

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: MARK G. SIMMONS

NUMBER: 14-DB-057

RECOMMENDATION TO THE LOUISIANA SUPREME COURT

This is a disciplinary proceeding based upon the filing of a Motion to Revoke Probation and to Make Deferred Suspension Executory (“Motion to Revoke Probation”) by the Office of Disciplinary Counsel (“ODC”). ODC is seeking to revoke the probation of Mark G. Simmons (“Respondent”), Louisiana Bar Roll Number 19995. For the reasons stated below, the Board recommends that ODC’s motion be granted, that Respondent’s probation be revoked, and that the previously deferred portion of the one-year and one-day suspension be made executory. The Board further recommends that Respondent be assessed with the costs and expenses of this matter.

PROCEDURAL HISTORY

On October 16, 2017, Respondent was suspended (effective 10/31/17) for one year and one day, with all but sixty days deferred, followed by a two-year supervised probation period with the following conditions: (1) Respondent successfully complete the LSBA’s Trust Accounting School; (2) Respondent successfully complete the LSBA’s Ethics School; and (3) Respondent’s trust account be audited on a quarterly basis. *In re Simmons*, 2017-1043 (La. 10/16/17), 226 So.3d 1102. The suspension resulted from the filing of formal charges which included two counts, one relating to Respondent’s mishandling of his trust account and one relating to misconduct in the handling of a client matter. The underlying facts were set forth in the Court’s opinion as follows:

The Client Trust Account Matter

The ODC received notice from respondent’s bank that his client trust account was overdrawn on September 6, 2012. Despite receiving notice of the overdraft from the ODC via certified mail, respondent failed to respond to the

ODC's request for an explanation and request for copies of records related to the account.

Eventually, the ODC was able to audit the account for the period from May 2012 to June 2013. The audit revealed that, on June 30, 2013, respondent had not yet disbursed at least \$5,296.29 to clients or third parties. At that time, the balance in the account was \$1,696.31, indicating that respondent had converted \$3,599.98 in funds belonging to clients or third parties.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.15 (safekeeping property of clients or third persons), 8.1(c) (failure to cooperate with the ODC in its investigation), and 8.4(a) (violation of the Rules of Professional Conduct).

The Cormier Matter

In April 2010, Patricia Cormier hired respondent to represent her regarding an EEOC claim against the Lafayette Parish School System. She paid respondent a total of \$2,000 for the representation. Respondent participated in mediation in the matter and corresponded with a representative of the school system in an attempt to present Ms. Cormier's demands to the full school board. On November 16, 2011, respondent sent a letter to the school system representative regarding the school board's alleged breach of the mediation agreement and his intent to contact the EEOC regarding the breach. Thereafter, respondent took no meaningful action regarding the matter. Ms. Cormier tried to contact respondent several times via e-mail, telephone, text message, and letter to obtain the status of the matter, but respondent failed to respond.

In April 2013, Ms. Cormier filed a disciplinary complaint against respondent. Despite receiving notice of the complaint via certified mail, respondent failed to respond. The ODC issued a subpoena to obtain respondent's sworn statement. Respondent was personally served with the subpoena but requested, via fax, that the sworn statement be rescheduled. The ODC attempted to contact respondent by telephone, e-mail, and fax regarding his request, to no avail. Respondent did not appear at the sworn statement.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), 1.16(d) (obligations upon termination of the representation), 8.1(c), and 8.4(a).

Id. at 1103-1104.

The Court concluded that Respondent mismanaged his client trust account, neglected a legal matter, failed to communicate with a client and failed to cooperate with the ODC in two investigations. The court further found that Respondent acted negligently except with respect to his knowing and intentional failure to cooperate with the ODC in its investigations.

The Court deferred all but sixty days of the one-year and one-day suspension. However, the Court ordered that following the active portion of the suspension, the Respondent be placed on supervised probation for a period of two years, subject to completion of LSBA's Trust Accounting and Ethics Schools and quarterly auditing of Respondent's trust account, commencing from the date of execution of a formal probation plan by Respondent, the ODC, and the probation monitor. The Court's order further provided that "any failure of respondent to comply with the conditions of probation, or any misconduct during the probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate." *Id.* at 1107-1108.

Respondent served the active portion of his suspension and was reinstated to the practice of law. His probation period commenced on April 10, 2018. Ex. ODC-1. The Probation Agreement executed by Respondent and Chief Disciplinary Counsel Charles B. Plattsmier included the following Probation Conditions:

PROBATION CONDITIONS -- Mark G. Simmons shall:

1. Promptly respond to all requests by and make himself reasonably available for conferences with Office of Disciplinary Counsel;

* * *

7. Maintain his trust account in accordance with the Rules of Professional Conduct and Louisiana Supreme Court Rule XIX §28A;

8. On a quarterly basis (periods ending **June 30th**, **September 30th**, **December 31st** and **March 31st**[]) at his expense, submit his client trust account to audits by an ODC- approved certified public accountant (CPA) and instruct and authorize the CPA to provide ODC with written audit reports, supporting documentation, and completed ODC Trust Audit Program forms within thirty days after the end of each quarter;

* * *

11. Acknowledge that any violation of the Rules of Professional Conduct and/or this Probation Agreement may result in summary revocation of his probation and making the deferred suspension executory and/or may result in the imposition of additional discipline as appropriate;

* * *

Id.

On April 29, 2019, the ODC filed its Motion to Revoke Probation. ODC bases this request on Respondent's failure to comply with the auditing requirements of the Court's order and the Probation Agreement. The ODC's allegations are set forth below in detail.

On April 30, 2019, an order was signed ordering that Respondent show cause on May 23, 2019, why his probation should not be revoked and that notice as to time and place of the hearing would be provided. By letter dated May 1, 2019, the order was sent to Respondent by U.S. Mail to his primary registration address and by e-mail to his registration e-mail address. The May 1, 2019 letter also provided notice of the date, time, and location of the evidentiary hearing and instructed that briefs should be filed by May 15, 2019, with reply briefs due May 20, 2019.

ODC filed a memorandum in support of the Motion to Revoke Probation on May 15, 2019. Respondent did not file a memorandum or brief in response to the Motion to Revoke Probation.

The hearing was convened before Board Panel "A" on May 23, 2019, as scheduled.¹ Deputy Disciplinary Counsel Yolanda Cezar appeared on behalf of ODC. Neither Respondent nor counsel for Respondent appeared at the hearing. The Board Panel heard argument from Ms. Cezar and ODC's Exhibits ODC-1 through ODC-9 were admitted into evidence without objection.

ODC'S ALLEGATIONS

In its motion to revoke Respondent's probation, ODC makes the following allegations:

I.

On October 31, 2017, the Louisiana Supreme Court suspended Respondent from the practice of law for a period of one year and one day, with all but sixty days of the suspension deferred. It was found that Respondent mismanaged his client trust account, neglected a legal matter, failed to communicate with a client and failed to cooperate with the ODC. *In re: Simmons*, 2017-B-1043.

Following the active portion of the suspension, Respondent was to be placed on supervised probation for a period of two years subject to the following conditions: (1) respondent successfully complete the Louisiana State Bar Association's (LSBA) Trust Accounting School; (2) respondent successfully

¹ Board Panel "A" was composed of Dominick Scandurro, Jr. (Chair), Carrie L. Jones (Lawyer Member), and Sheila E. O'Leary (Public Member).

complete the LSBA's Ethics School; and (3) respondent's trust account be audited on a quarterly basis.

II.

On April 9, 2018, Respondent signed a Plan of Probation. Among other conditions, Respondent agreed to:

On a quarterly basis, (periods ending June 30th, September 30th, December 31st, and March 31st) at his expense, submit his client trust account to audits by an ODC-approved certified public accountant (CPA) and instruct and authorize the CPA to provide ODC with written audit reports, supporting documentation, and completed ODC Trust Audit Program forms within thirty days after the end of each quarter.

III.

Respondent completed LSBA's Ethics School on February 2, 2018, and Trust Accounting School on February 22, 2018. With regard to the quarterly trust account audits, Respondent failed to submit an audit, quarterly or otherwise, during the period of probation.

IV.

The ODC respectfully submits that there is sufficient evidence demonstrating that Respondent has violated the terms of his probation. Pursuant to the provisions of Louisiana Supreme Court Rules, Rule XIX, Appendix C, Rule 5(C), the ODC seeks an expedited hearing before a panel of the adjudicative committee of the Louisiana Attorney Disciplinary Board.

EVIDENCE AND FACTUAL FINDINGS

On October 16, 2017, the Supreme Court suspended (effective 10/31/17) Respondent for one year and one day, with all but sixty days deferred, followed by a two-year probation period with the following conditions: (1) Respondent successfully complete the LSBA's Trust Accounting School; (2) Respondent successfully complete the LSBA's Ethics School; and (3) Respondent's trust account be audited on a quarterly basis. *In re Simmons*, 2017-1043 (La. 10/16/17), 226 So.3d 1102. The Court's order imposing discipline provided that any failure of Respondent to comply with the conditions of probation would constitute grounds for making the deferred portion of the suspension executory or imposing additional discipline. *Id.* at 1107-1108.

Respondent served the active portion of his suspension and was reinstated to the practice of law. His probation period commenced on April 10, 2018. Ex. ODC-1. Under the Probation

Agreement (“the Agreement”) executed by Respondent and Chief Disciplinary Counsel, Respondent was required to promptly respond to all requests by and make himself reasonably available for conferences with the Office of Disciplinary Counsel. *Id.* The Agreement further required that Respondent, on a quarterly basis (periods ending June 30, September 30, December 31, and March 31) and at his expense, submit his client trust account to audits by an ODC-approved certified public accountant and instruct and authorize the CPA to provide ODC with written audit reports, supporting documentation, and completed ODC Trust Audit Program forms within thirty days after the end of each quarter. *Id.* In the Agreement, Respondent also acknowledged that any violation of the Rules of Professional Conduct and/or the Agreement may result in summary revocation of his probation and making the deferred suspension executory. *Id.*

On July 16, 2018, Chief Disciplinary Counsel wrote to Respondent noting that Respondent had not yet submitted the audit for the period ending June 30, 2018, nor provided the ODC with the identity of the CPA Respondent proposed to use to audit his account, and requesting that Respondent do so to comply with the conditions of the Agreement. Ex. ODC-3. Respondent replied by letter dated July 25, 2018, enclosing copies of his bank statements from March 31, 2018, through June 29, 2018, which showed a beginning balance of \$1,996.49 and no activity in the account during the quarter. Respondent also requested that the ODC send him a list of approved CPAs. Ex. ODC-4.

On July 26, 2018, Angelina Marcellino, CIA, Forensic Auditor for the ODC, wrote to Respondent advising that she had reviewed the trust account documentation provided by Respondent. She further stated that it was necessary that Respondent provide an allocation/reconciliation of the trust account balance at the beginning of the period, explaining that the beginning balance should be allocated to each associated client with the client’s respective

dollar amount held in trust and that he should provide documentation for the funds held in the account. She also informed Respondent that the ODC did not maintain a pre-approved list of CPAs, but that it was his obligation to acquire a CPA and provide the name for approval. She requested that Respondent provide the information by August 2, 2018. Ex. ODC-5.

On September 4, 2018, Katie Curet Causey, Deputy Disciplinary Counsel, wrote to Respondent confirming that the information requested in Ms. Marcellino's letter had not been received and further advising that Ms. Causey had left telephone messages for Respondent with his assistant on August 27 and August 29 which had not been returned. She informed Respondent that he must provide the name of his proposed CPA and the requested information to ODC within seven days. She further explained that failure to comply would result in the filing of a petition to revoke Respondent's probation and impose the full period of suspension. Ex. ODC-6.

On October 24, 2018, Respondent gave a sworn statement at the ODC offices in Baton Rouge. Ex. ODC-7. He brought "some statements" from his trust account, but did not submit a reconciliation. Respondent stated that there was "very little transaction done since the March through the end of September." *Id.* at Bates 15. He explained that the beginning balance consisted of his own money although he could not give a breakdown of the sources of the funds. He further explained that after attending the trust accounting class, he understood that he was not supposed to leave funds in the account for long periods and withdrew most of the funds. *Id.* at Bates 17-20. Respondent also testified that he had contacted "almost 20 different CPAs" none of whom would do the auditing. He again requested that the ODC provide him with the name of a CPA who could do the audit. Ms. Causey responded that the ODC did not maintain a list of approved CPAs, but suggested Angela Willis may be a CPA who would perform the audit. *Id.* at Bates 16. Respondent indicated he would contact Ms. Willis when he returned to his office that day. *Id.* at Bates 22.

Deputy Disciplinary Counsel Gregory L. Tweed generally explained what was required in the audit and instructed Respondent to provide the ODC with the name of the CPA he planned to use and a time frame of how long it would take the CPA to perform the audit. *Id.* at Bates 23-27.

On November 14, 2018, Ms. Causey followed up with a certified letter to Respondent confirming that the ODC had not received any of the information requested during Respondent's sworn statement and further stating the ODC had not received the third quarter audit report which had been due on October 30, 2018. Ms. Causey also stated that she had left voice messages on Respondent's cell phone on November 9 and November 13 which had not been returned. She asked that Respondent provide the name of his CPA and the other information requested by November 26, and reminded Respondent that failure to comply with the conditions of probation may result in revocation. Ex. ODC-8.

Having received no further response from Respondent, Ms. Causey wrote to Respondent on November 28, 2018, advising Respondent that the ODC considered Respondent to be in violation of the Agreement and was prepared to file a motion to revoke his probation. Ms. Causey stated a motion to revoke probation would be filed without further notice to Respondent unless the required information was received from Respondent within ten days. Ex. ODC-9.

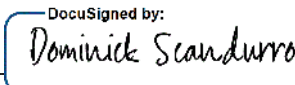
The Board finds that the ODC has presented sufficient evidence to demonstrate that Respondent has failed to comply with the terms and conditions of his probation in that he has failed to provide the name of a CPA for approval by the ODC and has failed to provide any quarterly audits of his trust account as required by the Court's order imposing sanction and by the Agreement.

CONCLUSION AND RECOMMENDATION

ODC has presented sufficient evidence to demonstrate that Respondent has violated certain conditions of his probation as detailed above, which constitutes grounds for the revocation of his probation under Supreme Court Rule XIX, Appendix C, Rules 5(A) and 5(C). Therefore, the Board recommends that Respondent’s Motion to Revoke Probation be granted and that the previously deferred portion of the one-year and one-day suspension be made executory. The Board further recommends that Respondent be assessed with the costs and expenses of this proceeding in accordance with Louisiana Supreme Court Rule XIX, §10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

- Linda G. Bizzarro**
- Carrie L. Jones**
- Brian D. Landry**
- Sheila E. O’Leary**
- Danna E. Schwab**
- Melissa L. Theriot**
- Charles H. Williamson, Jr.**

By  _____
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Dominick Scandurro, Jr.
FOR THE ADJUDICATIVE COMMITTEE

Evans C. Spiceland, Jr. - Not Participating.