ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: Donald Joseph Melancon

(Bar Roll No. 29976)

DOCKET NO- 18-DB-058

HEARING COMMITTEE RECOMMENDATIONS

This matter came on for hearing before Hearing Committee No. 55 at 9:07 a.m. on February 19, 2019, and concluded at 2:25 p.m. the same day. At the close of the hearing, the chair requested that ODC file a post-hearing brief containing numbered paragraphs stating the facts and conclusions it contended were clearly and convincingly proven by evidence adduced at the hearing. The chair also requested Respondent to respond in similarly numbered paragraphs to findings and conclusions proposed by ODC. Because of a delay in preparing the hearing transcript, ODC's deadline for filing its post-hearing brief was extended to April 24, 2019. ODC filed its post-hearing brief on that date, although it did not comply with the committee's formatting request. On May 8, 2019, Respondent filed a one-and-a-half page post-hearing brief containing general denials of the formal charges.

The formal charges alleged as follows:

Mismanagement of Client Trust Account

> A complaint was opened against the Respondent pursuant to an overdraft notification from Capitol One Bank. On 11/16/2015, check number 1661 in the amount of $57.00 was returned due to insufficient funds in Respondents Capitol One Trust Account (IOLTA) ending in number 0271. On 11/27/2015, check number 1734 in the amount of $600.00 was returned due to insufficient funds in Respondent's IOLTA ending in number 0271. On December 12/2/02015[sic], check number 1734 in the amount of $600.00 was returned a second time due to insufficient funds in Respondent's IOLTA ending in number 0271. In response, an audit was conducted on the IOLTA for the period of June 2015 through December of 2015. The audit shows that Respondent has commingled and converted client funds held in the client trust account. The audit further shows that on December 31, 2015, the IOLTA should have held at least $5,448.94; however, the balance was $64.67 on that day.

On January 10, 2017, the Respondent appeared at the Office of Disciplinary Counsel for a sworn statement. At that sworn statement, Respondent struggled to explain the overdrafts. Respondent's inability to explain the overdrafts shows that Respondent failed to properly reconcile his client trust account.

In September of 2015, Respondent settled a case on behalf of a client named Gary Forrest, in the amount of $30,000. Respondent deposited the same into his client trust account on September 18, 2015. Prior to this deposit, the balance in the IOLTA was **$96.04**. According to Mr. Forrest's settlement statement, he and Respondent agreed to a fee of 28.5 percent ($8,550.00). Further, according to the settlement statement, $5,283.90 was withheld to pay third-party medical providers, $2,500.00 was withheld for what is described as ***"Tina's Case Lien"***, and $100.00 was withheld for a petition filing fee. Mr. Forrest was given a "***Credit***", in the amount of $150.00. From that deposit, Respondent made the following distributions:

1. Check No. 1725, Clerk of Court, $200.00
2. Check No. 1657, Donald Melancon, $2000.00
3. Check No. 1660, Donald Melancon, $2000.00
4. Check No. 1662, Computer Repair Clinic, $1,220.00
5. Check No. 1666, Donald Melancon, $2,000.00
6. Check No. 1668, Donald Melancon, $500.00
7. Check No. 1669, Donald Melancon, $250.00
8. Check No. 1727, Edgardo Zeron, $5,275.00
9. Check No. 1728 Tina Case, $1,000.00
10. Check No. 1729, Gary Forest, $5,341.10
11. Check No. 1730, Edgardo Zeron, $2,500.00
12. Check No. 1731, Josephine Forrest, $4,476.10

On November16, 2015, all of the funds from the Forrest Settlement had been depleted. However, Respondent had converted $1,500.00 of the $2,500.00 held out for Tina's Child Support Lien and the $5,283.90 held out to pay the third-party medical providers.

In addition to converting third-party funds, Respondent also converted client funds. Pursuant to the Settlement Statement, Respondent was to promptly disburse $13,866.10 (13716.10 + 150.00) to Mr. Gary Forrest. The settlement check was deposited into the client trust account on September 18, 2015. The Respondent made payments to his client as follows:

Check No. 1729	9/25/15	Gary Forrest	$ 5,341.00
Check No. 1731	10/07/15	Josephine Forrest	$ 4,476.10
Check No. 1750	12/21/15	Gary Forrest	$ 450.00
			$10,267.10

By November 16, 2015, the Respondent had converted $4,049.00 of funds belonging to his client, Gary Forrest.

In addition to conversion, the Respondent engaged in comingling. The Forrester settlement check was deposited into the client trust account on September 18, 2015. The Respondent failed to promptly remove his attorney fee's in the amount of $8,550.00, from the client trust account. Respondent made the following distribution of this attorney fees [sic] from the Forrest settlement.

Check No. 1657	9/13/15	Respondent	$2,000.00
Check No. 1660	10/01/15	Respondent	$2,000.00
Check No. 1665	11/05/15	Respondent	$1,000.00
Check No. 1666	11/05/15	Respondent	$2,000.00
Check No. 167	11/12/15	Respondent	$1,500.00
			$8,500.00

Further, a check in the amount of $1,220.00 was paid out to Computer Repair clinic from Respondent's client trust account on October 26, 2015. Respondent has converted client and third-party funds, and comingled client funds.

Sharing Legal Fees with a Non-Attorney and Solicitation

Respondent paid Edgardo Zeron, a runner, 50% of his attorney fees for the referral of clients to his firm. Bank statements and the audit of Respondent's client trust account show that Respondent has made several payments from his client trust account to Mr. Zeron. (aka Zeron Legal Services). Check 1727 was paid to Edgardo "Rene" Zeron. Check number 1749, in the amount of $2,500.00 was made payable to Mr. Zeron.

At the sworn statement taken on January 10, 2017, the Respondent states that he entered into a contractual relationship with Mr. Zeron. Respondent states that Mr. Zeron was paid to provide various services to his Spanish speaking clients. Respondent describes these services as translations and document collection. Respondent describes payment method to Mr. Zeron as task based. Respondent stated that the fees he pays to Mr. Zeron comes [sic] from the attorney fees paid to him by clients, on a case by case basis. The terms of the agreement provide that Respondent would not pay Mr. Zeron more than 50% of the collected fee.

During the audit period, Respondent received a wire transfer in the amount of $7,500.00, into his client trust account for Maria Couceir. Thereafter, Respondent issued check number 1733, in the amount of $3,750.00, to Mr. Zeron. On November 16, 2015, Respondent issued a refund to Maria Couceir in the amount of $7,000.00. This refund resulted in the conversion of fees owned to

both client and third-party medical providers from the Gary Forrest settlement. During the audit period, the following payments were made to Mr. Zeron:

Check No. 1749	06/06/15	Edgardo Zeron	$2,500.00
Check No. 1727	09/22/15	Edgardo Zeron	$5,275.00
Check No. 1730	09/29/15	Edgardo Zeron	$2,500.00
Check No. 1732	10/05/15	Edgardo Zeron	$ 320.00
Check No. 1733	11/05/15	Edgardo Zeron	$3,750.00
			$14,345.00

Respondent has shared attorney fees with a non-attorney Edgardo Zeron and has paid Mr. Zeron a fee for the referral of clients.

Unethical Preauthorization to Endorse and Negotiate Settlement Instrument

Respondent's contingent fee retainer agreement contains a clause requesting and/or obtaining authorization to endorse and negotiate and instrument given in settlement of the client's claim, prior to the client approving the settlement. Respondent has violated Rule 1.8(k).

The Respondent has violated rules 1.5, 1.8, 1.15, 7.4 and 8.4 (a) (c) of the Rules of Professional Conduct.

Committee Findings

This Committee finds that the Office of Disciplinary Counsel proved by clear and convincing evidence that Respondent mismanaged his client trust account in violation of Louisiana Rule of Professional Conduct ("RPC") 1.15(a) & (b), but failed to prove by such evidence that Respondent violated the other rules cited above by ODC. Specifically, the Committee finds that the Office of Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent shared professional fees with a non-attorney and used a non-attorney for solicitation of business. Finally, the Committee finds that the Office of Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent solicited or obtained a power of attorney or mandate from a client that would have authorized the attorney, without first

obtaining the client's informed consent, to enter into a binding settlement agreement on the client's behalf.

The Committee finds that the baseline sanction for mishandling of a client trust account is a suspension. The Committee finds that the following aggravating factors are present: a pattern of misconduct over the course of seven months and multiple offenses. Mitigating factors include: the absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely and good faith effort to make restitution, a cooperative attitude toward the proceedings and remorse.

Discussion

1. Commingling and Conversion of Trust Account Funds

A revealing exchange occurred between Disciplinary Counsel and Respondent early in the hearing. Respondent attempted to explain how a check for $600.00 had been returned for insufficient funds a *second* time:

> A. It was an accounting issue. When the client submitted -- resubmitted the check, the funds were just not available -- funds were not available or they -- they were not in the account. But again, the client was made whole, and the deficiency was corrected.
>
> Q. You failed to reconcile your client trust account?
>
> A. My father, Donald Sr., can shed more light into the reconciliation of my trust account. He's an accountant and he's a businessman, and I rely on -- I rely on him a lot to help me with my books.
>
> As far as reconciliation personally, it is not really something that I completely understand.

(2/19/19 Transcript ("Tr.") at p. 20)

Respondent's admission that he did not "completely understand" how and why he needed to reconcile his trust account may have been the understatement of the hearing, if not the year.

Respondent's understanding of his ethical obligations relating to his trust account was not merely incomplete, it was practically non-existent.

Respondent had been admitted to the Louisiana Bar in 2005 and the California Bar in 2012 or 2013. He initially worked as a paralegal for a "mass tort litigation firm" in California and practiced "a little bit" in California. (Tr. p. 14). His current practice in Louisiana involves criminal defense, family law and personal injury. (Tr. p. 15).

Mr. Melancon, Sr., moved back from Texas shortly after Hurricane Katrina in 2005 and helped Respondent set up the books of his New Orleans law office. (Tr. p. 161). Mr. Melancon, Sr., however, moved with his daughter and son-in-law to Georgia in 2009 and could reconcile Respondent's Trust account only remotely and occasionally after that, using Quickbooks (Tr. at p. 162). Beginning in 2011, Mr. Melancon, Sr. ceased overseeing Respondent's accounting altogether. "Prior to that, I think we did - I mean, I did an admirable job. But after that, you know, I fell a little short of what I was supposed to do, but it was still your [Respondent's] business, you know," (responding to questions from Respondent. (Tr. at p. 163)).

The focus of ODC's investigation and that of its forensic accountant, Angelina Marcellino, Certified Internal Auditor, was on the period June 1, through December 31, 2015. Ms. Marcellino's report was introduced as an ODC exhibit 11, and her testimony summarized various aspects of her report. (Tr. at pp. 146-157) It seems inconceivable that Respondent's trust accounts mismanagement was limited to the seven-month period June 1 through December 31, 2015, but ODC's audit covered only those months. Respondent did not cross-examine Ms. Marcellino, (Tr. p. 157) or otherwise challenge her findings and conclusions, which the Committee adopts and incorporates in its findings. Ms. Marcellino's report fully supported the allegations of trust account mismanagement made in the formal charges, and there was no evidence to the contrary.

Much of the testimony concerning Respondent's handling of his trust account was related to clients Gary Forrest, Sr. and Gary Forrest, Jr. The deputy disciplinary counsel elicited testimony from Respondent respecting these accounts. (Tr. pp. 16-60) The testimony is largely incapable of being understood, as Respondent did not understand or recall many of the deposits into and disbursements from his client trust account. Moreover, Respondent often did not distinguish between Mr. Forrest Sr. and Mr. Forrest Jr., and sometimes identified them only as "Mr. Forrest". At least one payment was made to Josephine Forrest, who, apparently, was Gary Forrest, Sr.'s wife (or widow). ODC's presentation of Respondent's testimony was also unclear.

The forensic accountant presented by ODC, Ms. Marcellino whose report was ODC 11 (Bates stamped pp. 167-172) noted on page 2 (Bates stamp 168):

> Analysis of the trust account reflects several transfers made between the trust account, Mr. Melancon's personal checking account xxxx9241 and Mr. Melancon's business checking account xxxx7701. The transfers in and out of the trust and multiple other deposits and disbursements have not all been identified to the associated client or subject matter. Several obligations per the final disbursement statements provided have not been identified as paid during the period and Mr. Melancon has failed to provide proof of payment. Other obligations per the final disbursement statement, including attorney's fees, were identified as split between multiple payees with no records maintained for changes. Per Mr. Melancon, Mr. Edgardo "Rene" Zeron was often paid directly from the trust account from the attorney fee portion of deposits for clients specific services rendered including translation, document collection, and work with the client. It appears multiple disbursements that exceed associated deposits identified operating expenses disbursed from the trust, unidentified transfer in and out of the trust, and lack of proper record keeping may have all collectively and/or individually assisted [sic] in the shortage of funds held in the trust account to honor all client and third party obligations.

Ms. Marcellino concluded that:

> In my professional opinion and according to the information provided Mr. Melancon has misused, comingled, and converted the funds in his trust account. Insufficient information has been provided to determine the total funds necessary at the end of the audit period to honor all outstanding client and third party obligations; however per the information provided at least $5,048.94 should be held in trust as of 12/31/2015 for client money, third party obligations unearned running balances [sic] and IOLTA interest earned. The trust account balance of

> $64.67 as of 12/31/2016 [?] is $5,384.27 short to honor the identified obligations. Mr. Melancon has not kept sufficient records and no bank reconciliations have been provided to the ODC to support the required bank reconciliations were completed.

ODC 11, p. 6 (Bates No. 171).

Respondent also admitted that he had received a debit card from the bank holding the client trust account. (Tr. at pp. 59-60) His debit card had been activated, but there is no evidence that Respondent utilized the debit card to withdraw from the client trust account in violation of Louisiana Rule of Professional Conduct ("RPC") 1.15(f).

There is no question that Respondent's bookkeeping in connection with his client's trust account, as well as his operating account, was incredibly sloppy. Commingling unquestionably occurred as well as conversion, at least constructively. Respondent credibly testified that all of his clients had been made whole (*e.g.*, Tr. p.20, 126-127, 137-138), but there was no other evidence supporting or impeaching that proposition, except for Ms. Marcellino's general statement quoted above; the evidence concerning the overdrafts and payments in and out of his client trust account was so confusing that, while it raised a suspicion of conversion, there was no clear and convincing evidence supporting the notion that any client or third-party service provider was not paid what he or she was owed.

2. Sharing Fees with a Non- Lawyer

Respondent had some sort of arrangement with Edgardo ("Rene") Zeron, Jr. to perform paralegal and translation/interpreting services for his various personal injury and criminal cases, and Mr. Zeron received compensation for such services, although no time records supporting these services were kept. ODC characterized this relationship as a private referral relationship. Mr. Zeron admittedly referred several clients--mainly members of his family--to respondent, but claimed that he was not compensated for doing so, and Respondent characterized the relationship

and payments to Mr. Zeron the same way. Instead, Mr. Zeron would translate factual recitations by clients, who's first and in some cases only language was Spanish. He would also arrange for execution of medical release forms by Respondent's clients and send them to healthcare providers. He would provide other transportation services for clients who did not have their own means of transportation, and he would do some factual and legal research. (Tr. pp. 28-29.) Respondent testified that the only stipulation with Respondent in this arrangement was that Mr. Zeron would not be paid more for such services than what Respondent was paid in net legal fees in connection with a given case. (Tr. pp. 26, 61.) As noted, neither Respondent nor Mr. Zeron kept time records of Mr. Zeron's work for Respondent.

The arrangement between Mr. Zeron and Respondent raised suspicions in the eyes of the committee. Mr. Zeron was subpoenaed to testify at the hearing, but did not appear. ODC had taken a sworn statement from Mr. Zeron on September 3, 2017, introduced as ODC Exhibit 12. In the sworn statement, Mr. Zeron denied that he was paid for case referrals.

> "[by Mr. Zeron]...[D]does he [Respondent] pay me for case referrals? No.
>
> Q. So you don't get a fee or flat fee fixed fee or a percentage on the cases that he refers to you?
>
> A. No, Ma'm, that's -- that's -- a fee sharing. Is that what you're saying?
> ...
>
> * * *
>
> No, rather, I worked up the cases."

(ODC 12, p.50). Respondent also testified that services Mr. Zeron provided as a "runner" were for court-runner work, not for client referrals. (Tr. p. 29). Respondent admitted that his payments to Mr. Zeron were improperly drawn on Respondent's client trust account.

There was some testimony respecting whether a check written to Mr. Zeron by Respondent represented consideration or partial consideration for the sale of camper by Mr. Zeron to one of Respondent's clients. This check was written on the client trust account, and, of course, should not have been. Nor should any other checks payable to Mr. Zeron have been drawn against the client trust account, but should have been drawn against any earned fees deposited in Respondent's operating account. (Respondent also said he maintained what he called "a business account".) (Tr. p. 153.) But neither this payment nor any other substantial evidence supported the allegation that Mr. Zeron was paid as a *quid pro quo* for referrals to Respondent.

3. Unethical Preauthorization to Endorse and Negotiate a Settlement Instrument

"ODC Exhibit 9(b) is a "Standard Collection Contingent Fee Retainer Agreement," executed by Respondent and one of his collection clients.

The agreement provides, beginning with the last paragraph on p. 1:

> Attorney has full and unlimited power to act in client's behalf, to obtain additional or substitute counsel, to endorse checks or drafts in client's name, and to retain fees and costs. Client agrees to permit attorney to handle all matters in the preparation and conduct of this case, to take no action against the advice of attorney, to refrain from contacting adverse parties or their attorneys and to advise attorney immediately of any change of client's address or telephone number.

Disciplinary counsel charges that this paragraph is "... a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents," quoting RPC 1.8(k).

The Committee finds, however, that Respondent's retainer agreement does not go quite that far. Respondent says he copied the provision from a "form book," (Tr. p. 88), but the quoted language does not specifically give Respondent the power to settle a client's case without the client's permission. While the grant of "unlimited power" is certainly broad, the list of specific

powers that follows does not include the power to settle a case without the client's consent. ODC failed to produce any evidence that Respondent had exercised such power in connection with any client's case; at worst, the contract provision is ambiguous.

4. Recommended Sanctions

This Committee finds that ODC proved by clear and convincing evidence that Respondent's mismanagement of his client's trust account was grossly negligent, perhaps knowing in some instances, but not intentional. Even four and a half years after the events, Respondent was unable to explain how the commingling of his and his client's funds had occurred. Considering the American Bar Associations *Standards for Imposing Lawyers Sanctions,* the Committee finds that the baseline sanction for Respondent's misconduct is a suspension from the practice of law.

ODC cites six cases in support of its contention that Respondent should be disbarred. Each of these cases, however, is distinguishable. For instance, in *In re Brown-Mitchell,* 2014-2544 (La.04/05/15), 167 So.3d 545, the hearing committee recommended the disbarment of an attorney for converting client funds to his own use in defiance of four orders from the district court, for entering into a business transaction with a client without advising the client to seek review of the transaction by independent counsel, for converting client property to his own use, and for practicing law while ineligible to do so. The attorney had not participated in the hearing, claiming mental health issues. The committee chair denied Respondent's request for a continuance on that basis, but left the record open to give Respondent time to submit whatever documentary evidence he wished to present. The committee chair again extended the deadline for the submission of evidence or, alternatively, to permit her to apply for disability inactive status, but the attorney submitted nothing further and did not apply for disability inactive status.

Finding the baseline sanction to range from suspension to disbarment, the hearing committee found as aggravating circumstances the respondent's dishonest or selfish motive, multiple offenses, vulnerability of the victims and indifference to making restitution. Two committee members recommended a three-year suspension, while the remaining member recommended disbarment. The Disciplinary Board found that the hearing committee's factual findings supported numerous violations and recommended a three-year suspension. The Supreme Court concluded that, "[I]n light of egregious misconduct at issue in this matter, and considering the numerous aggravating factors present, we conclude that Respondent should be disbarred." 167 So.3d at 557. Justice Crichton would have imposed permanent disbarment. *Id.*

Here, the only violation ODC has proven by clear and convincing evidence is Respondent's gross mismanagement of his client trust account. Moreover, the aggravating circumstances present in *Brown-Mitchell* -- prior discipline, dishonest motive, refusal to acknowledge the wrongful nature of the misconduct, etc -- are absent here.

In *In re Cuccia,* 99-3041 (La. 12/17/99), 752 So.2d 796, the respondent filed a petition for consent discipline of disbarment, based on numerous allegations, namely of Rules 1.4 (failure to communicate with a client), 1.8(k) (solicitation of a power of attorney authorizing the attorney to enter into a binding settlement agreement on behalf of the client), 1.15 (safe keeping of property of the client or third person), 1.16 (termination of representation), 5.3 (failure to supervise non-lawyer assistance), and 7.2 (improper solicitation of prospective clients). The respondent's petition proposed that he be disbarred, and the Disciplinary Board recommended that the respondent be disbarred, to which neither ODC nor respondent filed an objection.

In *In re Hanchey,* 14-1683 (La.10/3/14), 148 So.3d 912, the hearing committee found that the respondent intentionally converted client funds, intentionally continued to practice law while ineligible, engaged in fraudulent criminal behavior, engaged in runner based solicitation, failed

to communicate a settlement offer to a client and converted the settlement funds to his own use. He also failed to advise another client of the need to seek independent counsel regarding respondent's allowing the client's claim to prescribe and attempted to settle with her while still ineligible to practice law, he converted that client's funds to his own use, he maintained an improper website, he failed to remit payroll withholdings to the IRS and the Louisiana Department of Revenue, he pledged a non-existing accident claim to secure a loan, and he failed to cooperate with ODC. Concluding the baseline sanction was disbarment, the hearing committee found the following aggravating factors: a dishonest and selfish motive, a pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceeding, refusal to acknowledge the wrongful nature of the conduct and substantial experience in the practice of law. The Committee found no mitigating factors. The Supreme Court held that permanent disbarment was appropriate under Guideline 1 of the Permanent Disbarment Guidelines (repeated or multiple instances of intentional conversion of client funds with substantial harm).

In *In re Sledge*, 03-1148 (La. 10/21/03), 859 So.2d 671, another case cited by ODC, while there was disagreement between the hearing committee and the Disciplinary Board concerning respondent's actions and inactions, the Supreme Court categorized the allegations against him as engaging in solicitation by offering persons money in exchange for referring clients to him, neglect of his law practice and failure to supervise his non-lawyer assistants, leading them to engage in the unauthorized practice of law. The court held that the first allegation was supported by evidence that three individuals were given cash payments by respondent for referral of clients. The Supreme Court also found that there was evidence that Respondent had "failed to exercise any meaningful supervision over his non-lawyer assistants, essentially requiring them to practice law in his absence in order for the firm to continue to operate." 859 So.2d at 684 Finding both the solicitation and failure to supervise constituted

serious misconduct, the court concluded that the baseline sanction was disbarment and that aggravating factors were the presence of multiple offenses, refusal to acknowledge the wrongful nature of the conduct and substantial experience in the practice of law. In mitigation, the court found that Respondent had no prior disciplinary record and had been experiencing personal and emotional problems during the time in question. In view of these factors, the court found no basis to deviate from the base line sanction of disbarment. Justice Knowles would have permanently disbarred the respondent, 859 So.2d at 686, and Justice Weiner dissented from the disbarment sanction recommended by both Justice Knowles and the majority as being "too harsh." 859 So.2d at 687

In *In re Brown*, 2016-0396 (La. 5/2/16), 189 S.3d 387, the respondent was charged with twelve (12) counts of trust account misuse, some of which involved criminal violations such as theft and forgery. The hearing committees found the factual allegations of the formal charges were deemed admitted and proven by clear and convincing evidence. The Committee had also found that respondent had acted knowingly and intentionally by engaging in criminal conduct, by failing to pay settlement funds and subsequently converting to his own use money owed to third-party medical providers and a mediator, among other things. The committee recommended that respondent be permanently disbarred, to which neither Respondent nor ODC filed objection. The Disciplinary Board found a pattern of misconduct, multiple offenses, a dishonest or selfish motive, refusal to acknowledge the wrongful nature of the conduct substantial experience of the practice of law, indifference to making restitution, and illegal conduct. The Board recommended permanent disbarment; the Supreme Court agreed.

Finally, ODC cites *In re Dunn*, 2018-0340 (La. 5/11/18), 241 So.3d 984, in which the respondent failed to make substantial payments to healthcare providers, the obligations to whom had been guaranteed by him. Respondent had used funds owed to a healthcare provider to pay

for his own medical expenses in connection with quadruple bypass heart surgery and a period in which he had been unable to work. ODC's forensic auditor had conducted an audit of the respondent's client's trust account over a period exceeding six years, concluding that the respondent had misused and converted the funds in the account and had committed accounting errors with potential comingling at times. His account balance fell below the amount necessary to honor the obligations to healthcare providers on multiple occasions, and disbursements were often made prior to the associated deposit. The respondent had failed to provide sufficient support to confirm documentation of records to insure he was handling his IOLTA trust account properly. The committee found that respondent's misuse of his client trust account went "well beyond sloppy record keeping and innocent mistakes." Instead, it appeared to the hearing committee that Respondent had used his trust account for a "personal slush fund" for various purchases with little or no regard for safeguarding funds owed to the healthcare professional. The ODC audit indicated that respondent's "trust account had fallen well below the agreed upon amount he owed the healthcare specialists, rather indicating that conversion had taken place." 241 S.3d at 988. The committee recommended disbarment. Neither Respondent nor the ODC objected to the hearing committee's report, although the respondent in his brief to the Disciplinary Board suggested that a deferred suspension be imposed, subject to probation. The Disciplinary Board took guidance from *Louisiana State Bar Ass'n* v. *Hinrichs* 486 So.2d 116 (La. 1986), which had noted:

> In a **typical case of disbarment** for violation of DR 9-102 [precursor of Rule 1.15], **one or more of the following elements are usually present: the lawyer acts in bad faith and intends a result in- consistent with his client's interest;** the lawyer **commits forgery or other fraudulent acts in connection with the violation;** the **magnitude of the damage or risk of damage, expenses** and **inconvenience caused the client is great;** the lawyer **either fails to make full restitution or does so tardily after extended pressure of disciplinary or legal proceedings.**

> A three-year suspension from practice typically results in cases involving similar but less aggravated factors. In such cases the lawyer is guilty of at least a **high degree of negligence** in causing his client's funds to be withdrawn or retained in violation of the disciplinary rule. **He usually does not commit other fraudulent acts** in connection therewith. The attorney usually **benefits from the** infraction but, in contrast with disbarment cases, **the client may not be greatly harmed or exposed to great risk of harm.** The attorney **fully reimburses or pays his client the funds due** without the necessity of extensive disciplinary or legal proceedings.
>
> A suspension from practice of **eighteen months** or two years will typically result where the facts are appropriate for a three-year suspension, except that there are **significant mitigating circumstances**; or where the facts are appropriate for a one-year suspension, except that there are significant aggravating circumstances.
>
> A suspension from practice of **one year or** less will typically result where the negligence in withdrawing or retaining client funds is not gross or of a high degree. No other fraudulent acts are committed in connection with the violation of the disciplinary rule. There is no serious harm or threat of harm to the client. Full restitution is made promptly, usually before any legal proceeding or disciplinary complaint is made.
>
> A reprimand may be appropriate in a case where there is a minor violation of DR-9-102, but there is no conversion or harm to the client [Citations omitted].

486 So.2d at 121-22, quoted in *Dunn* at 241 So.3d, 988-91. (Emphasis added.) The Supreme Court went on to hold that this respondent's conduct fell within the scope of that warranting disbarment.

The conduct of the instant Respondent is easily distinguished in both its amount and egregiousness from the conduct of the respondents in the cases cited by ODC. While the respondents in the cases cited by the ODC were charged with multiple violations of the Rules of Professional Conduct, and such violations were proven by deemed admitted or clear and convincing evidence, ODC carried that burden only with respect to this Respondent's

mismanagement of his client trust account. The Committee cannot say there was absence of proof regarding the charges of improper client solicitation and his securing of a prohibited power of attorney, but that evidence was hardly clear and convincing. Other than delayed payments, there was no clear and convincing proof of harm to any of Respondent's clients, although his client trust account mismanagement did cause general harm to the profession and the public. Nevertheless, client trust account mismanagement is a serious offense, and Respondent's mismanagement of his client trust account cannot be allowed to continue.

The case is more analogous to *In re Wilson,* 12-0579 (La. 6/15/12), 90 So.3d 1018, which involved a fact pattern similar to the one in this case. The Supreme Court found that the respondent in *Wilson* had knowingly comingled and converted client and third-party funds, which created the potential for harm. Finding that respondent's conduct was negligent, resulting in violations of RPC 1.15(d) and RPC 1.15(f), the court determined the applicable baseline sanction to be suspension. While the Hearing Committee had recommended a three (3) year suspension, the Disciplinary Board found that a suspension of that length would be "too harsh," 90 So.3d at 1021, and the Supreme Court agreed, affirming the Board's recommendation that the respondent be suspended for one (1) year and one (1) day, fully deferred, subject to a two year period of supervised probation with conditions. *Id.,* at n. 6.

The conditions recommended by the Disciplinary Board and adopted by the Supreme Court in *Wilson* were as follows:

> (1) Regularly quarterly audits of respondent's IOLTA account shall be submitted to the ODC during the period of probation, to be performed by a CPA of respondent's choosing, [but] approved by the ODC, with costs and expenses of the audit to be paid by respondent;
>
> (2) At least six hours of respondent's mandatory CLE requirements during the probation period shall be in the area of law practice management/client trust account management;

(3) Respondent must successfully complete both the Louisiana State Bar Association's Ethics School and Trust Accounting Program during the probation period; and

(4) Any failure of respondent to comply with the conditions of probation or any misconduct during the probationary period would be grounds for making the deferred suspension executory, or for imposing additional discipline, as appropriate.

90 So.3d at 1021, n.6

In *Wilson*, the aggravating factors found by the Supreme Court included a pattern of misconduct and multiple offenses, which, as noted above, also exist here. The instant Respondent credibly acknowledged the wrongful nature of his conduct, and he had not practiced law extensively, although enough to make it a non-mitigating factor. As in *Wilson*, mitigating factors present in this case are the absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely effort to rectify the consequences of the misconduct, and a cooperative attitude toward the proceedings. See also, recent Supreme Court decisions *In re Oscar Araujo,* 219-007 (La. 2/25/19), *In re Aubreye Denton*, 219-0014 (La. 2/11/19) and I*n re Daniel J. Hunter,* 219-0158 (La. 03/06/19), imposing similar discipline by consent.

Accordingly, this Committee recommends that Respondent be suspended from the practice of law for a period of one (1) year and one (1) day, fully deferred, subject to a two (2) year period of supervised probation, with the four conditions imposed by the *Wilson* case enumerated above. The Committee further recommends that Respondent be assessed with the costs and expenses of these proceedings.

Hearing Committee No. 55

Desiree Dupre by DLH
Public Member

Mark Dupuis by DLH
Attorney Member

Chair

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