

# **Baton Rouge Bar Law Expo**

## **Ethics CLE**

**September 17, 2015**

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**Chief Disciplinary Counsel**

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In Louisiana, solo practitioners and small firms are the ‘backbone’ of our legal profession. Representing nearly 55% of the entire Louisiana bar population, lawyers in small firm and in a solo setting represent clients from all walks of life with a wide variety of legal problems. On the other hand, large firms tend to represent institutional clients (banks, companies, insurers, government entities, etc.).

When ‘real people’, the client base of most solos and small firm members, become disgruntled they file complaints with ODC—nearly 3200 times per year. While screening efforts reduce those numbers down to about 1250 new disciplinary investigations per year, those numbers are still very significant. The effort today will be directed to those things you need to know to avoid complaints, recent matters of interest, and decisions by the Supreme Court in matters of lawyer discipline.

A few topics we need to visit about first:

1. Effective April 1, 2015: Reconcile those trust accounts at least quarterly—and keep the records
2. Plan and Supervise: Responsibility for non-attorney staff and their conduct
3. Problems with fixed fees: Are changes afoot?
4. Naming your successor: Could be mandatory soon
5. “Disaster Planning”: It’s not just about hurricanes!

# Recent Developments in Lawyer Discipline

Prepared by LADB Externs Jaime Morgan and Mario Zavala, Jr.

February 11, 2015

## Jurisprudence:

### Conversion of Client Funds/Commingling

#### *In re Kenner O. Miller, Jr., 14-0538 (La. 05/23/14) 139 So.3d 993*

Between December 2005 and February 2009, Kenner O. Miller, Jr. (“Respondent”) commingled, converted, and/or misappropriated for his own use the sum of \$208,260.83. The amount included funds from the proceeds of settlements in personal injury cases due to clients and third-party medical providers.

The Office of Disciplinary Counsel’s (“ODC’s”) auditor documented details of Respondent’s commingling, conversion, and/or misappropriation of the funds. The auditor’s report indicated that Respondent deposited \$13,100 of his personal funds into his client trust account. Respondent also paid certain operating expenses, such as payroll and rent, directly from the trust account. Additionally, he overpaid his attorney’s fees and costs from settlement funds in several client matters, resulting in deficient funds to pay client and third-party medical providers their portions of the settlements. Finally, Respondent’s trust account was overdrawn in July 2007 and 2008.

Prior to this misconduct, Respondent was previously disciplined in 2007 for neglecting legal matters, failing to communicate with clients, failing to properly withdraw from the representation of clients, engaging in dishonest conduct, and engaging in conduct prejudicial to the administration of justice. During the hearing, Respondent presented evidence that suggested his misconduct was caused by cocaine abuse, for which he had been treated. However, the Lawyers Assistance Program provided that respondent tested positive for cocaine on January 27, 2009. Respondent was placed on interim suspension. As a result of his misconduct, Respondent was suspended from the practice of law for eighteen months, retroactive to the date of his interim suspension. Respondent had not been reinstated from this suspension and thus remained suspended from the practice of law when the new formal charges were filed against him.

ODC filed formal charges against Respondent in which it is alleged he violated Rules 1.15(a)(b) (safekeeping property of clients or third parties), 1.15(d) (failure to timely remit funds to a client or third party), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commission of a criminal act that reflect adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent failed to answer the formal charges and the factual allegations

were deemed admitted and proven by clear and convincing evidence pursuant to Supreme Court Rule XIX, § 11(E)(3). Respondent did not file anything for the hearing committee's ("Committee") consideration.

The Committee found that the Respondent commingled, converted, and/or misappropriated \$208,260.83 between December 1, 2005 and February 27, 2009. The Committee further found a factual basis for the report prepared by the ODC's auditor. Based on these facts, the Committee determined Respondent violated the Rules of Professional Conduct as alleged in the formal charges.

In determining the appropriate sanction, the Committee found no mitigating factors present and did not address the presence of any aggravating factors. However, it did determine, based on the serious nature of the misconduct and Respondent's failure to answer the formal charges, that permanent disbarment was the only viable sanction. Neither Respondent nor the ODC filed an objection to the Committee's report and recommendation.

After review, the Disciplinary Board ("Board") found that the Committee correctly applied the Rules of Professional Conduct to determine Respondent violated the rules as alleged in the formal charges. Accordingly, the Board adopted the Committee's findings of fact and law and recommended permanent disbarment.

Upon review, the Court found that Respondent commingled, converted, and/or misappropriated \$208,260.83 in client and third-party funds over a period of approximately three years. The Court agreed with the Board that Respondent knowingly and intentionally violated duties owed to his clients and the legal profession. Respondent also violated duties owed to the public, and caused significant actual harm to several clients and third-party medical providers. The Court found that Respondent's conduct demonstrated a disregard for his clients and his duties as an attorney and accepted the recommendation of the Board, ordering Respondent permanently disbarred.

## **Fees**

### ***In re David J. Mitchell, 13-2688 (La. 5/7/14), 145 So.3d 305***

David J. Mitchell ("Respondent") worked as an insurance defense attorney with a law firm in New Orleans. He billed for legal work on an hourly basis, and depending upon the client, was authorized to seek reimbursement for out of pocket expenses and for mileage in connection with travel on legal matters for clients.

Around the year 2008, Respondent submitted expense reimbursement requests which were routinely reviewed by a partner. After noting irregularities, partners within the law firm were consulted and they authorized a more comprehensive review of Respondent's expense reimbursement request. A thorough review of Respondent's reimbursement request forms dating back several years were reviewed and verified for accuracy. The investigative review within the law firm showed a significant number of events for which Respondent sought reimbursement that were not calendared, not documented in a file, and were continued and therefore had not

occurred or had been covered by someone else within the law firm. Over a period of several years the total came to in excess of \$20,000.

The Office of Disciplinary Counsel (“ODC”) filed formal charges alleging that Respondent’s conduct violated the following provisions of the Rules of Professional Conduct: 1.5(a) (fees), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(a) (violation of the Rules of Professional Conduct). After reviewing the hearing testimony and the documentary evidence, the hearing committee (“Committee”) concluded that Respondent violated the Rules as charged and recommended that he be permanently disbarred. The Committee found the Respondent engaged in a pattern of serious professional misconduct as detailed in the formal charges. The Board adopted the Committee’s factual findings and legal conclusions.

The Court concluded that the evidentiary foundation was proper. It found that the evidence reviewed indicated that ODC established that Respondent submitted hundreds of questionable and undocumented requests for expense reimbursement. Also, the Court found that Respondent violated duties to his client and the legal profession, resulting in actual harm to his client, the firm, and the profession. Respondent’s conduct was found to be both knowing and intentional. The applicable baseline sanction was found to be disbarment. The Court found that Respondent’s conduct fell squarely within Guideline 1 (repeated or multiple instances of intentional conversion of client funds with substantial harm) of the permanent guidelines, and permanently disbarred Respondent.

### **Conflict of Interest: Current Clients**

#### **In re Randy J. Fuerst, 14-0647 (La. 12/09/14) – So.3d –**

Randy Fuerst (“Respondent”) maintained a law office in Lake Charles, where his practice was almost exclusively confined to family law matters. Beginning in 1998, after he and his wife were divorced, and continuing through 2010, Respondent was involved in consensual sexual relationships with six women who had at one time either retained his services or consulted with him regarding their divorce cases. With one exception, the sexual relationships did not occur while the attorney-client relationship was ongoing.

The Office of Disciplinary Counsel (“ODC”) filed formal charges alleging violations of Rules 1.7(a)(2) (a lawyer shall not represent a client if the representation involves a concurrent conflict of interest wherein there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or third person, or by a personal interest of the lawyer), 1.8(b) (a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent), 1.10 (imputation of conflicts of interest), 2.1 (in representing a client, a lawyer shall exercise independent professional judgment and render candid advice), and 8.4(d) (engaged in conduct prejudicial to the administration of justice). The hearing committee

(“Committee”) concluded that Respondent negligently violated duties owed to his client and the legal profession. There was no apparent harm, but the potential for harm existed. The Committee determined the baseline sanction is suspension from the practice of law for thirty days, fully deferred, subject to one year of unsupervised probation.

The ODC filed an objection to the Committee’s report, arguing that the Committee failed to find violations of the Rules of Professional Conduct where they existed and recommended a sanction that is inadequate to address the extent of the misconduct in which the respondent engaged. The Disciplinary Board (“Board”) determined the Committee’s factual findings are supported by the record and are not manifestly erroneous. The Board further determined that the Respondent did not violate the Rules of Professional Conduct except with regard to the MRW matter. The Board adopted the Committee’s finding that Respondent violated Rules 1.7(a)(2), 2.1, and 8.4(d) with respect to MRW. The Board recommended suspension from the practice of law for thirty days, fully deferred, subject to one year of unsupervised probation. The Board reasoned that the Respondent negligently violated duties owed to his client. Although the misconduct did not cause actual harm, the risk for harm was great.

The Court acknowledged that Respondent did have a sexual relationship with a current client, MRW. However, the Court did not find support in the Rules of Professional Conduct for ODC’s argument that the ethical prohibitions against attorney-client sexual relationships should be extended to former clients. Therefore, the Court did not find misconduct in Respondent’s relationships with BMP, MLDG, VADL, CCL, or BDW. Also, the Court found no manifest error in the Committee’s factual findings that the Respondent did not engage in any inappropriate conduct towards KGH and SKS.

Although Respondent’s sexual relationship with MLDG did not constitute misconduct, the Court did find that he violated Rule 1.10 by referring her legal matter to another lawyer in the law firm with which he was associated as “Of Counsel.” A lawyer who is “Of Counsel” to a law firm is considered to be a member of the firm for purposes of analyzing imputed disqualification questions. After Respondent was discharged by MLDG, he was required to refer her divorce case to a lawyer outside his law firm prior to the time he became involved in a personal relationship with her. Accordingly, the Court imposed a six-month suspension from the practice of law, with three months deferred.

### **Frivolous Litigation**

#### ***In re Madro Bandaries, 14-1435 (La. 12/09/14) –So.3d--***

Madro Bandaries (“Respondent”) and Joanna Cassidy (“Ms. Cassidy”) entered into a “Legal Engagement and Retainer Agreement.” The retainer agreement contained a provision that if there was “any dispute” between Respondent and Ms. Cassidy, “the proper venue for litigation would be the Parish of Orleans, State of Louisiana.” Respondent began making monetary advances to Ms. Cassidy for a variety of purposes, including travel and payment of her mortgage note relating to her Louisiana residence. These advances totaled more than \$33,000.

In February 2010, the relationship between Respondent and Ms. Cassidy ended, and Respondent, relying upon the retainer agreement, demanded repayment of the advances. Ms. Cassidy engaged the services of a different attorney to represent her interests in the termination of the retainer agreement. Her attorney filed a Petition for Declaratory Relief asserting that the agreement was invalid; that the parties had never intended for there to be an attorney-client relationship; and that no amounts were due by Ms. Cassidy pursuant to the retainer agreement.

The following day, and prior to any service of Ms. Cassidy's suit on Respondent or his law firm, Respondent's lawyer filed a petition captioned Madro Bandaries, PLC and Nathan Bandaries v. Joanna V. Cassidy, No. 10-2840 on the docket of the Orleans Parish Civil District Court, Division "E." The petition referred to the retainer agreement between Respondent and Ms. Cassidy and demanded reimbursement for advanced made to her. Plaintiffs subsequently filed a motion to dismiss the lawsuit without prejudice, which was granted by order dated May 20, 2010. However, the voluntary dismissal was vacated on a motion by Ms. Cassidy. Plaintiffs then amended the petition to seek recovery only of legal fees which Respondent contended Ms. Cassidy owed for services rendered. On July 14, 2010, the two Orleans Parish cases were consolidated before Judge Piper Griffin.

In the meantime, three lawsuits were filed against Ms. Cassidy in the 10th Judicial District Court for the Parish of Natchitoches and in the Natchitoches City Court. The Office of Disciplinary Counsel ("ODC") alleged that each of the Natchitoches suits raised legal and factual arguments that were essentially identical to those which Respondent had already raised in the Orleans Parish case. Also, Respondent filed a lawsuit in Orleans Parish against Ms. Cassidy's business agent, Bernard Gilhuly ("Mr. Gilhuly"), a resident of California. ODC alleged that the suit against Mr. Gilhuly raised legal and factual arguments that were essentially identical to and included within those which Respondent had already raised in the Orleans Parish lawsuit filed previously.

ODC filed one count of formal charges against Respondent, alleging that he engaged in a pattern and practice of filing repetitive, harassing, burdensome, and frivolous lawsuits, appeals, and writs against Ms. Cassidy violating Rules 3.1 (meritorious claims and contentions), 4.4.(a) (in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

After the testimony and evidence presented at the hearing, the hearing committee ("Committee") determined that Respondent violated the Rules of Professional Conduct as alleged in the formal charges. The Committee recommended suspension from the practice of law for one year, with all but three months deferred, subject to the condition that Respondent avoid future misconduct.

The Disciplinary Board ("Board") accepted the Committee's factual findings and also agreed that the Committee correctly applied the Rules of Professional Conduct. The Board determined Respondent violated duties owed to the legal system and the profession, causing financial harm to Ms. Cassidy in the form of legal fees and costs incurred by having to defend against the

frivolous filings. The Board agreed that the sanction recommended by the Committee was appropriate.

The Court agreed with the Committee that Respondent brought the Natchitoches litigation against Ms. Cassidy for the purpose of harassing her and that there was no basis in fact or law for these suits. The Court found the same with regard to the lawsuit filed against Mr. Gilhuly, Ms. Cassidy's business agent. The Court stated that Respondent knowingly violated duties owed to the legal system and the profession. The Court determined that a downward deviation from the baseline sanction of suspension was warranted and publicly reprimanded respondent.

### **Misuse of Client Funds**

#### ***In re Gary P. Duplechain, 13-2423 (La. 01/17/14) 131 So. 3d 843***

Gary Duplechain ("Respondent") operated a real estate title company, GPD Title, from January 2005 until August 2010. Between January 2006 and June 2010, GPD Title acted as an agent for Commonwealth Land Title Insurance Company. During a routine audit of GPD Title by Commonwealth, a shortage of approximately \$5,000 in GPD Title's escrow account was revealed.

Respondent subsequently admitted that he used funds from GPD Title's escrow account to pay abstract costs for a closing which had not yet been funded and that he paid his employee's salaries during the months of July 2009 and March 2010.

The Office of Disciplinary Counsel ("ODC") filed formal charges against Respondent alleging that his conduct violated Rules 1.15 (safekeeping property of clients or third persons), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commissions of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent was served with formal charges via certified mail but failed to answer. The factual allegations contained therein were therefore considered deemed admitted and proven by clear and convincing evidence pursuant to Supreme Court Rule XIX, § 11(E)(3). The parties were given an opportunity to file with the hearing committee ("Committee") written arguments and documentary evidence on the issue of sanctions. Respondent failed to file anything for the Committee's consideration.

After ODC's deemed admitted submission, the Committee made factual findings consistent with the factual allegations set forth. Also, the Committee found that Respondent did not pay restitution, although he indicated that he was in the process of resolving the unpaid escrow balance funds. The Committee found the Respondent intentionally converted client funds, causing injury by depriving the client of those funds. The Committee recommended that Respondent be suspended from the practice of law for three years.

The Disciplinary Board ("Board") agreed with the Committee's factual findings. The Board also determined that Respondent violated the Rules of the Professional Conduct as alleged in the formal charges. The Board recommended that Respondent be suspended from the practice of law

for three years. In addition, the Board recommended that Respondent be ordered to pay the full amount of restitution owed to Commonwealth.

The Court agreed that Respondent violated the Rules of Professional Conduct when he used client's funds to pay his business operating expenses, including employee salaries as well as the abstract and title search fees associated with another client's real estate venture. To determine the appropriate level of sanction, the Court used the guidelines outlined in *Louisiana State Bar Ass'n v. Hinrichs*, 486 So. 2d 116 (La. 1986). Due to the fact that Respondent used client's funds to run his law practice, and failed to make restitution to Commonwealth for the converted funds, the case fell on the higher end of the *Hinrichs* range, *i.e.*, disbarment or a three-year suspension. The Court agreed with the Committee and the Board that a three-year suspension was appropriate.

### **Permanently Banned from the Practice Law**

#### **In re Syed A. Salat, 13-2619 (La. 1/17/14), 131 So.3d 841**

In 1992, Syed Salat ("Respondent"), along with the cooperation of an employee of the East Baton Rouge Parish Clerk of Court's office, entered into a scheme to alter the filing dates on six lawsuits to make it appear as if the suits had been filed within the applicable prescriptive period. Respondent was later criminally charged in the matter. He was convicted of six counts of filing false public records and sentenced to two years imprisonment on each count, the sentences to run concurrently. His conviction and sentence were affirmed on appeal and the Louisiana Supreme Court denied his application for writs. *State v. Salat*, 95-0072 (La. App. 1st Cir. 4/496), 672 So.2d 333, writ denied, 96-1116 (La. 10/4/96), 679 So. 2d 1378.

Shortly after his conviction, Respondent was placed on interim suspension. *In re Salat*, 94-0705 (La. 4/29/94), 637 So. 2d 454. 12. While the criminal matter was pending on appeal, he filed a petition for consent disbarment. On April 21, 1995, the Louisiana Supreme Court granted the petition and disbarred petitioner, retroactive to the date of his interim suspension. *In re Salat*, 95-0751 (La. 4/21/95), 653 So. 2d 548.

In April 2012, Respondent filed an application for readmission. The Office of Disciplinary Counsel ("ODC") filed an objection to the application, and the matter was subsequently considered by a hearing committee ("Committee"), which recommended readmission be denied because he did not make full restitution to his victims and did not possess the requisite honesty and integrity to practice law in Louisiana. The Disciplinary Board ("Board") likewise recommended readmission be denied. Respondent objected to the Board's recommendation, raising as error of the Board's finding that he did not meet his burden of proof.

Since Respondent's 1995 disbarment, he applied for readmission to the practice of law in 1999, 2002, and 2007. Each of his subsequent reapplications were rejected, based upon a combination of factors, most notably Respondent's failure to make a reasonable, good faith effort at restitution, submission of false and forged documents with his second application for

readmission, and submission of false statements on a 2002 application for a notarial commission in another state. The Committee also made a finding of fact, that the Respondent had not accepted responsibility for his misconduct. Although the Board rejected this conclusion, the Louisiana Supreme Court's review of the record revealed that the Committee's factual findings were based upon its credibility determinations and were not manifestly erroneous.

Based upon its review of the record, the Court found that Respondent did not prove by clear and convincing evidence that he possessed the requisite competence, honesty and integrity to practice law in this state, and in light of the egregious nature of Respondent's conduct, it was abundantly clear that he lacked the moral fitness demanded of lawyers admitted in the State of Louisiana. Although traditionally, disbarred attorneys have been allowed to apply for readmission, the Court with its absolute discretion may refuse admission to disbarred attorneys, "including the right to do so on a permanent basis" *In re: Laudumiey & Mann*, 03-0234 (La. 6/27/03), 849 So. 2d at 522. Considering the totality of the facts, the Court determined that it could conceive of no circumstance under which the Respondent would ever be readmitted to practice law in Louisiana, and his application for readmission was once again denied. The Court further ordered that no further applications for readmission by the petitioner would be permitted.

## **The Unauthorized Practice of Law**

### ***In re Seth Cortigene and Newton B. Schwartz, Sr.*, 13-2022, 13-2172 (La. 2/14/14), 144 So.3d 915**

Seth Cortigene ("Respondent Cortigene") and Newton Schwartz ("Respondent Schwartz") represented a client in connection with litigation over a work-related diving accident. Respondent Schwartz attended and participated in the deposition of the client taken in New Orleans, although he was not licensed or admitted to practice *pro hac vice* in Louisiana at any time during the litigation. Respondent Cortigene, co-counsel in the litigation, was charged with facilitating Respondent Schwartz's misconduct and failing to report it to disciplinary authorities.

Respondent Cortigene was admitted to the Texas bar and to the Louisiana bar. However, Respondent Cortigene has been ineligible to practice law in Louisiana since September 9, 2009, due to failure to pay bar dues and disciplinary assessments, failure to meet mandatory continuing legal education requirements, and failure to file mandatory trust account disclosure statements. Respondent Schwartz is admitted to the Texas Bar. He has not been licensed, or admitted to practice *pro hac vice*, in Louisiana at any time pertinent hereto.

On November 12, 2004, Mr. Watts was injured in a diving accident off the Louisiana coast while in the course and scope of his employment with Superior Diving Company, which is located in Louisiana. Mr. Smith, co-worker of Mr. Watts, told Mr. Watts about his attorneys, Respondent

Schwartz and Respondent Cortigene. At that time, Mr. Watts was not interested in hiring an attorney. Shortly thereafter, Mr. Watts was contacted by Mr. James Tweedle, who identified himself as an “investigator ... like a scout or some sort like that.” Mr. Watts gave permission to Mr. Tweedle for Respondent Schwartz to contact him. Respondent Schwartz met with Mr. Watts at his home in Mississippi and offered Mr. Watts a check for \$9,000 and living expenses while the lawsuit was ongoing, if Mr. Watts would retain Respondent Schwartz as his attorney. Mr. Watts declined.

Within a week, Respondent Schwartz received a phone call from Mr. Watts advising that he was interested in retaining Respondent Schwartz. Respondent Schwartz anticipated Mr. Watt’s lawsuit could be filed in Louisiana and enlisted Respondent Cortigene to serve as co-counsel. Respondent Cortigene met with Mr. Watts in Mississippi to have the contract signed and to introduce himself to Mr. Watts as a lawyer who would be representing him in Louisiana. Upon being formally retained, Respondent Schwartz provided Mr. Watts with the promised \$9,000 and began making monthly payments to Mr. Watts. Interest rates of 12% to 15% were charged on the advance payments to Mr. Watts. Between December of 2004 and December of 2006, Respondent Schwartz made client “loans” to Mr. Watts totaling over \$72,000.

Responding to Superior Diving’s preemptive declaratory judgment action in federal court in Louisiana, Respondent Cortigene filed his first appearance. Respondent Schwartz was listed on the pleading as “Of Counsel,” and at the time Respondent Cortigene knew that Respondent Schwartz had not been admitted *pro hac vice*.

The Office of Disciplinary Counsel (“ODC”) filed formal charges against Respondent Cortigene alleging violations of Rule 5.1(c)(1) (ratifying another lawyer’s violation of the Rules of Professional Conduct), 5.5 (assisting another to engage in the unauthorized practice of law), 8.3(a) (failing to report violations of the Rules of Professional Conduct); and 8.4(a) (knowingly assisting another to violate the Rules of Professional Conduct). The charges further allege that Respondent Schwartz violated Rule 1.8(e) (improperly providing financial assistance to a client), 1.8(i) (acquiring a propriety interest in the cause of action), 5.5 (engaging in the unauthorized practice of law), 7.3(a) (soliciting professional employment), 8.4(a) (knowingly assisting or inducing another to violate the Rules of Professional Conduct or doing so through the acts of another), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

The hearing committee (“Committee”) recommended that Respondent Cortigene be disbarred, and that Respondent Schwartz be publicly reprimanded for his misconduct and enjoined from the practice of law in the state of Louisiana. The Disciplinary Board (“Board”) largely adopted the Committee’s findings and recommendations. With regard to Respondent Cortigene, the Board recommended disbarment. As to Respondent Schwartz, the Board agreed that disbarment would be the appropriate sanction for his misconduct; however, because he is not a member of the Louisiana bar, the Board ordered that Respondent Schwartz be publicly reprimanded and permanently enjoined from the practice of law in Louisiana. Neither Respondent Cortigene nor ODC had objected to the Board’s recommendation of disbarment. However, Respondent Schwartz filed an appeal of the Board’s ruling objecting to the exercise of jurisdiction over him

in the matter. ODC objected, asserting that the Board erred in concluding that Respondent Schwartz cannot be disbarred in Louisiana.

The Court found that the record supported the Committee's finding of fact that Respondent Schwartz engaged in the practice of law in Louisiana by appearing at and participating in a deposition. Louisiana jurisprudence establishes that participation in out-of-court proceedings such as depositions and sworn statements constitutes the practice of law. *See In re: Jackson*, 02-3062 (La. 4/9/03), 843 So.2d 1079; *In re Williams*, 02-2698 (La. 4/9/03), 842 So.2d 353. Additionally, the record established that Respondent Schwartz knew he was listed on the federal court's docket as an attorney of record in the Watts case, yet he still did not seek *pro hac vice* admission or even notify the federal court that he was not admitted as counsel of record. Louisiana jurisprudence has reserved the most severe sanctions for those attorneys who have "manifested a conscious intent to flout the authority of this court by practicing after being prohibited from doing so." *Jackson*, 02-3062 at p. 5, 843 So. 2d at 1082. In cases where the unauthorized practice of law is a product of negligence rather than intent, the court typically imposes lesser sanctions than disbarment. *See e.g., In re: Ellis* 99-2483 (La. 9/15/99), 742 So. 2d 869.

The Court did not find that Respondent Schwartz's conduct warranted the highest level of discipline because he did not violate any direct orders from the Court. However, the record established Respondent Schwartz's conduct was not purely negligent, as in those cases imposing the lowest range of discipline. Respondent Schwartz's testimony revealed he was aware of his obligation to seek *pro hac vice* admission and consciously chose not to do so. Although he did not violate any specific court orders, he manifested a lack of candor toward the federal district court. The Court found Respondent Schwartz's conduct, while not warranting disbarment, called for a substantial three-year suspension from seeking admission to the Louisiana bar or seeking admission to practice in Louisiana on a temporary or limited basis, including, but not limited to, seeking *pro hac vice* admission before a Louisiana court pursuant to Supreme Court Rule XVII, § 13 or seeking limited admission as an in-house counsel pursuant to Supreme Court Rule XVII, § 14. The ODC was directed to report this judgment to all jurisdictions in which Respondent Schwartz is currently admitted.

Regarding Respondent Cortigene, the Committee and the Board both recommended he be disbarred. He did not object to the Court regarding that recommendation. The Court found that the findings and recommendations of the Committee and the Board were supported by the record. The Court considered the presence of aggravating factors, particularly Respondent Cortigene's prior disciplinary record; the Court adopted the Board's recommendation and order that Respondent Cortigene be disbarred.

***In re Clarence T. Nalls, Jr.*, 13-2873 (La. 5/7/14), 145 So.3d 1011**

On September 2012, the ODC filed formal charges against respondent, alleging that his conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.15(a) (safekeeping property of clients or third persons), 1.15(d) (failure to timely remit funds to a client or third person), 1.16(d) (obligations upon termination of the representation), 5.5(a) (engaging in the unauthorized practice of law), 8.4(b) (commission of a criminal act that reflects

adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The allegations of Count I involve respondent's unauthorized practice of law. Due to a prior disciplinary matter, on January 16, 2009, Mr. Nalls's suspension became effective while he was representing Wade Garner in a criminal matter. Mr. Nalls had previously filed a Petition for Certiorari with the United States Supreme Court. Respondent continued to correspond with Mr. Garner about the status of his case until at least April 14, 2010. Respondent also did not provide Mr. Garner with his file or an accounting of insurance proceeds Mr. Garner had entrusted to him as his attorney.

Additionally, on February 23, 2009, over one month after his suspension became effective; respondent agreed to represent Linder Shields in a wrongful termination case and collected a \$2,500 advance fee. Respondent did not inform Ms. Shields of his suspension from the practice of law. Instead, respondent informed her that other attorneys with whom he was associated would make court appearances for him on her behalf. On June 11, 2011, Ms. Shields called the Louisiana State Bar Association and learned that respondent was suspended from the practice of law.

The allegations of Count II involve respondent's conversion of client funds. During respondent's representation of Mr. Garner, Mr. Garner's wife passed away. Subsequently, Mr. Garner received life insurance benefits from Prudential Insurance, which proceeds were paid in the form of a checking account with an initial balance of \$38,000. Prudential Insurance provided blank checks to Mr. Garner so he could access the funds in the account.

Because Mr. Garner was incarcerated at the time, he gave respondent power of attorney, and the Prudential Insurance proceeds were sent to respondent for safekeeping. However, respondent did not maintain any records of his handling of the funds. Respondent wrote checks drawn on the Prudential checking account payable to cash in various amounts. Other than documentation for administrative services on May 8, 2007, which may account for some or all of the May 10, 2007 check, there were not proper documentation showing the purpose of the checks, and the cashed checks were not deposited into respondent's client's trust account. Because of the lack of documentation, the ODC's auditor concluded that respondent converted between \$12,405.34 and \$13,105.34 of Mr. Garner's insurance proceeds.

The committee determined that respondent violated Rules 1.15(d), 1.16(d), 5.5(a), and 8.4(c) in Count I and Rules 1.15(a) and 1.15(d) in Count II. Additionally, the committee determined that respondent violated Supreme Court Rule XIX, § 28(A)(1)(2) in Count II. The committee did not address the alleged violations of Rules 8.4(b) and 9.4(c) with respect to Count II. The committee also determined that respondent negligently violated duties owed to his clients.

The Board determined that respondent violated Rules 1.15(d), 1.16(d), 5.5(a), and 8.4(c) in Count I and Rule 1.15(a) in Count II. However, the Board found that respondent did not violate Rule 1.15(d), 8.4(b), or 8.4(c) in Count II. The Board also determined that respondent violated Supreme Court Rule XIX, § 28(A)(1)(2).

The Court accepted the Board's recommendation and disbarred respondent. The Court also ordered respondent to provide an accounting to Mr. Garner and make full restitution.

## **Criminal Conduct**

### **In re Felix Anthony DeJean, IV, 13-2311 (La. 1/10/14), --So.3d—**

On August 26, 2011 at Mr. DeJean's office, a conference was held to try to settle a pending legal matter. At one point, the negotiations turned sour leading Mr. DeJean to use "inappropriate language" with the opposing party and opposing counsel. Mr. DeJean stated that he was going to "nail you [referring to the Kimbles] down like Pontius Pilot and the nail driving five." During the hearing, Mr. DeJean testified that he was just "referring to his intent to succeed in Court in the pending litigation." However, the opposing party felt threatened by Mr. DeJean's aggressive tone of voice and mannerisms.

The ODC filed formal charges against Mr. DeJean, alleging he used means that had no substantial purpose other than to embarrass, delay, or burden a third person in violation of Rule 4.4(a); committed a criminal act in violation of Rule 8.4(b); and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

After reviewing the record and considering the testimony and exhibits provided at the hearing, the committee pointed out in its report that "there was absolutely no physical contact between Complainants or the Respondent" and that there was no evidence to suggest that respondent intentionally sought to embarrass or burden the Kimballs (sic) or their attorney when the informal settlement conference degraded into the incident which formed the basis of this complaint. The committee's opinion was that the evidence taken as a whole did not meet the clear and convincing standard of proof that the Respondent violated Rule 4.4(a), 8.4(b), or Rule 8.4(d). Therefore, the committee recommended that the formal charges be dismissed, stating however, that its decision to dismiss the charges "should not in any way be interpreted as consent to or agreement with the actions taken by the Respondent on August 26, 2011."

Upon review of the committee's report, the Board, however, found that the record contained sufficient evidence that Respondent committed a criminal act in violation of Rule 8.4(b). The Board determined that the committee misinterpreted the legal definition of simple assault, as defined in LSA-R.S. 14:36 and 14:38.<sup>1</sup> The committee determined that ODC failed to prove simple assault because the evidence did not establish there was physical contact between the respondent and the complainants in this matter. However, physical contact is not an element of simple assault. The elements of an assault are: (1) the intent-to-scare mental element (general intent); (2) conduct by the defendant of the sort to arouse a reasonable apprehension of bodily harm; and (3) the resulting apprehension on the part of the victim. *State in Interest of Tatom*, 463 So. 2d 35, 37 (La. App. 5 Cir. 1985). The Board found that respondent committed a simple

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<sup>1</sup> LSA-R.S. 14:36 provides: Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery.

LSA-R.S. 14:38 provides in pertinent part: Simple assault is an assault committed without a dangerous weapon.

assault thus violating Rule 8.4(b). The Board also found that the respondent's behavior during the settlement conference violated Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice).

As such, the Board recommended that respondent be publically reprimanded. The Court found the Board's conclusion correct that respondent's conduct was prejudicial to the administration of justice and affirmed the public reprimand.

***In re Sean Daniel Alfortish, 13-2424 (la. 5/7/14), 145 So.3d 1024***

In March 2005, respondent was elected as president of the Louisiana Horsemen's Benevolent and Protective Association, Inc. ("HBPA"). In March 2008, respondent was reelected to a second term and served in that capacity until November 2010, when he was indicted by a federal grand jury in the Eastern District of Louisiana on twenty-nine counts of conspiracy and fraud charges relating to the HBPA.

In November 2011, the ODC filed one count of formal charges against respondent alleging that his conduct violated Rules 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct.

In 2012, respondent pled guilty to a single felony count of conspiracy to commit mail, wire, identity document, and healthcare fraud. In the factual basis accompanying the guilty plea, respondent admitted that he and others conspired to rig the outcome of the March 2008 HBPA elections. An object of the conspiracy was to reelect respondent as HBPA president to elect his favored candidates as members of the association's board of directors. In order to accomplish the conspiracy, respondent and his co-conspirators prepared and cast falsified election ballots. Following the counting of the ballots, respondent was declared to be the winner of the election for president, and likewise, all of respondent's candidates for the HBPA board of directors were elected. When these elections results were subsequently challenged pursuant to the HBPA bylaws, respondent presided over the hearing held in the matter, knowing that he had participated in mailing falsified ballots, and directed others to do so.

The hearing committee determined that respondent violated Rules 8.4(b) and 8.4(c) of the Rules of Professional Conduct. His actions involved the fraudulent taking of money from the HBPA healthcare trust, and engaging in a scheme to fix his own reelection as president of the HBPA. This conduct reflects adversely on respondent's honesty, trustworthiness, and fitness as a lawyer.

The committee found the following aggravating factors: a prior disciplinary record, a dishonest or selfish motive, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law (admitted 1993). In mitigation, the committee recognized the following: a cooperative attitude toward the proceedings and character or reputation. The committee found the payment of restitution to be neither an aggravating nor mitigating factor, reasoning that the restitution was not paid by respondent, but rather by the insurer for the HBPA.

The Board found that the committee's factual findings were supported by the record and were consistent with the factual basis underlying respondent's conviction. The Board found that, based on those facts, respondent violated the rules as alleged in the formal charges. The Board recommended that respondent be permanently disbarred. The respondent filed an objection to the Court.

The Court [adopted the findings of fact and conclusions of law found by the Board and] permanently disbarred respondent.

***In re Chanci Shermaine Shaw, 14-0751 (La. 6/20/14), 141 So.3d 795***

On January 2012, the ODC filed formal charges in 12-DB-001 against Shaw, an attorney licensed to practice law in Louisiana but on interim suspension for threat of harm to the public. On June 2013, the ODC filed a second set of formal charges against respondent in 13-DB-026. Respondent failed to answer the formal charges.

12-DB-001

On April 2004, Christine Fontenot hired respondent to represent her in a personal injury claim. Thereafter, respondent failed to keep Ms. Fontenot informed of the progress of the representation. Respondent also filed suit on behalf of Ms. Fontenot after prescription had run, entered into a settlement without advising Ms. Fontenot that she had done so, and failed to pay Ms. Fontenot any of the settlement proceeds or provide her with an accounting of the settlement.

13-DB-026

On November 17, 2011, a grand jury in East Baton Rouge Parish returned an indictment charging respondent with two counts of felony theft by fraud and two counts of filing false public records.

On May 2, 2013, respondent pleaded guilty to Count I of the indictment, which charged her with theft by fraud of fifteen hundred dollars or more, a felony, in violation of La. R.S. 14:67(A)(B)(1). Count I of the indictment reads as follows:

On or about December 1, 2007, through and/or including on or about November 17, 2011, the defendant herein committed the Theft of Fraud of fifteen hundred (\$1,500) dollars or more, in that the defendant knowingly submitted false information for the purpose of obtaining greater compensation than that to which Helping Hands and the defendant were legally entitled for furnishing services when the defendant falsified a Medicaid "provider agreement" application to conceal the true ownership of helping Hands of South Louisiana, Inc., criminal convictions of one of the owners, disciplinary action, and previous enrollment information, to obtain a Medicaid provider number. The defendant certified that to the best of her knowledge, information contained in the provider agreement is accurate and complete and agreed that concealment of a material fact may result in prosecution under applicable federal and state laws. The defendant, with intent to deprive the State of Louisiana permanently of these monies, used the illegally obtained Medicaid provider number to fraudulently bill the Medicaid Program and received compensation through fraudulent means, in violation of LA. R.S. 14:67(A)(B)(1).

The court ordered respondent to make restitution to Ms. Fontenot and permanently disbarred respondent.

**In re Steven L. Rushing, 14-2053 (La. 11/21/14), 152 So.3d 138**

Rushing, an attorney licensed to practice law in Louisiana and Texas but suspended from practice, was charged in a bill of information with one count of mail fraud in violation of 18 U.S.C. § 1341 on February 2013, in the United States District Court for the Eastern District of Texas.

On November 2000, Loyd Watts hired respondent to file a civil suit on his behalf. Respondent subsequently failed to file the suit and failed to communicate with Mr. Watts. When respondent did communicate with his client, he misrepresented to him that he was trying to get the case set for trial when it had not been filed in the first instance. On December 2010, Mr. Watts terminated respondent's representation and requested the return of his file; however, respondent failed to comply with his client's request. On March 12, 2012, respondent was suspended from the practice of law in Texas for four years based upon his misconduct in the Watts matter. Commission for Lawyer Discipline v. Rushing, No. 2011-2704-A on the docket of the 188th District Court of Gregg County, Texas.

Additional disciplinary proceedings were instituted against respondent arising out of his representation of Catherine Vick. In that matter, respondent was retained in 2002 to represent Ms. Vick in a medical malpractice case. Respondent filed suit on behalf of Ms. Vick in July 2003. Thereafter, he performed little or no work in the case and failed to properly communicate with his client. When respondent did communicate with Ms. Vick, he advised her that he was working on the case and that a settlement offer would soon be forthcoming. However, in 2009, Ms. Vick learned through another attorney that her suit had been abandoned and dismissed for want of prosecution in 2005. Respondent failed to comply with his client's request to return her file. On May 10, 2012, respondent was suspended from the practice of law in Texas for six years, with three years of said suspension to be probated with conditions, based upon his misconduct in the Vick matter. Commission for Lawyer Discipline v. Rushing, No. 2010-2096-A on the docket of the 188th District Court of Gregg County, Texas.

After receiving notice of the Texas orders of discipline, the ODC filed a motion to initiate reciprocal discipline proceedings in Louisiana, pursuant to Supreme Court Rule XIX, § 21. Certified copies of the decisions and orders of the Texas court were attached to the motion. On June 4, 2012, the court rendered an order giving respondent thirty days to demonstrate why the imposition of identical discipline in this state would be unwarranted. Respondent failed to file any response to the court.

The charges, which consist of one count, allege violations of the following Rules of Professional Conduct ("Rule(s)"): 8.4(b) (the commission of a criminal act) and 8.4(c) (the commission of an act involving dishonesty, fraud, deceit, or misrepresentation).

Previously, respondent was suspended on November 19, 2011, by the Court for twenty-four months with twelve months deferred with conditions imposed by the Supreme Court of Texas, which were made reciprocal in Louisiana.

The Respondent had been disciplined in two prior cases: *In re Rushing*, 2011-1995 (La. 11/18/11), 74 So.3d 708 (“Rushing I”) and *In re Rushing*, 2012-1172 (La. 9/14/12), 98 So.3d 284 (“Rushing II”).

The Respondent was convicted for mail fraud in violation of 18 U.S.C. § 1341. The mail fraud charges stem from the Respondent’s use of the United States Postal Service in connection with his scheme to convert client funds, previously earmarked to pay healthcare providers out of a settlement to his own use.

The committee determined the factual allegations of the formal charges were admitted and proven by clear and convincing evidence, and that respondent violated the rules as alleged in the formal charges. The committee found respondent violated duties owed to his clients, the public, and the profession. The committee determined that disbarment was the applicable baseline sanction.

The Board determined that respondent knowingly, if not intentionally, violated duties owed to his clients and the profession. The Board found that respondent caused actual and potential injury to his clients and the healthcare providers by converting funds meant to pay the healthcare providers out of a settlement. The Board recommended permanent disbarment.

The Court found it appropriate to defer to the Texas judgments imposing discipline upon respondent. Thus, reciprocal discipline in the form of a four-year suspension and a six-year suspension, with three years deferred were imposed even though Louisiana has no exact equivalent. The Court also accepted the Board’s recommendation and permanent disbarred respondent.

***In re Elizabeth Ashley Brunet-Robert*, 13-2929 (La. 5/7/14), 145 So.3d 1018**

On January 31, 2006, respondent was arrested in St. Landry Parish and found to be in possession of methamphetamine. On September 1, 2009, respondent represented to the 27th Judicial District Court that she was entering into the district attorney’s diversionary program. The matter was then continued without date. During the month of November 2008, respondent issued sixteen checks drawn on her brother’s checking account without his authorization or consent. These checks totaled approximately \$2,000. On December 17, 2008, respondent sold an oxycodone tablet to an undercover police officer in Evangeline Parish for \$40 in cash. Respondent was arrested and charged with distribution of a Schedule II controlled dangerous substance. On October 21, 2009, respondent pleaded guilty to a reduced charge of possession of a Schedule II controlled dangerous substance. She was sentenced to serve four years at hard labor, with three and a half years suspended, and placed on four years active supervised probation. On April 1, 2009, respondent was arrested in St. Landry Parish and charged with being a principal to monetary instrument abuse and a principal to theft in the amount of \$700. This incident involved the cashing of four checks in the name of respondent’s father without his authorization or consent. On January 5, February 25, and October 15, 2009, respondent was found in contempt

for failing to appear in court in Evangeline Parish. Ms. Brunet-Robert was also cited for driving under suspension and failing to have insurance.

The committee found that Respondent is still using controlled substances and has not successfully completed a drug rehabilitation program. The ABA Standards indicate that disbarment is the baseline sanction for Respondent's misconduct; however, based on the mitigating factors, the committee found that a downward deviation from the baseline sanction to suspension was warranted. The court adopted a three-year suspension and pointed out the importance of using the resources of LAP to go back to a healthy and productive lifestyle. The committee determined that respondent acted intentionally with respect to the stipulated violations of Rules 8.4(b), 8.4(c), and 8.4(d). The committee recommended respondent suspended from the practice of law for three years, retroactive to the date of her interim suspension, followed by probation. The committee also recommended she be assessed with the costs and expenses of this matter.

The Board determined respondent knowingly violated duties owed to the public, the legal system, and the legal profession by engaging in criminal activity and by failing to appear in court on several occasions, which resulted in her being held in contempt. The Board recommended respondent be suspended from the practice of law for three years, retroactive to the date of her interim suspension. The Board also expressed a sincere hope that respondent will seek adequate treatment by successfully completing an inpatient substance abuse rehabilitation program and entering into a monitoring contract with LAP before applying for reinstatement to the practice of law. The Board also recommended that respondent be assessed with the costs and expenses of this matter.

The Court ordered respondent be suspended from the practice of law for three years, retroactive to November 18, 2009, the date of her interim suspension.

***In re Wade P. Richard, 14-1684 (La. 10/3/14), 148 So.3d 923***

On June 2007, respondent was driving with passenger Shannon Boudreaux when he was stopped by the Lafayette Police Department ("LPD"). The officers asked for respondent's identification and discovered that his driver's license had been suspended. The officers then arrested respondent, at which time respondent volunteered that there were "narcotics" inside the vehicle. Thereafter, officers from the Lafayette Parish Narcotics Unit were called to the scene. A subsequent search revealed the presence of approximately 200 alprazolam (Xanax) tablets. Respondent was then arrested and booked on charges of possession with intent to distribute Schedule IV narcotics. Respondent was later allowed to plead guilty to a misdemeanor (possession of drug paraphernalia) by the district attorney's office.

On April 2013, the ODC filed formal charges against respondent, alleging that his conduct violated Rule 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer). Respondent answered the formal charges, denying misconduct.

The committee determined respondent acted intentionally and knowingly in his possession of the drugs, and with the intent to distribute them. The committee determined the baseline sanction was disbarment.

The Board determined the committee's factual findings were supported by the record and are not manifestly erroneous. The Board also found that the hearing committee correctly applied the rules to determine respondent violated Rule 8.4(b). The board adopted the committee's findings of fact and law.

The Court adopted the Coard's recommendation and permanently disbarred respondent.

**In re John Brewster Ohle, III, 14-1083 (La. 10/24/14), 149 So.3d 1226**

On November 2008, respondent was indicted by a federal grand jury in the Southern District of New York on various tax and fraud offenses. On August 2009, the Government filed an eight-count Second Superseding Indictment against respondent. The presiding federal judge severed three of these counts on January 2010, and the Government proceeded to trial on the severed counts only, subsequently recast as the Third Superseding Indictment. Count One charged respondent with conspiracy in violation of 18 U.S.C. § 1371. As charged to the jury, the conspiracy had two objects: (1) to commit wire fraud by obtaining fees, directly or indirectly, from Bank One, and (2) to defraud the Internal Revenue Service. In Counts Two and Three, respondent was charged with evasion of his personal tax obligations for the 2001 and 2002 tax years, respectively, in violation of 26 U.S.C. § 7201.

The underlying facts of the Third Superseding Indictment are complex, but essentially, the Government alleged that respondent's criminal conduct occurred as part of an effort to market, sell, and implement a tax shelter known as "Hedge Option Monetization of Economic Remainder," or HOMER, which respondent designed for high net worth clients of Bank One. Respondent, who is also a CPA, allegedly prepared fraudulent invoices to obtain referral fees from Bank One on the transactions relating to this tax shelter, although he was not entitled to receive the fees, and then concealed the receipt of the ill-gotten referral fees by failing to report them on his individual tax returns. Furthermore, the Government alleged that respondent embezzled at least \$3 million dollars from a client's trust account and willfully evaded taxes on approximately \$6.5 million in income in 2001 and 2002.

On June 2, 2010, following a three-week trial, the jury found respondent guilty of all three counts of the Third Superseding Indictment. In response to a special interrogatory, the jury found that the Government had proven respondent's guilt with respect to both alleged objects of the Count One conspiracy.

On January 2011, respondent was sentenced to serve 60 months in a federal penitentiary, followed by a three-year period of supervised release. Respondent was ordered to pay \$5,553,680.74 in restitution plus the cost of prosecution, and ordered to forfeit \$2,954,334 in proceeds traceable to the charged conspiracy, as well as his interest in the property detailed in the indictment.

On October 20, 2011, the United States Court of Appeals for the Second Circuit affirmed respondent's conviction in an unpublished opinion. Mandate issued on March 6, 2012. Respondent subsequently filed a motion to set aside his conviction pursuant to 28 U.S.C. § 2255. The § 2255 motion remains pending at this time.

On November 2010, the ODC filed one count of formal charges against respondent, alleging that his conduct as set forth above violated Rules 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). Respondent initially failed to answer the formal charges, and the factual allegations were deemed admitted and proven by clear and convincing evidence. Thereafter, the deemed admitted order was recalled and respondent filed an answer to the formal charges denying any violation of the rules. The disciplinary matter was then held in abeyance pending the finality of respondent's criminal conviction.

The committee recommended that the respondent be permanently disbarred. Neither respondent nor the ODC filed an objection to the committee's report. The Board also recommended that the respondent be permanently disbarred.

The court found that the respondent's conduct warranted disbarment, thus permanently disbarred him.

### **Lack of Diligence and Communication**

#### ***In re Otha Curtis Nelson, Sr., 13-2699 (La. 5/7/14), 146 So.3d 176***

##### **Count I – The Aucoin Matter**

On July 15, 2000, respondent issued a check from his trust account in the amount of \$250, made payable to Tina Aucoin on behalf of his client Karen Aucoin. Tina attempted to cash the check on July 19, 2000 but was informed by the bank that the check would not clear. However, Tina was able to cash the check on July 25, 2000. The funds would not clear respondent's trust account because he failed to reconcile the account during this time. He also improperly maintained his personal funds in the trust account during this time. The ODC alleged that respondent's conduct violated Rules 1.15 (safekeeping property of clients or third persons) and 8.4(a) (violation of the Rules of Professional Conduct). The court found that respondent violated Rules 1.15 and 8.4(a) as charged.

##### **Count II – The Matthews Succession Matter**

Beulah Holmes hired respondent to handle the succession of her mother, Fannie Matthews. At the time of probate, Ms. Matthews' estate was valued at \$50,736.12. Respondent billed the succession \$21,576.75, or 43% of the value of the estate, for his services; of that amount, in June 2000, he collected \$14,276.93, or approximately 28% of the value of the estate. He then attempted to secure real property owned by the estate as further payment of his billed fee, and did so without advising the owners of the property to obtain an independent legal opinion. In the

estate items, respondent included United States savings bonds payable to certain relatives of Ms. Matthews even though the savings bonds were not properly part of the estate. In an attempt to ensure his fee was paid, respondent intentionally held the savings bonds in his possession from June 2000 until February 2002 (approximately twenty months) even though they constituted property of third persons. He also attempted to collect a fee for cashing the savings bonds in the amount of 25% of the face value of the bonds. However, respondent's services were not necessary because the savings bonds could have been cashed by the owners without the assistance of an attorney. None of the owners of the savings bonds agreed to compensate respondent for cashing them.

The succession was not complex, did not require administration, and did not involve novel questions of law. It did not impose unusual time constraints on respondent, and he was not precluded from accepting other employment while handling it. The ODC alleged that respondent's conduct violated Rules 1.4 (failure to communicate with a client), 1.5(a) (charging an unreasonable fee), 1.8 (conflict of interest), 1.15, 1.16 (declining or terminating representation), 8.4(a), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The court found that respondent violated Rules 1.5(a), 1.15, 8.4(a), and 8.4(c). The court found insufficient evidence to prove violations of Rule 1.4, 1.8, and 1.16.

#### Count III – The Kendrix Matter

On 1994, Roy Kendrix hired respondent to handle his worker's compensation matter. On July 1995, Mr. Kendrix was awarded a \$31,900.35 judgment in the case. Included in the judgment was a \$1,000 award for arbitrary and capricious failure to pay benefits and \$3,000 in attorney's fees in connection with the award for arbitrary and capricious failure to pay benefits, plus interest. On December 1996, respondent withheld \$3,354.56 as attorney's fees for the arbitrary and capricious finding. He also withheld as attorney's fees \$3,828.79, which represented 20% of the first \$20,000 awarded, plus interest from the date of judicial demand, as provided by statute. However, respondent admitted that he failed to file a motion for approval of these attorney's fees. The ODC alleged that respondent's conduct violated Rules 1.5(a), 1.15, and 8.4(a). The court found that Respondent violated 1.15 and 8.4(a) because he did not seek judicial approval prior to withholding his fees. The court found that he did not violate Rule 1.5(a) because attorney's fees that are awarded judicially and/or are allowed by law cannot be deemed excessive.

#### Count IV – The NSF Check Matter

On May 30, 2002, respondent issued a \$166.50 check from his trust account to pay the filing fee to the Clerk of Court for the Louisiana Supreme Court in a matter involving his client, Colin Williams. The check was returned for non-sufficient funds ("NSF"). On June 27, 2002, respondent remitted payment of the filing fee to the Clerk of Court via a certified check, and the clerk's office accepted the filing on behalf of Mr. Williams. The ODC alleged that respondent's conduct violated Rules 1.5 (fee arrangements), 1.15, 8.4(a), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). The court found that respondent violated Rules 1.15 and 8.4(a). The court found that the committee correctly concluded that the ODC failed to carry its burden of proof regarding Rules 1.5 and 8.4(d).

#### Count V – The Hills Matter

On August 2002, Marvin Hills hired respondent to represent him in a child custody matter. Respondent and Mr. Hills entered into a verbal fee agreement, and Mr. Hills paid respondent a total of \$750 for the representation. Respondent prepared and filed a rule for change of custody and drafted a single set of interrogatories and requests for production of documents. Mr. Hills terminated respondent's services on February 2003. Thereafter, on April 2003, respondent sent Mr. Hills a letter demanding he pay an additional \$1,305 in attorney's fees over and above the \$750 previously paid. One month later, respondent sent Mr. Hills an itemized bill for attorney's fees totaling \$3,818.14 with a balance due of \$3,193.14. The bill included services such as typing and updating respondent's time sheet, which should not have been included in the services rendered at respondent's \$125 hourly rate. The ODC alleged that respondent's conduct violated Rules 1.4, 1.5, 8.4(a), 8.4(c), and 8.4(d). The court found that respondent violated Rules 8.4(a) and 8.4(c) because the fees he attempted to collect were excessive and because the amount he sought to collect in May 2003 increased substantially from the amount he demanded in April 2003. The court agreed with the committee that the record does not contain sufficient evidence to support a finding that respondent violated Rules 1.4, 1.5, and 8.4(d).

#### Count VI – The Brown Matter

On July 2003, Jackie Brown hired respondent to represent her husband, Albert Brown, in a felony criminal matter. Respondent agreed to represent Mr. Brown at an hourly rate of \$150 per hour for work done at his office and \$250 per hour for work done out of his office. Mr. Brown's felony charge was reduced to a misdemeanor on the day of the trial on November 2003. The Browns paid respondent a total of \$1,400 for the representation. On February 11, 2004, respondent sent the Browns an itemized bill for \$33,761.65. In the bill, he included charges for typing and updating his time sheet, which should not have been included in the services rendered at his hourly rate. The ODC alleged that respondent's conduct violated Rules 1.5, 8.4(a), and 8.4(c). The court found that respondent violated Rules 1.5 and 8.4(a). He did not violate Rule 8.4(c) because his conduct was negligent.

#### Count VII – The Lewy Physical Therapy Matter

Respondent represented Barnabus Whitley in a personal injury matter and guaranteed payment to Lewy Physical Therapy for treatment of Mr. Whitley's injuries. Respondent settled Mr. Whitley's claim and disbursed Mr. Whitley's portion of the settlement funds to him on September 6, 2003. Despite withholding \$562 from the settlement funds to pay Lewy Physical Therapy, respondent did not remit the funds until July 16, 2005. The ODC alleged that respondent's conduct violated Rules 1.15, 8.4(a), and 8.4(d). Respondent stipulated that he violated Rule 1.15(d) (failure to timely remit funds to a client or third person) by failing to promptly deliver funds to Lewy Physical Therapy. The court found that respondent violated Rules 8.4(a) and 8.4(d) but not Rules 1.1 and 3.5.

#### Count VIII – The Tayari Harris Matter

Respondent represented Tayari Harris in a criminal matter, the trial of which began on December 2005. During voir dire, respondent used all twelve of his peremptory challenges to remove Caucasian jurors from the panel. Respondent subsequently admitted that he excused the jurors "because of racial reasons," leading the trial court to grant the State's request for a mistrial. The ODC alleged that respondent's conduct violated Rules 1.1 (competence), 3.5 (impartiality and

decorum of the tribunal), 8.4(a), and 8.4(d). The court found that respondent violated Rules 8.4(a) and 8.4(d) but not Rules 1.1 and 3.5.

#### Count IX – The Joseph Harris Matter

On March 23, 2007, Joseph Harris hired respondent to represent him in a pending civil case in federal court. On that day, the two entered into a written contract for the representation. On April 13, 2007, respondent enrolled as Mr. Harris' counsel of record. Motions to dismiss Mr. Harris' case were granted on October 22, 2007. There is no indication that respondent filed any opposition to the defendants' motions to dismiss. Furthermore, respondent never made a court appearance on Mr. Harris' behalf. Respondent last communicated with Mr. Harris on August 2008 and never informed Mr. Harris that he was no longer representing him. The ODC alleged that respondent's conduct violated Rules 1.1(a) (failure to provide competent representation to a client), 1.2 (scope of the representation), 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4, 1.16(d) (obligations upon the termination of the representation), and 8.4(a). The court agreed with the committee that the ODC failed to carry its burden of proof with respect to the allegations of misconduct in this count.

#### Count X – The Lewis Matter

Tracey Valmont paid respondent \$500 to review Dwayne Lewis' post-conviction relief matter. On July 2009, Mr. Lewis filed a disciplinary complaint against respondent, requesting a refund of the \$500 because of alleged misconduct by respondent. Respondent did not respond to notice of the complaint. The ODC alleged that respondent's conduct violated Rules 1.1(a), 1.2, 1.3, 1.4, 8.1(c) (failure to cooperate with the ODC in its investigation), and 8.4(a). The court agreed with the committee that the ODC established only a violation of Rule 8.1(c).

#### Count XI – The Valmont Matter

On January 2008, Tracey Valmont hired respondent to represent him in a personal injury matter against the Louisiana Department of Public Safety and Corrections. Mr. Valmont paid respondent a \$500 advance deposit. Thereafter, respondent failed to take any material action in furtherance of Mr. Valmont's claim. He also failed to adequately communicate with Mr. Valmont. On October 2009, Mr. Valmont filed a disciplinary complaint against respondent. Respondent failed to respond to notice of the complaint. The ODC alleged that respondent's conduct violated Rules 1.3, 1.4, 1.5, 3.2 (failure to make reasonable efforts to expedite litigation), 8.1(c), 8.4(a), and 8.4(c). The court found that respondent violated Rules 1.3, 1.4, 1.5, 3.2, 8.1(c), and 8.4(a) but not Rule 8.4(c).

#### Count XII – The Wiley Matter

On December 2007, respondent and Christopher Wiley entered into an attorney-client relationship. Mr. Wiley paid respondent a total of \$3,150 for his services. Of this amount, respondent earned only \$1,545, leaving an unearned balance of \$1,605, which he has not yet refunded. The ODC alleged that respondent's conduct violated Rules 8.1(c)2, 8.4(a), and 8.4(c). The court accepted the board's adoption of the committee's findings and conclusions that

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<sup>2</sup> In the formal charges, the ODC alleged that respondent failed to respond to notice of the disciplinary complaint related to this count. However, the ODC failed to provide documentary evidence or testimony in support of this allegation.

respondent violated Rule 8.4(a); however, the committee found no evidence to support violations of Rules 8.1(c) and 8.4(c).

#### Count XIII – The Searls Matter

Respondent reviewed a civil claim that Gregory Searls wished to pursue, but he declined the representation. Mr. Searls did not pay respondent for reviewing his claim. On February 2010, Mr. Searls filed a disciplinary complaint against respondent, but respondent failed to respond to notice of complaint. The ODC alleged that respondent's conduct violated Rules 1.3, 1.4, 8.1(c), and 8.4(a). The board adopted the committee's conclusion that the ODC established only a violation of Rule 8.1(c). The Court adopted the Board's conclusion on this count.

#### Count XIV – The Audit Matter

On May 14, 2010, respondent issued a \$171.50 check from his trust account to pay the filing fee to the Clerk of Court for the Louisiana Supreme Court in a matter involving his client, Rosa Clark. The check was returned NSF. On June 2, 2010, respondent remitted payment of the filing fee to the Clerk of Court via a certified check, and the clerk's office accepted the filing on behalf of Ms. Clark. Based on this NSF check, the ODC's auditor, Angela Willis, contacted respondent and requested documents for a review of his trust account. However, the ODC ultimately had to issue a subpoena to respondent's bank in order to obtain the requested documents. Ms. Willis prepared a report of her findings with respect to respondent's trust account, to which findings respondent has stipulated. In particular, respondent acknowledged that he was improperly using his trust account and maintaining his personal funds in the account. For example, on June 23, 2010, funds related to a succession matter were deposited into the trust account; however, these funds were used to pay respondent's office expenses, as described in Ms. Willis' report. On July 22, 2010, the client finally received \$3,000 as her share of these funds, and she allowed respondent to retain \$2,025.04 of the funds as a loan to cover respondent's costs in connection with her grandmother's legal matter. Respondent's share of the funds was \$1,300. The ODC alleged that respondent's conduct violated Rules 1.5, 8.1(c), 8.4(a), 8.4(c), and 8.4(d). The board adopted the committee's findings as follows: the committee adopted the findings in Ms. Willis' report that respondent commingled personal funds with client funds. The committee also found that respondent routinely failed to reconcile his trust account statement and consistently placed personal funds into his trust account. With respect to the commingling of funds, there was a clear pattern of misconduct over time in that respondent repeatedly failed to hold his clients' funds separate from his own. Although none of respondent's clients were harmed, the potential for client harm existed. Respondent knowingly commingled funds and intentionally failed to cooperate with the ODC. Thus, the respondent violated Rule 8.4(a), but the ODC failed to prove that Rules 1.5, 8.4(c), and 8.4(d) were violated. The Board did not address the alleged violation of Rule 8.1(c). The Court stated that the record supported a finding that respondent violated Rule 8.1(c).

The Court sanctioned a three-year suspension, with all but one year deferred. The Court also sanctioned that after the active portion of his suspension, respondent shall be placed on supervised probation for a period of two years, subject to 4 conditions. Any violation of the conditions of probation, or any other misconduct during the probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate.

**In re Mack Arthur Hollis, 13-2568 (La. 3/14/14), 135 So.3d 596**

Count I

On the summer of 2004, Ameshila Alfred, her mother, and her stepfather hired respondent to represent them in a personal injury matter stemming from a June 7, 2004, automobile accident. Respondent received the related accident report on October 2004. He encountered some difficulties in obtaining an in forma pauperis affidavit from his clients. However, he ultimately received Ms. Alfred's pauper affidavit and purportedly notarized same on February 10, 2005. Respondent filed a petition for damages on behalf of his clients on May 3, 2006, nearly two years after the June 7, 2004 accident. The defendants filed an exception of prescription, and the trial court signed a judgment dismissing the lawsuit on November 27, 2006. Respondent subsequently informed his clients that the dismissal of their lawsuit was based upon his failure to timely file the petition.

Count II

On October 6, 2010, the committee conducted a formal hearing to address the alleged misconduct in Count I. During the hearing, respondent testified about Ms. Alfred's pauper affidavit. Specifically, respondent admitted that he notarized the affidavit on August or September 2005 (after the prescription date) and not on February 10, 2005 as indicated on the affidavit. In his testimony, he claimed that he "didn't want to put a prescribed date on there." Respondent further testified that he notarized the affidavit outside of the presence of the affiant. Furthermore, he acknowledged that he is not, in fact, registered as a notary public in the State of Louisiana.

ODC filed amended formal charges on February 16, 2012. The amended charges alleged that respondent violated Rules 1.1 (failure to provide competent representation to a client), 1.3 (failure to act with reasonable diligence and promptness in representing a client), 3.3 (candor toward the tribunal), and 8.4. Respondent answered the amended formal charges, essentially denying any misconduct. Accordingly, the matter proceeded to a formal hearing on the merits.

The committee determined that respondent violated the rules as alleged in the amended formal charges. The committee determined that the baseline sanction is suspension. The Board also concluded that the baseline sanction is suspension. The Board agreed with the aggravating and mitigating factors found by the committee. The Board recommended that respondent be suspended from the practice of law for one year and one day. The Board also recommended that respondent make restitution to his clients in the amount of \$7,000, the estimated value of their claim had it not prescribed.

The Court held that respondent neglected his client's legal matter, causing their personal injury claim to prescribe. Additionally, he backdated Ms. Alfred's pauper affidavit and improperly notarized the affidavit by (1) notarizing same outside of the presence of the affiant and (2)

notarizing same when he was not a duly-commissioned notary. Based on these facts, respondent violated the Rules of Professional Conduct as alleged in the amended formal charges.

The Court agreed with the Board that respondent acted negligently, knowingly, and intentionally. He violated duties owed to his clients, the public, the legal system, and the legal profession, causing actual and potential harm.

The Court adopted the Board's recommendation suspending the respondent from the practice of law for one year and one day. The respondent was also ordered to make restitution to his clients in the amount of \$7,000.