconduct is much like that found in *Donald*, and several of the aggravating factors are also similar, including prior discipline.

The majority believes a downward deviation from the *Donald* sanction is appropriate due the age of the prior discipline and the delay in bringing the disciplinary action. I would first note that the prior disciplinary action was for the exact same behavior as the present disciplinary matter, a fee dispute. As to any delay in the proceedings, I do not believe they were significant enough to impact the imposition of the appropriate sanction. On this point, I would note that more mitigating factors were found in *Donald* than in the instant matter.

As this matter is most akin to the Donald case, my recommendation is to impose a similar sanction of a six-month suspension, fully deferred, subject to a one year period of probation (unsupervised), during which time the Respondent should be required to submit the fee dispute in the Kirksey matter to fee arbitration with the LSBA and attend the LSBA's Ethics School.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

s/ Brian D. Landry

By:_____

Brian D. Landry,
Adjudicative Committee Member

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: LARRY ENGLISH

DOCKET NO. 17-DB-005 C/W/ 17-DB-009

DISSENT

I join with Mr. Landry in his dissent and for the reasons stated concur with the recommended sanction.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

By: DocuSigned by: Linda G. Bizzarro BBE507ED[illegible]
LINDA G. BIZZARRO
Adjudicative Committee Member

APPENDIX "A"

Rule 1.4. Communication

(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Rule 1.5(f)(5) Fees

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

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

Rule 1.15. Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Except as provided in (g) and the IOLTA Rules below, funds shall be kept in one or more separate interest-bearing client trust accounts maintained in a bank or savings and loan association: 1) authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government; 2) in the state where the lawyer's primary office is situated, if not

within Louisiana; or 3) elsewhere with the consent of the client or third person. No earnings on a client trust account may be made available to or utilized by a lawyer or law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

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

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

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

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

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

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:

(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.