

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: PATRICK A. GIRAUD

NUMBER: 17-DB-050

RECOMMENDATION TO THE LOUISIANA SUPREME COURT



INTRODUCTION

This is an attorney discipline matter based upon the filing of formal charges by the Office of Disciplinary Counsel (“ODC”) against Patrick A. Giraud (“Respondent”), Louisiana Bar Roll Number 29877.<sup>1</sup> ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.15(a) (safekeeping property - improper use of a client trust account), 1.15(f) (safekeeping property – checks made payable to “cash” prohibited) and 8.4(c) (dishonesty, fraud, deceit, or misrepresentation).<sup>2</sup> The hearing committee (“committee”) assigned to the matter concluded that Respondent violated Rules 1.15(a), 1.15(f), and 8.4(c) as charged. The committee recommended Respondent be suspended for one year and one day and that the suspension be fully deferred upon Respondent’s complying with the following conditions:

- (1) that Respondent continue to be bound by the terms of his July 12, 2016 Recovery Agreement which he signed while participating in the Judges and Lawyers Assistance Program (“JLAP”) for a period of two years following the imposition of sanctions,
- (2) that Respondent be required to obtain regular audits of his trust account, to be performed by a CPA of his choosing, subject to the approval of the ODC,
- (3) that the findings of said audits be submitted quarterly to the ODC, with the cost and expense of the audits paid by Respondent, for two years following the imposition of the sanctions,
- (4) that Respondent be required to take at least six hours of his mandatory CLE in the area of law office practice/client trust account management,
- (5) within one year of the imposition of the sanctions, Respondent should be required to successfully complete the Louisiana State Bar Association’s Trust Accounting Program, and

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<sup>1</sup> Respondent was admitted to the Louisiana Bar on 10/28/2005. His primary registration address is 305 Main St., Belle Chasse, LA 70037. Respondent is currently eligible to practice law in Louisiana.

<sup>2</sup> See attached Appendix for full text of the Rules.

(6) that Respondent pay costs and expenses as set forth under Louisiana Supreme Court Rule XIX, §10.1.

For the following reasons, the Board concurs in the committee's factual findings which are supplemented herein and adopts the committee's conclusions regarding rule violations. The Board recommends that Respondent be suspended for one year and one day, fully deferred, subject to the conditions set forth herein. The Board further recommends that Respondent be assessed with the costs and expenses of this matter.

### **PROCEDURAL HISTORY**

The formal charges were filed on September 7, 2017. The charges state, in pertinent part:

#### **I.**

On February 3, 2016, ODC received an overdraft notice from Hancock/Whitney Bank, pertaining to your client trust account, ending in XXX9124. The notice concerned an overdraft, which occurred on November 23, 2015. You have advised that the overdraft resulted from your issuing a check from the trust account, which was to pay for an evaluation for one of your clients by Dr. Russo. At the time of presentment by Dr. Russo, your trust account held insufficient funds to cover the \$600 payment. When the check was issued, the individual client was being represented in a personal injury matter and had no funds in your trust account. The payment was not one that should have been made from the trust account.

In reviewing your financial records covering the period from August 1, 2015, through January 31, 2016, it was confirmed that you regularly paid non-client expenses from your trust account. ODC has identified payments totaling \$33,219.33 in such non-client expenses. Payees for these transactions included, yourself, Wal-Mart, Office Depot, and Brother Martin High School. During your October 26, 2016, sworn statement, you confirmed that during the year 2015, you regularly utilized your trust account as a second operating account. Your handling of your trust account in this manner is contrary to the provisions or [sic] Rule 1.15(a) of the Rules of Professional Conduct. ODC has also identified several checks made payable to "CASH," contrary to Rule 1.15(f) of the Rules of Professional Conduct.

ODC has further determined that as of January 31, 2016, your trust account should have held at least \$16,345.62, to satisfy pending client expenditures. The account balance on this date was only \$3,235.61, \$13,110.01 short of the calculated necessary balance. This shortage in your trust account represents an intentional conversion of client and/or third-party funds, in violation of Rules 1.15(a) and

8.4(c) of the Rules of Professional Conduct, and prior jurisprudence of the Louisiana Supreme Court.

The evidence supports the conclusion you intentionally utilized funds from your trust account to support your addiction [sic] to prescription pain medications; specifically, OxyContin. You have since submitted to a 90-day inpatient treatment program and have executed a five-year recovery agreement with the Judges' and Lawyers' Assistance Program.

ODC believes there is clear and convincing evidence to support formal charges for your intentional violation of Rules 1.15(a), 1.15(f) and 8.4(c) of the Rules of Professional Conduct.

Respondent filed an answer to the formal charges on October 23, 2017. In his response, Respondent admitted the allegations of misconduct made against him, specifically violations of Rules 1.15(a) and 1.15(f). Respondent denied the alleged violation of Rule 8.4 and requested a hearing to present evidence of aggravating circumstances.

The hearing in this matter was held on January 29, 2018 before Hearing Committee No. 37.<sup>3</sup> First Assistant Disciplinary Counsel Gregory L. Tweed appeared on behalf of the ODC. Respondent appeared with counsel, Peter A. Barbee. The committee heard testimony from the following: Respondent, J. "Buddy" Stockwell III (Executive Director of JLAP), and Angelina Marcellino (Forensic Auditor for the ODC). ODC's Exhibits ODC1 through ODC8 were admitted into evidence without objection.

The hearing committee filed its report on March 12, 2018. On March 15, 2018, the ODC filed an objection to the committee's recommendation asserting that the recommended sanction is too lenient. The ODC agreed that the baseline sanction is a one year and one day suspension, but asserted that the period of deferment recommended by the committee is not supported by the record.

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<sup>3</sup> Hearing Committee No. 37 was comprised of Wade Webster (Committee Chair), Robert M. Johnston (Lawyer Member), and Linda Ellis (Public Member).

The matter was originally scheduled for argument before a board panel on May 17, 2018. On April 16, 2018, ODC filed its brief to the Board supporting its objection to the committee's recommendation. ODC argued that the minimum sanction for Respondent's misconduct should be a one year and one day suspension.

On April 26, 2018, the Board, on its own motion, continued the argument in this matter from May 17, 2018, to June 28, 2018. On April 27, 2018, Mr. Barbee filed a motion to withdraw from representation of Respondent which motion was granted on May 4, 2018. On May 31, 2018, Cullen A. Tonry filed a notice of enrollment as counsel for Respondent and a motion to continue the argument before the board panel scheduled for June 28, 2018, which was granted. Respondent filed his brief to the Board on July 12, 2018. Respondent maintains that the committee's recommended sanction of a one year and one day suspension, fully deferred, is appropriate and urges the Board to adopt the recommendation.

Oral argument of this matter was held on August 9, 2018, before Board Panel "C."<sup>4</sup> First Assistant Disciplinary Counsel Gregory L. Tweed appeared on behalf of the ODC. Respondent appeared with counsel, Cullen A. Tonry.

## **HEARING COMMITTEE REPORT**

The committee filed its report on March 12, 2018. The report is quoted here in its entirety:

### **INTRODUCTION**

Formal charges were filed by the Office of Disciplinary Counsel ("ODC") in this matter on September 7, 2017. The charges alleged that Patrick A. Giraud ("Respondent") violated Rules 1.15(a), 1.15(f) and 8.4(c) of the Rules of Professional Conduct by intentionally utilizing funds from his trust account to support an addiction to prescription pain medication, specifically, Oxycontin.

The hearing on this matter provided evidence supporting the allegations of the ODC that Respondent intentionally violated Rules 1.15(a), 1.15(f) (prohibiting

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<sup>4</sup> Board Panel "C" was composed of Danna E. Schwab (Chair), Melissa L. Theriot (Lawyer Member), and Charles H. Williamson, Jr. (Public Member).

a lawyer from improperly taking a client's property in a trust account) and Rule 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty).

### **ANALYSIS OF THE EVIDENCE**

Respondent was admitted to the Bar in 2005. He had no prior disciplinary history. During the period of 2013 through early 2016 he daily used Oxycontin, and admitted that he did not have a prescription for this opioid drug but purchased it from another attorney and others. He admitted that he was in violation of Rules 1.15(a) and 1.15(f). (Tr. p. 24). During the period he admitted that he used his trust account as an "operating account" and he did not have authority from any clients to do so (Tr. pp. 21-22, 24).

After an attorney he worked with died of a heroin overdose, and during the time he was under investigation by the ODC, Respondent entered an inpatient drug rehabilitation facility, Palmetto Addiction Recovery Center, where he resided for 95 days. He signed a Recovery Agreement in which he agreed to forego drug or alcohol use (Tr. p. 55). After being discharged from the drug rehab facility he voluntarily agreed to taking drug tests, and has had 24 such drug tests at Affinity Health facility (Tr. pp. 87-88). He has also regularly attended Alcoholics Anonymous meeting at the John Calvin Presbyterian Church. He continues to be a regular participant in AA, and testified that he had not drunk alcohol or used drugs since he left the inpatient facility (Tr. pp. 51-55).

J.E. Buddy Stockwell, III, Executive Director of Judges and Lawyers Assistance Program also testified. He first met Respondent in March, 2016, and found him to be "so open", that he "badly wanted help" (Tr. p. 75). Respondent signed a five year monitoring agreement, and also agreed to go to 90 Alcoholics Anonymous meetings in the first 90 days after his inpatient discharge which he did. (Tr. p. 77). The multiple drug tests that he has taken following his discharge have all been negative (Tr. pp. 87-88). Mr. Stockwell testified that he did not "have any concerns" currently about Respondent relapsing. (Tr. p. 94).

Angelina Marcellino, Forensic Auditor for the ODC, also testified. She reviewed Respondent's trust account for the six month period from August 1, 2015 to January 31, 2016. She found that Respondent had misused and converted funds in his trust account, the total being approximately \$13,000, although it may have been as high as \$33,000. She also reviewed records showing that Respondent had made recent restitution to clients and former clients, and was satisfied that he had done this properly (Tr. pp. 100-107).

The ODC stipulated that the following mitigating factors apply to the claims against Respondent: (1) he had a complete absence of prior disciplinary record from the date of his admission to the Bar, 2005[,] until he misused trust account funds to support his Oxycontin habit which occurred in 2015; (2) Respondent made timely restitution to those individuals from whom he had taken funds that had been in his trust account; and (3) he made full and free disclosure to the ODC and was fully responsive during the ODC investigation, including admitting his violation of the Rules of Professional Responsibility.

## **FINDINGS OF FACT**

The committee finds that the testimony of Respondent and the other witnesses are creditable. The evidence shows that Respondent improperly took funds in his trust account to support a drug habit. The evidence also shows that following treatment Respondent has shown no signs of continued violation of the Rules of Professional Conduct.

## **OPINION**

The Panel concludes that Respondent violated Rules of Professional Conduct 1.15(a), 1.15(f) and 8.4(c) as alleged by the ODC.

The Panel recommends that Respondent be suspended for one year and one day and that the suspension be fully deferred upon the Respondent complying with the following conditions: (1) that Respondent continues to be bound by the terms of his July 12, 2016 Recovery Agreement which he signed while participating in the Judges and Lawyers Assistance Program, for a period of two years following the imposition of sanctions, (2) that Respondent be required to obtain regular audits of his trust account, to be performed by a CPA of his choosing, subject to the approval of the ODC, (3) that the findings of said audits be submitted quarterly to the ODC, with the cost and expense of the audits paid by Respondent, for two years following the imposition of the sanctions, (4) that Respondent be required to take at least six hours of his mandatory CLE in the area of law office practice/client trust account management, (5) within one year of the imposition of the sanctions, Respondent should be required to successfully complete the Louisiana State Bar Association's Trust Accounting Program, and (6) that Respondent pay Costs and Expenses as set forth under Rule 10.1 of the Rules for Lawyer Disciplinary Enforcement.

## **ANALYSIS OF THE RECORD BEFORE THE BOARD**

### **I. Standard of Review**

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. Rule XIX, §2(G)(2)(a) states that the Board is “to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges ... and petitions for reinstatement, and prepare and forward to the court its own findings, if any, and recommendations.” Inasmuch as the

Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of “manifest error.” *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee’s application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/92).

**A. The Manifest Error Inquiry**

The factual findings of the committee do not appear to be manifestly erroneous, are supported by the record, and are adopted by the Board. Further, the Board makes the following additional findings.

In 1988, Respondent began working as a clerk in traffic court in New Orleans where his father was a traffic court judge. His father died in 1998. At that time, Respondent had not completed college and felt he had not succeeded in life. After his father died, he decided that he would return to school to become a lawyer and wanted to become a traffic judge like his father. Respondent was admitted to the Louisiana Bar in 2005 at age 39. Upon admission, he went to work in the office of a good friend (“Respondent’s friend”). Respondent’s friend had a successful trial practice and was a mentor to Respondent. Respondent more or less used office space and followed his friend’s lead. Respondent’s friend ran the business. Respondent’s primary practice area was criminal defense. Respondent also continued to work in traffic court until 2013. T.9-11, 35-37.

Respondent ran for traffic judge in 2011 and again in 2013 and lost both elections. He testified that after the 2013 loss, he felt that he had failed in reaching a goal he had worked toward for many years and that he had failed others in his life and “the bottom dropped out.” Respondent’s friend gave him OxyContin and told him it would make him feel better and able to function.

Within a couple of weeks, Respondent realized he was physically addicted. T.11-12; ODC2, p. 004.

In November 2015, Respondent wrote a \$600 check from his trust account to Dr. Courtney Russo to perform a medical evaluation of one of Respondent's personal injury clients. Dr. Russo's office called Respondent and advised him there were insufficient funds in the account to cover the check. On the day before Respondent wrote the check in question, Respondent's friend died of a heroin overdose. Respondent was no longer working in the same office with his friend at that time. T.25-27, 37, 50.

The ODC received a notice of the overdraft from the bank on February 3, 2016. The ODC subsequently made an inquiry for information from Respondent related to the overdraft. In his March 17, 2016, response to the inquiry, Respondent explained the history leading to his depression in 2013. He admitted his addiction and that the effects of the addiction overwhelmed his finances and that he eventually began to take money from his trust account. He advised that when he received the call from Dr. Russo's office about the overdraft, he "ran down" and paid Dr. Russo and the overdraft fee in cash and that he had since paid all outstanding debts related to client settlements. He further wrote that he had contacted the JLAP program and was preparing to enter inpatient treatment. ODC2, p. 004.

The evidence shows that Respondent always promptly paid his clients the amounts they were owed from any settlement funds received. However, the evidence, including the testimony of Respondent and the ODC auditor, Ms. Marcellino, also shows that Respondent otherwise mishandled his trust account in 2015. During the audited period, August 2015 through January 2016, the mishandling included payment of client costs from the trust account in cases in which he had not yet received payments on behalf of the client, failure to disburse attorneys fees owed to



himself from the trust account, depositing flat fees into the trust account, delays in making payments to third parties after settlement payments were deposited into the trust account, and payment of personal expenses from the trust account. The personal expenses included utility payments, school payments, and payments written to cash. Respondent testified he used some of this money to pay for OxyContin. As of January 31, 2016, the end date of the audit period, the trust account balance was \$13,110.01 short of the calculated balance which should have been in the account. T.22-24; ODC6.

Respondent testified that he knew an operating account was for office money and a client trust account was for client funds. He understood that delineation and followed it up until 2015. He did not dip into the trust account until approximately July or August of 2015. Before then he was generating enough money from his practice to support his drug habit. At that point, his practice was beginning to go downhill due to his drug use. T.46-49.

Respondent testified that by the time of the overdraft, his life was “just a fog” as a result of the drug use. He had previously been married and had two children and lived in a nice house in an affluent neighborhood in New Orleans. By the time of the overdraft, he had sold the house, sold the car, and was divorced. T.37-44.

After consulting with JLAP, Respondent entered an inpatient rehabilitation facility on April 3, 2016, where he received inpatient treatment for 95 days. T.51, 77, 82. He then entered into a five-year JLAP contract and, at the time of the hearing, was in full compliance with all of the requirements including monitoring, drug testing, and attendance at AA meetings. T.82-92. Respondent testified at the hearing that he had not used any drugs or alcohol since entering the rehabilitation facility. T.51-56. Mr. Stockwell testified that Respondent came to JLAP in March

of 2016 voluntarily and was reaching out for help. T.75-77. He further testified that he did not have any concerns at all about Respondent at the time of the hearing.<sup>5</sup>

Respondent has also engaged the services of an accountant who has reviewed his trust account to ensure it is in compliance and who has also educated him regarding reconciliation of his accounts.<sup>6</sup> T.27-28; ODC7. Respondent testified that he was only doing criminal work at the time of the hearing. Therefore, while he still maintained the trust account, he did not have a need to use it at the time. T.29.

### **B. *De Novo* Review**

Respondent admitted and the ODC proved by clear and convincing evidence that Respondent violated Rules 1.15(a) and 1.15(f). Respondent testified that he never intended to steal from or short anyone. T.39-40. Because Respondent did not promptly disburse from the trust account attorneys fees owed to him as he should have, some of the funds he paid out of the trust account actually belonged to him. Nonetheless, at the end date of the audit, the obligations owing others exceeded the balance in the account by \$13,110.01. And, Respondent used some of the funds from the account to pay for drugs. Therefore, the Board adopts the committee's finding that ODC proved by clear and convincing evidence that Respondent violated Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation).

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<sup>5</sup> Mr. Stockwell stated, "We don't have any concerns at all about Patrick right now. He's doing everything he needs to do. There's a lot of things I'm worried about today as a JLAP Director, but Mr. Giraud is not one of them." T.94.

<sup>6</sup> Respondent testified that he previously did not have knowledge regarding formal reconciliation of an account, but until 2015, he did keep a record of payments from the trust account and the balance. T.15-18.

## **II. The Appropriate Sanction**

### **A. Rule XIX, §10(C) Factors**

Louisiana Supreme Court Rule XIX, §10(C) states that when imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
2. whether the lawyer acted intentionally, knowingly, or negligently;
3. the amount of actual or potential injury caused by the lawyer's misconduct; and
4. the existence of any aggravating or mitigating factors.

Here, Respondent violated duties to the public, the profession, and the clients. He acted at times negligently, knowingly, and intentionally in mishandling his trust account. Respondent never intended to steal from anyone and his misconduct resulted in no actual harm to his clients or the public. However, the mishandling of his trust account created the potential for harm to his clients and third parties.

The committee did not make any independent statement regarding any mitigating factors. Instead the committee only recited that the ODC had stipulated to the following mitigating factors: absence of prior disciplinary record; timely restitution; and full and free disclosure to the ODC and full cooperation in the ODC investigation. ODC argues that while the committee did not identify chemical dependency as a mitigating factor, the committee appeared to give significant weight to Respondent's drug addiction and subsequent treatment when, the ODC argues, the evidence did not establish chemical dependency as a mitigating factor. The Board finds that the following mitigating factors are supported by the evidence: absence of prior disciplinary record; personal or emotional problems; timely and good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board and cooperative attitude toward proceedings; chemical dependency; and remorse.

Standard 9.32(i) of the *ABA Standards for Imposing Lawyer Sanctions* provides that mental disability or chemical dependency including alcoholism or drug abuse may be considered in mitigation when:

- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
- (2) the chemical dependency or mental disability caused the misconduct;
- (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
- (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

The commentary to Standard 9.32 further explains:

Issues of physical and mental disability or chemical dependency offered as mitigating factors in disciplinary proceedings require careful analysis. Direct causation between the disability or chemical dependency and the offense must be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantial contributing cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is considered as mitigating, it should be given little weight. A showing of rehabilitation from chemical dependency may be considered but should not, in and of itself, be a justification for a recommendation for discipline less than that which would have been imposed upon an attorney in similar circumstances where a chemical dependency was not present.

The ODC argues that the chemical abuse should not be considered a mitigating factor because there is insufficient evidence of causation. The Board finds that chemical dependency was a substantial contributing cause of Respondent's misconduct and, therefore, should be given great weight. It is true that Respondent did not put a medical provider on the stand and directly ask whether his chemical dependency led to his misconduct. However, it is suggested that reasonable review of the totality of the evidence supports a finding of causation in this case. Respondent's testimony shows his use of his trust account as an operating account did not begin until he had been using drugs for two years and he was in a "fog" from drug use and his practice

was beginning to decline from his drug use. T.38, 48-49. When the ODC made inquiry about the one overdraft, Respondent immediately admitted the mishandling of his trust account, revealed that he had become addicted to drugs, and sought help from JLAP. He wrote to the ODC, "I am not attempting to justify my actions but merely explaining as openly and candidly as I can what caused the shortage in my IOLTA account." ODC2, p. 004. He entered a rehabilitation facility and has complied with all JLAP requirements since his discharge and the JLAP Director now has no concerns about Respondent.

The committee made no statement at all in the committee's report as to whether or not any aggravating factors are present. The ODC argues two aggravating factors are present: substantial experience in the practice of law and multiple offenses (repeated conversion of client funds). Respondent had been practicing for approximately eight years when he began using OxyContin and just less than ten years when he began using his trust account as an operating account. The Board finds that this time period does not support an aggravating factor of substantial experience in the practice or a mitigating factor of inexperience in the practice. The Board finds that the aggravating factor of multiple offenses is supported by the evidence.

#### **B. The ABA Standards and Case Law**

Standard 4.12 of the *ABA Standards for Imposing Lawyer Sanctions* appears to be most relevant to the situation presented here. Standard 4.12 provides:

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

The jurisprudence involving factual circumstances of mishandling a trust account which are similar to those presented here supports the committee's recommended sanction even in cases where chemical dependency was not considered to be a mitigating factor. The case of *In re*

*Cicardo*, 2004-0828 (La. 7/2/04), 877 So.2d 980, is very similar to the present case. In *Cicardo*, the respondent was suspended for one year, fully deferred, subject to a two-year period of probation governed by conditions including audits of his trust account and attendance at ethics and law office management training. Mr. Cicardo was admitted to the bar in 1984. He began misusing his trust account in 1997, shortly after the death of his father with whom he had practiced law since his graduation from law school and who had handled all business aspects of the practice. For five years from early 1997 to the end of 2001, the respondent periodically used funds in his client trust account for the operation of his law office. As in the present matter, the withdrawals came from funds held in the trust account to pay medical liens or subrogation claims, funds representing the respondent's attorneys fees that had not been promptly withdrawn from the account, and attorneys fees deposited to the account which should not have been deposited there. Also, as in the present case, no client or third party was ever underpaid and there were no unreasonable delays in payments. The respondent's conduct was knowing, but caused no actual harm to his clients or third persons.

During the period in question, the respondent in *Cicardo* was dependent upon and impaired by alcohol. In November 2001, he began inpatient rehabilitation treatment. In February 2002, he entered into a two-year recovery contract with the then Lawyers Assistance Program. In March 2002, he self-reported his misconduct. The Court found "very substantial mitigating factors" including absence of prior disciplinary record, absence of dishonest or selfish motive, personal and emotional problems (alcohol abuse, divorce, bankruptcy), full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings, good character and reputation, and remorse. *Id.* at 984. Alcohol dependency was not considered a mitigating factor because the respondent admitted alcohol was not the cause of his misconduct.

In *In re Wilson*, 2012-0579 (La. 6/15/12), 90 So.3d 1018, the respondent attorney was found to have violated Rules 1.5(f)(4)(client advance deposit for costs and expenses must be placed in trust account), 1.15(a), 1.15(d)(prompt notification and payment to clients or third parties of funds received in which client or third party has interest), 1.15(f), and 8.4(c) and was suspended for one year and one day, fully deferred, followed by a two-year period of supervised probation governed by conditions including audits of her trust account and attendance at ethics, trust account, and law practice management training. In *Wilson*, the ODC conducted an investigation, including a ten-month audit of the respondent's trust account, after the respondent's trust account was overdrawn. The hearing committee found that respondent routinely failed to reconcile her trust account, commingled her personal funds with her clients' funds, and converted client and third-party funds, but no harm was caused to her clients by her misconduct. The committee found respondent's conduct was negligent, knowing, and intentional and recommended respondent be suspended from the practice of law for three years, fully deferred, subject to a two-year period of supervised probation with conditions.

The Board found in *Wilson* that the respondent's conduct was negligent and knowing and that she knowingly commingled and converted client and third-party funds which created the potential for harm. However, the Board determined the sanction recommended by the committee was too harsh and, instead, recommended the respondent be suspended for one year and one day, fully deferred, subject to a two-year probation period with conditions. The Supreme Court adopted the sanction recommended by the Board. Mitigating factors included absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely good faith effort to rectify the

consequences of the misconduct, and a cooperative attitude toward the proceedings. Aggravating factors present were a pattern of misconduct and multiple offenses.<sup>7</sup>

Regarding the respondent's misconduct, the Court stated:

The record in this matter establishes that respondent grossly mismanaged her client trust account. She failed to deposit advanced costs and other client funds into the account, commingled her funds with client funds by regularly leaving her attorney's fees in the account, allowed the balance of the account to drop below the amount she was holding for clients and third parties, and failed to promptly deliver to Dr. Clifton funds withheld from her clients' settlements for medical treatment.

*In re Wilson, supra* at 1022. In deciding to defer the one-year and one-day suspension, the Court further explained:

However, our jurisprudence has recognized that in cases where the commingling causes no actual harm, a fully-deferred suspension coupled with supervised probation will afford respondent the opportunity to correct the problems which caused her misconduct, while at the same time protecting the public from future misconduct.

*Id.* at 1023.

The Board's finding that chemical dependency is a mitigating factor in this matter lends further support to the sanction recommended by the committee. In the recent case of *In re Ashley*, 2018-0408 (La. 5/25/18), 243 So.3d 547, the Court found that respondent neglected legal matters, failed to communicate with clients, failed to refund unearned fees, and failed to cooperate with the ODC in its investigations in violation of Rules 1.3 (diligence), 1.4 (communication), 1.5 (fees), 8.1(c) (bar admission and disciplinary matters – failure to cooperate with ODC), and 8.4(a) (misconduct). The Court further found that the respondent violated duties owed to his clients, the public, the legal system, and the legal profession and that his misconduct was at least grossly

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<sup>7</sup> The Board rejected the aggravating factor of substantial experience in the practice of law. The respondent had been practicing for six years at the time of the misconduct. The Board explained that this did not qualify the respondent for the mitigating factor of inexperience in the practice, but did not establish she had substantial experience. The Court accepted the aggravating and mitigating factors found by the Board.



negligent, if not knowing, and caused actual harm to several past clients, which had yet to be rectified. Aggravating factors included a prior disciplinary record, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. Mitigating factors were personal or emotional problems, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, and mental disability or chemical dependency including alcoholism or drug abuse. The Court imposed a fully-deferred, eighteen-month suspension with conditions and restitution, which sanction had been recommended by the Board and the committee.

In determining the sanction to be imposed in *Ashley*, the Court explained:

In instances in which an attorney is found to have committed ethical misconduct stemming from an alcohol or substance abuse problem, we have imposed fully deferred suspensions so long as the attorney has demonstrated that he or she has addressed the problem. *See, e.g., In re: Finckbeiner*, 16-0654 (La. 5/20/16), 192 So.3d 111 (fully deferred one year and one day suspension imposed upon an attorney who was twice arrested for DWI, where the attorney successfully completed a thirty-day inpatient treatment program and entered into a one-year diagnostic monitoring agreement with JLAP); *In re: Tallon*, 08-0179 (La. 2/22/08), 974 So.2d 1290 (fully deferred one year and one day suspension imposed upon an attorney who was convicted of two DWI's, but who had taken steps to address her alcoholism); *In re: Labourdette*, 07-1653 (La. 9/19/07), 964 So.2d 927 (fully deferred one year and one day suspension imposed upon an attorney convicted of possession of controlled substances, where the attorney entered into a JLAP contract and demonstrated he had been sober for a significant period to time).

The evidence supports a finding that respondent is affected by a chemical dependency and that the chemical dependency caused the misconduct. The evidence also reflects that he has sought treatment and has demonstrated a meaningful period of recovery. According to respondent, he has been sober for more than two years. He has also completed an inpatient treatment program at Pine Grove in August 2015. Furthermore, respondent has been subject to a JLAP agreement since September 2015, and the director of the program reports that he has no reason to believe that respondent is “using substances or is a risk.” By all accounts, respondent’s recovery has made a recurrence of his misconduct unlikely. The proposed sanction will encourage his commitment towards recovery, and at the same time protect the public by providing a mechanism to remove respondent from practice if he relapses into substance abuse in the future.

*In re Ashley, supra* at p. 554. It is noted that in *Ashley*, only the respondent and Mr. Stockwell testified at the hearing regarding his dependency. No medical provider was called to testify specifically as to causation in connection with the mitigating factor.

The ODC argues that Respondent's actions in this matter warrant an actual period of suspension of a minimum of one year and one day. In support of this argument, the ODC further cites several decisions in which the Court imposed sanctions of three-year suspensions. These decisions generally involve more egregious misconduct than Respondent's misconduct here and/or the misconduct resulted in actual harm to clients. For example, in *In re Romero*, 2004-3087 (La. 4/29/05), 900 So.2d 819, the respondent neglected legal matters of four clients, failed to communicate with them, and failed to return a fee to one of them. In another criminal matter, the client was placed on probation and ordered to pay restitution for worthless checks. The client paid the respondent funds to be paid on her behalf as restitution in the criminal matter. Respondent failed to maintain a trust account and failed to forward any of the client funds to the district attorney in restitution. The client claimed that as a result, she was left with a felony conviction for writing worthless checks. In *In re Scheurich*, 2003-3264 (La. 4/30/04), 871 So.2d 1104, the respondent was found to have misused his client trust account, commingled personal and client funds, paid a referral fee to a non-lawyer, and failed to timely pay third-party medical providers and converted those funds to his own use. Mr. Scheurich mishandled his trust account for six years and made late payments to third parties ranging from one to six years after receiving the settlement funds. *See also In re Wharton*, 2003-1816 (La. 10/17/03), 872 So.2d 459 (multiple counts of failing to communicate with clients, neglecting legal matters, failing to refund unearned legal fees, and failing to cooperate with the ODC in its investigation and "surprising indifference to rectifying the consequences of her misconduct"); *In re Blanche*, 2012-0552 (La. 6/22/12), 90 So.3d 1034

(respondent pled guilty to several criminal drug charges including two charges of creating and operating a clandestine laboratory for unlawful manufacture of a controlled dangerous substance and was sentenced to consecutive sentences of fifteen, five, and fifteen years, all suspended conditioned upon probation and drug treatment); *In re Brunet-Robert*, 2013-2929 (La. 5/7/14), 145 So.3d 1018 (the respondent was arrested multiple times for drug violations including selling an oxycodone tablet to an undercover police officer, issued sixteen checks on brother's checking account without his authorization, cashed four checks in father's name without his authorization, and was found to be in contempt for failure to appear in court); *In re Doyle*, 2007-2015 (La. 4/4/08), 978 So.2d 904 (multiple complaints by clients; respondent converted client and third-party funds, failed to communicate with clients, and neglected client matters; in at least one instance, respondent forged client's endorsement on a settlement check).

The ODC next cites the case of *In re Miciotto*, 2016-1757 (La. 11/18/16), 206 So.3d 860, which the ODC mistakenly argues resulted in a sanction of a one-year and one-day suspension. In fact, the sanction imposed was a one-year and one-day suspension, *fully deferred*, subject to a two-year, supervised probationary period and treatment for gambling addiction. This decision actually supports the sanction recommended by the committee. The respondent in *Miciotto* converted client funds which he then used to gamble at a casino. The respondent acted knowingly and intentionally, but no actual harm occurred.

The ODC additionally cites two cases resulting in one-year and one-day suspensions with partial deferrals. See *In re Clegg*, 2010-0323 (La. 7/6/10), 41 So.3d 1141 (One-year and one-day suspension with six months deferred with additional conditions. Law partners conducted intervention with respondent partner who was using crack cocaine. Respondent participated in ninety-day inpatient rehabilitation treatment and reluctantly executed a five-year JLAP contract.

He subsequently tested positive twice for cocaine. Law firm expelled him and submitted ethics complaint.); and *In re Levith*, 2004-0827 (La. 10/19/04), 884 So.2d 1197 (one-year and one-day suspension, all but thirty days deferred, with probation and additional conditions for improper use of trust account related to gambling activities).

Based on the above discussion, the Board concurs in the committee's recommendation that Respondent be suspended for one year and one day, fully deferred. The fully deferred suspension is appropriate considering all of the circumstances presented here and is in line with jurisprudence involving similar situations. In *Louisiana State Bar Ass'n v. Hinrichs*, 486 So.2d 116 (La. 1986), in preface to setting forth general guidelines for sanctions in conversion cases, the Court stated:

... Because disciplinary sanctions ultimately depend upon this court's evaluation of each attorney's moral character, however, a disbarment or suspension should not be imposed mechanically. Because of the compound difficulty in deciding and writing about such a subjective question, there will always be a degree of real or seeming inconsistency among disciplinary cases. Our objective is not to make a science of lawyer corrections, but only to approach more nearly the goal of justice in treating like cases alike.

*Hinrichs, supra* at 122.

Additionally, to encourage Respondent's continued recovery and to further protect against any recurrence of his misconduct, the Board also recommends the deferral of the suspension be subject to the following conditions:

- (1) Respondent shall enter into a new JLAP contract for a period of five years, or as otherwise recommended by JLAP, and shall remain in compliance with its terms, with periodic reports to be provided to the ODC;
- (2) Respondent shall be subject to a two-year probationary period during which time Respondent shall be required to obtain, at his cost and expense, quarterly audits of his trust account to be performed by a certified public accountant of his choosing, subject to the approval of the ODC, and the reports of the audits shall be promptly submitted to the ODC;
- (3) Within one year of the Court's imposition of sanction, Respondent shall take at least six hours of his mandatory CLE in the area of law office practice/client trust account management;

(4) Within one year of the Court's imposition of sanction, Respondent shall complete the LSBA Trust Accounting School; and

(5) Any failure of Respondent to comply with the above conditions, or any misconduct during the probationary or JLAP contract period, may be grounds for making the deferred suspension executory, or imposing additional discipline, as appropriate.

The Board further recommends that Respondent be assessed with the costs and expenses of these proceedings in accordance with Louisiana Supreme Court Rule XIX, §10.1(A).

### **CONCLUSION**

Considering the foregoing, the Board concurs in the committee's factual findings as supplemented herein and adopts the committee's conclusions regarding rule violations. The Board recommends that Respondent be suspended for one year and one day, fully deferred, subject to the conditions set forth above. Additionally, the Board recommends that Respondent be assessed with the costs and expenses of this matter.

## RECOMMENDATION

The Board recommends that Patrick A. Giraud be suspended from the practice of law for one year and one day and that the suspension be fully deferred subject to the following conditions:

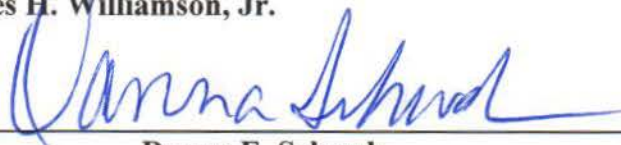
- (1) Respondent shall enter into a new JLAP contract for a period of five years, or as otherwise recommended by JLAP, and shall remain in compliance with its terms, with periodic reports to be provided to the ODC;
- (2) Respondent shall be subject to a two-year probationary period during which time Respondent shall be required to obtain, at his cost and expense, quarterly audits of his trust account to be performed by a certified public accountant of his choosing, subject to the approval of the ODC, and the reports of the audits shall be promptly submitted to the ODC;
- (3) Within one year of the Court's imposition of sanction, Respondent shall take at least six hours of his mandatory CLE in the area of law office practice/client trust account management;
- (4) Within one year of the Court's imposition of sanction, Respondent shall complete the LSBA Trust Accounting School; and
- (5) Any failure of Respondent to comply with the above conditions, or any misconduct during the probationary or JLAP contract period, may be grounds for making the deferred suspension executory, or imposing additional discipline, as appropriate.

The Board further recommends that Respondent be assessed with the costs and expenses of these proceedings in accordance with Louisiana Supreme Court Rule XIX, §10.1(A).

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By:



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**Danna E. Schwab**

**FOR THE ADJUDICATIVE COMMITTEE**

## APPENDIX

### Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Except as provided in (g) and the IOLTA Rules below, funds shall be kept in one or more separate interest-bearing client trust accounts maintained in a bank or savings and loan association: 1) authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government; 2) in the state where the lawyer's primary office is situated, if not within Louisiana; or 3) elsewhere with the consent of the client or third person. No earnings on a client trust account may be made available to or utilized by a lawyer or law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

...

(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. [Last sentence added in 2015.]

...

### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

...

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

...