

Original

**LOUISIANA ATTORNEY DISCIPLINARY BOARD**

**IN RE C. E. BOURG, II**

**NUMBER 02-DB-116**

FILED DISCIPLINARY BOARD	
Date	October 2, 2003
Clerk	K. Arzmode

**RULING OF THE DISCIPLINARY BOARD**

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This is a disciplinary proceeding based on the filing of a Petition for Consent Discipline (herein "Petition") prior to formal charges by C. E. Bourg, II, ("Respondent") of Morgan City, Louisiana, for failure to properly communicate the basis of a fee and to handle a fee dispute with a client. The Office of Disciplinary Counsel ("ODC") concurred in the proposed discipline of a public reprimand. After reviewing the record and considering the law, the Board accepts the Petition and orders a public reprimand be issued against the Respondent.

**PROCEDURAL HISTORY**

On November 12, 2002, and prior to the filing of formal charges, Respondent filed the Petition and Joint Stipulation [of Facts] conditionally admitting his failure to communicate the basis for a fee, failure to promptly render an accounting and hold the disputed fee in his trust account in exchange for a public reprimand. ODC filed its concurrence and memorandum in support on November 13, 2002. The Board heard this matter on January 30, 2003.

**STIPULATION OF FACTS<sup>1</sup>**

Respondent and ODC submitted the following stipulated facts:

Commencing in or about April of 1999 C. E. Bourg, II represented two clients, Sandra Fernandez and Sidney Moffet, in related legal matters concerning

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<sup>1</sup> Joint Stipulation [of Facts], November 12, 2002.

an Alcoholic Beverage Outlet. On April 30, 1999 Mr. Bourg received an advance fee of \$1,850.00 from Mr. Moffet. Mr. Bourg had previously received an advance fee of \$1,850.00 from Ms. Fernandez, and had commenced work on her litigation. Mr. Bourg failed to properly and adequately explain to Mr. Moffet the basis of the fee, i.e. whether it was a flat fee under Rule of Professional Conduct 1.5(f)(2), or an advance deposit to be earned on an hourly basis under Rule of Professional Conduct 1.5(f)(3). The parties agree and stipulate that Mr. Bourg's failure to clearly explain this to Mr. Moffet constitutes a violation of Rule of Professional conduct 1.5(b). By March 6, 2001 a dispute over the earned/unearned portions of the \$1,850.00 advance fee (be it hourly or flat) had arisen between Mr. Bourg and Mr. Moffet. Mr. Bourg did not promptly render an accounting for said fee, nor did he deposit or hold any portion of said fee in his trust account. Mr. Bourg did not make a refund of any portion of the \$1,850.00 advanced fee. The parties agree and stipulate that Mr. Bourg's conduct violated Rules of Professional Conduct 1.15(c) [hold separate and account]; 1.5(f)(3)(6) [handling of hourly advanced/unearned fees]. By cashiers check dated October 25, 2002 Mr. Bourg deposited the entire \$1,850.00 with Mr. Moffet's attorney to hold in trust pending the resolution of the fee dispute. Mr. Bourg has the following prior discipline: Admonition 94-ADB-050 July 5, 1994 for failure to cooperate; Admonition 94-ADB-054 July 5, 1994 for failure to cooperate; a 6 month suspension followed by 2 years of probation in La.S.Ct. #94-B-1092 ordered on October 28, 1994 for commingling and conversion of client funds. In the matter sub judice Mr. Bourg violated duties owed to his clients. Mr. Bourg's violation of Rule of Professional Conduct 1.5(d)[sic (b)] was negligent. Mr. Bourg's violation of 1.15(c), 1.5(f)(3)(6) and 1.16(d) were grossly negligent, but were also partly due to cash flow problems in his practice. Mr. Bourg did not act out of either a dishonest or a selfish motive. The injury caused to the complainant was a delay from March 6, 2001 to October 25, 2002 in commencing the proper resolution of the fee dispute.

### **RESPONDENT'S REQUEST FOR CONSENT DISCIPLINE AND ODC'S CONCURRENCE**

Based upon the stipulated facts, Respondent admits that his "negligent and grossly negligent" conduct violated duties owed to his client, Mr. Moffet. Respondent agrees that his conduct violated Rules 1.5(b), (f)(3) and (f)(6); 1.15(c) and 1.16(d). Respondent proposed and ODC concurred in a public reprimand. In its concurrence, ODC asserted that customarily matters like this would have been diverted or admonished. "However, given Mr. Bourg's prior disciplinary history, and the delays in placing the fee dispute in a posture of resolution, diversion is not applicable and an admonition is not appropriate."

ODC's Concurrence p. 1. Respondent was suspended in 1994 for six months for commingling and converting funds with no deceitful motive. *In re Charles E. Bourg, II*, 94-1092 (La. 10/28/94), rehearing denied (12/8/94); 644 So.2d 371. ODC emphasized that this matter is effectively being resolved as a fee dispute and the Court encourages such resolution outside the disciplinary arena. ODC's Concurrence. p. 1, citing, *In re Jonnie Jones, Jr.*, 00-2765 (La. 2/21/01); 779 So.2d 702. Finally, ODC agreed that Respondent did not act with a selfish or dishonest motive.

### ANALYSIS OF THE PROPOSED SANCTION

The Board is required to analyze the facts of the consent discipline to determine if the proposed sanction is appropriate for the stated misconduct. La. Sp. Ct. R. XIX, §20. The Board must either accept or reject the proposed consent discipline. In making its findings, the Board looks to Louisiana Supreme Court Rule XIX, Section 10(C) for guidance in determining whether the stated form of discipline is appropriate for the alleged misconduct. The Court has set forth the following criteria:

- (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.

La. Sp. Ct. R. XIX, §10(C).

Respondent violated duties owed to his client, Sidney Moffet. Based upon the definitions of mental intent<sup>2</sup> provided in the ABA's *Standards for Imposing Lawyer*

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<sup>2</sup> According to the ABA Standards, negligence is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Intent is "the conscious objective or purpose to accomplish a particular result."

*Sanctions* (herein "Standard"), Respondent's actions were negligent.<sup>3</sup> Based upon an undeveloped record due to the status as consent discipline, Mr. Moffet's harm appears to be a delay from March 6, 2001, to October 25, 2002, to get the fee dispute in a position for resolution. Although Respondent did not deposit the disputed funds (\$1,850.00) in his trust account at the time the dispute arose, he has since (October 25, 2002) transferred the full amount to Mr. Moffet's current attorney pending the resolution of the matter.

The parties asserted the mitigating factor of the absence of a dishonest or selfish motive and the aggravating factor of prior discipline.<sup>4</sup> The Board takes judicial notice of the aggravating factor of substantial experience in the practice of law<sup>5</sup> and the mitigating factor of the remoteness of prior offenses.

Standard 4.63 provides for a public reprimand "when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client." Based upon the stipulated facts, Respondent negligently failed to communicate the basis for the fee to Mr. Moffet. Between Respondent and Mr. Moffet, there was not a clear understanding as to whether the fee was a flat fee or if it was an advanced payment to be billed against on an hourly rate.

The board issued a public reprimand for an attorney's inadequate and inaccurate accounting which resulted in the wrong amount being refunded to the client. *In re Burton P. Guidry*, 99-DB-098 (Disc. Bd., September 2000). Guidry was found to have violated

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<sup>3</sup> The parties stipulated that Respondent's conduct was negligent and "grossly negligent". Neither case law nor the ABA Standards provide for a state of mind described as "grossly negligent". The Board recognizes the categories of mental intent as established by the Louisiana Supreme Court and the ABA Standards.

<sup>4</sup> Admonition, 94-ADB-054, failure to cooperate with a disciplinary investigation in violation of Rules 8.1(c) and 8.4(g).

Admonition, 94-ADB-050, failure to cooperate with a disciplinary investigation in violation of Rules 8.1(c) and 8.4(g).

Suspension, six months with two years of probation, *In re Charles E. Bourg, II*, 94-1092 (La. 10/28/94), 644 So.2d 371, for commingling and conversion of client and/or third party funds.

Rules 1.15(a) (failure to keep complete records of clients' funds) and 1.16(d) (failure to refund unearned fees) and 8.4(a) (misconduct).

In the case of *In re Arthur A. Lemann, III*, 00-DB-084 (Disc. Bd., October 2000), an attorney and client orally agreed that work would be done at an hourly rate with a cap of \$70,000.00. Sometime thereafter, the attorney believed the client had waived the cap. After a favorable result, the attorney sought payment for an additional \$192,000.00 of fees. A complaint was filed but prior to the filing of formal charges, the attorney admitted that he failed to provide his client with accurate or complete information in violation of Rule 1.5(b). The board approved a public reprimand as the appropriate sanction.

The case law and the ABA Standards support a public reprimand as the appropriate sanction in the instant matter.

### **RULING**

Based on the foregoing;

IT IS HEREBY ORDERED that the Petition for Consent Discipline be accepted, and that Respondent, C. E. Bourg, II, be publicly reprimanded for his violation of Rules 1.5(b), (f)(3) and (f)(6); 1.15(c) and 1.16(d).

IT IS FURTHER ORDERED that Respondent be assessed all costs and expenses of these proceedings, with legal interest to commence running thirty days from the date of the finality of this Ruling until paid.

IT IS FURTHER ORDERED that in accordance with Supreme Court Rule XIX, Section 17B, notice of this reprimand shall be published in the journal of the state bar and in a newspaper of general circulation for Morgan City, Louisiana.

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<sup>5</sup> Respondent was admitted to practice on September 21, 1972.

**LOUISIANA ATTORNEY DISCIPLINARY BOARD**

Judy Y. Barrasso  
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BY:



**ROBERT E. LEAKE, JR.**  
**FOR THE ADJUDICATIVE COMMITTEE**

Christopher H. Riviere - Recused