

**LOUISIANA ATTORNEY DISCIPLINARY BOARD**

**IN RE: MARK G. SIMMONS**

**NUMBER: 14-DB-057**

**RECOMMENDATION TO THE LOUISIANA SUPREME COURT**

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This is a disciplinary proceeding based on the filing of formal charges against the Respondent, Mark G. Simmons, by the Office of Disciplinary Counsel (“ODC”). For reasons stated below, the Disciplinary Board recommends that the Respondent receive a suspension from the practice of law for one year and one day, with all but sixty days deferred, conditioned upon: (1) successful completion of the LSBA Trust Accounting School; (2) successful completion of the LSBA Ethics School; and (3) a two-year supervised probationary period during which Respondent’s trust account will be audited on a quarterly basis. The probationary period should commence from the date Respondent and ODC execute a formal probation plan. Any failure of the 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. Respondent should also be assessed with all costs and expenses of these proceedings.

**PROCEDURAL HISTORY**

The formal charges in this matter were filed by ODC against the Respondent on November 17, 2014. In the charges, ODC alleges in Count I that the Respondent violated Rules of Professional Conduct: 1.15 (safekeeping property of clients or third persons; commingling and conversion of client funds); 8.1(c) (failure to cooperate); and 8.4(a) (violating or attempting to violate the Rules of Professional Conduct) when he overdrew his client trust account. As to Count II, ODC alleges that the Respondent violated Rules of Professional Conduct 1.3 (failure to act with

diligence in representing a client); 1.4 (failure to communicate); 1.16(d) (failure to protect client's interest upon termination of representation); 8.1(c) (failure to cooperate); and 8.4(a) (violating or attempting to violate the Rules of Professional Conduct) in connection with his representation of a client in an EEOC claim against the Lafayette Parish School System.<sup>1</sup> After several attempts, the charges were served on the Respondent via certified mail on July 9, 2015 at his secondary registration statement address<sup>2</sup>, and on July 13, 2015 at his primary registration statement address<sup>3</sup>. Respondent filed an Answer to the formal charges on August 3, 2015, asserting that, as to Count I, the funds that were part of the overdraft did not include funds from any client, and that, as to Count II, he completed the representation for which he was hired.<sup>4</sup>

On August 5, 2015, the Board Administrator's Office set this matter for a telephone scheduling conference on August 28, 2015 and for a hearing on November 19, 2015 in Baton Rouge, Louisiana. The case was assigned to Hearing Committee Number 42.<sup>5</sup> ODC submitted its Pre-Hearing Memorandum on October 29, 2015. The Respondent did not submit a Pre-Hearing Memorandum. ODC filed an unopposed Motion for Continuance on November 12, 2015, as the parties were attempting to confect a consent discipline agreement in the matter. This motion was

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<sup>1</sup> The pertinent text of these rules can be found in the attached Appendix.

<sup>2</sup> This address is 13801 Chalmette Avenue, Baton Rouge, LA 70801.

<sup>3</sup> This address is 334 Saint Joseph Street, Baton Rouge, LA 70802-5951.

<sup>4</sup> Correspondence in the record also indicates that the Respondent was personally served with a copy of the formal charges on January 23, 2015, and that he submitted a response to the charges to ODC on February 26, 2015. *See* March 11, 2015 correspondence from Deputy Disciplinary Counsel Yolanda Cezar to Mr. Simmons. Thereafter, as noted above, he was served again via certified mail on July 9, 2015 and July 13, 2015, and he filed his formal answer with the Disciplinary Board on August 3, 2015.

<sup>5</sup> Members of Hearing Committee Number 42 included William E. Scott, chair, Kelsey K. Funes, lawyer member, and Adrian R. Gordon, public member. Mr. Gordon was later replaced by Hurley H. Griffing as the public member on the committee.

granted by Mr. Scott on November 9, 2015, and the hearing was reset for February 18, 2016 in Baton Rouge, Louisiana.

A pre-hearing telephone conference was held on February 15, 2016. At this time, the parties agreed to another continuance of the matter, and Mr. Scott formally approved this continuance in an order issued on February 16, 2016. Thereafter, the hearing was rescheduled for May 19, 2016, with a pre-hearing conference call set for May 13, 2016. Both the pre-hearing conference call<sup>6</sup> and the hearing were held as scheduled.

On June 17, 2016, the hearing committee issued its report in this matter, recommending that the Respondent be suspended from the practice of law for one year and one day, fully deferred, conditioned upon (1) successful completion of Trust Account Management Training; (2) successful completion of a Law Office Practice CLE course (a minimum of one hour); and (3) a violation-free two-year probationary period during which Respondent's trust account would be audited on a quarterly basis and found to be in compliance.

On June 23, 2016, the Board Administrator's Office scheduled this matter for oral argument before Panel "C" of the Disciplinary Board on August 18, 2016. ODC's Pre-Argument Memorandum was filed on July 19, 2016. The Respondent did not file a Pre-Argument Memorandum. On August 16, 2016, Melissa L. Theriot, Chair of Panel "C", signed an order continuing all cases scheduled for oral argument on August 18, 2016 until September 29, 2016 due to the recent flooding across Louisiana. Oral argument was held on September 29, 2016. Yolanda Cezar appeared on behalf of ODC. The Respondent did not appear.

### **FORMAL CHARGES**

The formal charges in this matter read, in pertinent part, as follows:

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<sup>6</sup> Despite notice, the Respondent failed to attend the pre-hearing conference call.

## COUNT I

### **Investigation File No. 30160** **Complainant – ODC**

The ODC received notice from Regions Bank that, on September 6, 2012, Respondent's client trust account ending in 0232 was overdrawn. On September 13, 2012, the ODC forwarded notice of the overdraft to Respondent via certified mail with return receipt request[ed]. Respondent was instructed to forward to the ODC within ten (10) days of receipt of the letter a written explanation of the circumstances surrounding the overdraft and steps that he had taken to resolve the matter. He was also instructed to forward copies of the last six (6) months of his trust account statements, including canceled checks and disbursement sheets. On September 18, 2012, the ODC received the return receipt card bearing Respondent's signature as acknowledgement of receipt of the notice.

Due to Respondent's failure to respond to the September 13, 2012 request, notice of the overdraft was forwarded to Respondent again on January 14, 2013 and July 15, 2013 via certified mail with return receipt request[ed]. Notice was forwarded to Respondent on June 5, 2013 via U.S. mail without a return receipt request. No return receipt card was received regarding the January 14, 2013 letter. However, a search of the United Postal Services website indicates that the notice was delivered at 2:18 pm on January 18, 2013. The July 15<sup>th</sup> notice was returned to the ODC on August 12, 2013 marked "unclaimed". The notice dated June 5, 2013 was not returned to the ODC.

Respondent has violated the following Rules of Professional Conduct:

- 1.15** 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.

**8.1(c)** A lawyer shall not fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.

**8.4(a)** A lawyer shall not violate or attempt to violate the Rules of Professional Conduct.

## COUNT II

### **Investigation File No. 30525** **Complainant – Patricia Colbert Cormier**

Respondent was retained in April 2010 for representation regarding an EEOC claim against Lafayette Parish School System. Representation began in 2010. In a letter dated March 23, 2011, Respondent informed complainant that instead of his usual hourly rate of \$260.00, he would charge her a flat rate of \$3,000. Complainant made a total of four payments totaling \$2,000.

Respondent participated in mediation and thereafter forwarded a confidentiality agreement, an agreement to mediate and a mediation settlement agreement to complainant to sign and return to him. In a letter to a school system representative dated December 6, 2010, Respondent submitted a list of demands that complainant wanted presented to the full school board. Respondent forwarded

a letter to the school board with an amended list of items his client wanted presented before the school board.

There is no indication that Respondent has taken any meaningful action regarding complainant's matter since November 16, 2011 when he forwarded a letter to the school board representative regarding the board's alleged breach of the agreement and his intent to contact the EEOC regarding the alleged breach, as well as his request that the matter be re-opened. Complainant forwarded correspondence to Respondent dated August 28, 2012, October 10, 2012 and January 24, 2013 inquiring about his whereabouts as well as the status of her case. Respondent failed to respond.

Notice of the ethical complainant was forwarded to Respondent on May 3, 2013. On May 7, 2013, the ODC received the return receipt card bearing Respondent's signature as indication that he received the notice. As a result of Respondent's failure to respond to the notice of the complaint, a subpoena was issued commanding him to appear at the ODC on Wednesday, July 10, 2013 to submit a sworn statement. Respondent was personally serviced with the subpoena on June 24, 2013. Respondent forwarded notice to the ODC via fax on July 9, 2013 at 3:48 pm advising that he would not be available to appear for the sworn statement and requesting that it be rescheduled for Friday, July 12, 2013. Upon receipt of Respondent's fax, Deputy Disciplinary Counsel made several attempts to contact Respondent via telephone, to no avail. As a result, a voice message was left at Respondent's office and a response was forwarded to Respondent via email and fax regarding his request. Respondent was informed that his request was denied and he was instructed to contact the ODC. Respondent failed to respond.

Respondent has violated the following Rules of Professional Conduct:

- 1.3** Failure to act with reasonable diligence and promptness in representing a client
- 1.4** Failure to keep the client reasonably informed about the status of the matter
- 1.16(d)** Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advanced payment of fee or expense that has not been earned or incurred.
- 8.1(c)** A lawyer shall not fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.
- 8.4(a)** A lawyer shall not violate or attempt to violate the Rules of Professional Conduct.

**WHEREFORE**, pursuant to Rule XIX, Section 11 B(3), the Office of Disciplinary Counsel states that Deputy Disciplinary Counsel's *Request for Permission to File Formal Charges* was approved, and the above alleged conduct, or any part thereof, if proven, merits the imposition of appropriate sanctions in accordance with Louisiana Supreme Court Rule XIX and the American Bar Association's Standards for Imposing Lawyer Sanctions.

#### **STIPULATIONS OF THE PARTIES**

At the hearing held in this matter, the parties stipulated to numerous factual findings. These stipulations are as follows:

1. On September 12, 2012, the ODC received notification from Regions Bank that Mr. Simmons' IOLTA Account ending in 0232 (hereinafter "trust account") had been overdrawn.
2. As a result, the ODC conducted an audit of Mr. Simmons' trust account ending in 0232.
3. The audit covered the time period from May 2012 through June 2013.
4. The items reviewed included bank statements from May 2012 as well as bank statements from July 2012 through June 2013. It also included canceled checks and settlement statements.
5. Mr. Simmons failed to maintain sufficient records and documents, including deposit slips and settlement statements, to address the activity of the trust account and ensure proper handling of his trust account.
6. The trust account balance fell below the amount necessary to honor the funds deposited.
7. Mr. Simmons converted, comingled and misused the funds in his client trust account.
8. Mr. Simmons and ODC stipulate to the findings of the audit report performed by ODC's forensic auditor, Ms. Angelina Marcellino.
9. Deposits from May through December of 2012 totaling \$10,484 in Mr. Simmons' trust account were not identified with a client.
10. On October 1, 2012, a deposit of \$4,213.90 was made in Mr. Simmons' trust account, and this deposit was identified with a client named Erika Echols. In connection with this deposit, a disbursement of \$1,585.37 was made to Mark Simmons and a third party disbursement of \$971.12 was made, but there was no indication that a disbursement was made to the client.



11. On May 3, 2012, a disbursement of \$3,184.25 from Mr. Simmons' trust account was made to a funeral home identified with an Edward A. Simmons. However, there was no deposit or other disbursement identified with that client.
12. On November 28, 2012, a disbursement from Mr. Simmons' trust account to the 19<sup>th</sup> JDC was made, and it was identified with the succession of Moran. However, there were no deposits or any other disbursements associated with that client.
13. On December 6, 2012, a deposit of \$850.00 in Mr. Simmons' trust account was identified with a Gary Shuford, but there were no disbursements identified with that client.
14. On December 10, 2012, a disbursement of \$294.00 from Mr. Simmons' trust account to the St. Charles Parish Sheriff's Office was identified with an Elissa Ennis, but there was no deposit associated with her or no other disbursements.
15. On March 14, 2013, a disbursement of \$4,321.42 from Mr. Simmons' trust account made to CVS was identified with a Donna Hookpin, but there was no deposit or any other disbursement identified with that client.
16. On May 21, 2013, a deposit of \$3,730.00 in Mr. Simmons' trust account was identified with a Patricia Robinson. However, there was a client disbursement of \$1,500.00, and a third party disbursement of \$1,100.00 was made. In addition, another disbursement was identified with this client for \$2,704.32, exceeding the amount that was deposited on Ms. Robinson's behalf. Ms. Robinson was overpaid.
17. During the audit period, there were electronic transfers to Mr. Simmons' operating account ending in 2755 ("operating account") totaling \$89,520 and checks totaling \$900. Mr. Simmons was unable to identify any clients associated with the transactions or justification for the transactions.

Hrg. Tr., pp. 7-13.

As noted above, the parties stipulated to the findings of the audit report that was performed by Ms. Marcellino. This report concludes that the Respondent converted, commingled, and misused the funds in his client trust account and also had procedure and accounting errors in his trust account records. Ms. Marcellino also noted that Respondent's account balance fell below the amount necessary to honor funds deposited and he failed to properly document his records to ensure that he was handling his trust account properly. The total amount of funds found by Ms. Marcellino to have been converted was \$3,599.98. *See* May 18, 2016 Audit Report of Angelina Marcellino; Hrg. Tr. p. 105.

### **THE HEARING COMMITTEE'S REPORT**

As discussed earlier, the hearing committee issued its report on June 17, 2016. As to Count I, the committee concluded that ODC had proven that: (1) Respondent commingled his own property (personal funds) with the property (funds) of his clients; and (2) the Respondent did not cooperate appropriately with ODC in its investigation of the matter. The Committee also concluded that ODC did not prove, and admitted that it had not proven, that any client's funds in Respondent's client trust account were misappropriated or stolen, nor did ODC prove that any of the Respondent's clients did not timely receive all funds to which they were entitled from the trust account. As to this Count, the committee found that the Respondent had violated Rules 1.15, 8.1(c) and 8.4(a).

In considering Count II, the committee determined that ODC had not proven by clear and convincing evidence that the Respondent did not perform the services he was retained to perform for Ms. Colbert-Cormier.<sup>7</sup> However, the committee found that ODC had proven by clear and

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<sup>7</sup> This finding is significant. At issue during the proceedings was whether Respondent had been hired only to represent Ms. Colbert-Cormier in the mediation process with the EEOC or to also file a civil suit on her behalf if the

convincing evidence that the Respondent did not act with reasonable diligence and promptness in representing his client, that he failed to keep his client reasonably informed about the status of the matter, and upon termination of representation, he did not provide reasonable notice of termination to the client. The committee also determined that the Respondent did not cooperate with ODC in its investigation of Ms. Colbert-Cormier's complaint. As a result, the committee found that the Respondent had violated Rules 1.3, 1.4, 1.16(d), 8.1(c) and 8.4(a).

Notably as Count II, the committee cited its observation that Ms. Colbert-Cormier's expectations in her lawsuit were exceedingly high and may not have been attainable under any set of circumstances. The committee also pointed out that there was no written documentation of the contract for legal services between the Respondent and Ms. Colbert-Cormier, that the nature of the fee arrangement changed during the representation, and that there was no clear and convincing evidence as to whether that change was to the benefit or detriment of Ms. Colbert-Cormier.

The committee found that the Respondent's actions were negligent, and not intentional, with the exception of his failure to cooperate in a timely manner with ODC. The committee noted that the Respondent's actions constituted a clear failure to communicate and cooperate in a timely manner with the ODC.

In conclusion, the committee recommended that the Respondent be suspended from the practice of law for one year and one day, fully deferred, conditioned upon (1) successful completion of Trust Account Management Training; (2) successful completion of a Law Office Practice CLE course (a minimum of one hour); and (3) a violation-free two-year probationary

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mediation process was unsuccessful. Ms. Colbert-Cormier claimed that Respondent was hired to file a lawsuit against the Lafayette Parish School System, alleging retaliation and/or discrimination, if the mediation was unsuccessful. Hrg. Tr., p. 78; ODC Exhibit 2. Respondent claimed that that he was hired only to represent Ms. Colbert-Cormier in the mediation process with the EEOC, and when this failed and the EEOC did not find in Ms. Colbert-Cormier's favor and closed her claim, his representation ended. Hrg. Tr. p. 44; ODC Exhibit 1o. As the Respondent basically provided only mediation services to Ms. Colbert-Cormier and he filed no lawsuit on her behalf, the committee apparently concluded that he was hired only to provide mediation services to his client.

period during which Respondent's trust account would be audited on a quarterly basis and found to be in compliance.

## ANALYSIS

### I. The Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (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 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.

Here, the committee's findings of fact are not manifestly erroneous, except for its finding that no client funds in Respondent's client trust account were misappropriated. Even though no client complaints alleging that funds were owed were lodged, Ms. Marcellino's audit report shows that funds due to nine parties at the end of the audit period had not yet been disbursed and that the funds in the Respondent's trust account at that same time were insufficient to cover all of these pending disbursements.<sup>8</sup> Moreover, the parties stipulated that conversion of client funds had occurred, and Ms. Marcellino's audit report also concludes that Respondent had converted \$3,599.98 in client funds as of the end of the audit period. Hrg. Tr., p. 9. As noted in the

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<sup>8</sup> Although ODC did contact some of Respondent's clients to verify that they had received their payments which were due to them, ODC could not contact or reach all of Respondent's clients to confirm this same information. *See* Hrg. Tr., pp. 15-16.

stipulations, “Mr. Simmons converted, co-mingled and misused the funds in his client trust account” and “the account balance fell below the amount necessary to honor the funds deposited and [Respondent] failed to . . . honor the funds deposited and he failed to maintain proper documentation to ensure proper handling of his trust account.” *Id.* See also *In re Bullock*, 16-0075 (La. 3/24/16); 187 So.3d 986, citing *In re Torry*, 10-0837 (La. 10/19/10); 48 So.3d 1038 (the parties’ factual stipulations in a disciplinary matter must be given their effect unless they are withdrawn).

*De novo* review of the committee’s application of the Rules of Professional Conduct shows that the committee correctly found that the Respondent had violated the Rules of Professional Conduct as charged.

## **II. The Appropriate Sanction**

### **A. The Rule XIX, Section 10(c) Factors**

Louisiana Supreme Court Rule XIX, Section 10(c) states that in 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, the Respondent has violated duties owed to his clients and to the profession. His actions as they concerned his trust account management and his handling of Ms. Colbert-Cormier’s case were negligent, but his actions surrounding his failure to cooperate with ODC in its investigation of his alleged misconduct were knowing and intentional. While no clients were

harmful by the mismanagement of his trust account, the potential for harm was great. Further, Ms. Colbert-Cormier suffered great frustration and possible injury due to the Respondent's failure to properly communicate with her concerning her EEOC matter and the termination of his representation following the conclusion of the mediation process.<sup>9</sup>

Aggravating factors in this matter include multiple offenses (particularly as to his trust account), substantial experience in the practice of law (admitted on April 27, 1990, thus 26 years of practice at the time of the hearing), and bad faith obstruction of the disciplinary process proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. Mitigating factors include absence of a prior disciplinary record.

#### **B. The ABA Standards and Louisiana Caselaw**

Standard 4.13 of the *ABA Standards for Imposing Lawyer Sanctions* provides that "reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." The ODC audit report shows that funds due to nine parties at the end of the audit period had not yet been disbursed and that the funds in the Respondent's trust account at that same time were insufficient to cover all of these pending disbursements. Moreover, the parties stipulated that conversion of client funds had occurred, and Ms. Marcellino's audit report also concludes that Respondent had converted \$3,599.98 in client funds as of the end of the audit period. Although the Respondent's conduct was negligent and no clients had yet been harmed, the potential for injury is apparent.

Standard 4.43 provides that "reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential

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<sup>9</sup> The record is inconclusive as to whether Ms. Colbert-Cormier's claim via a civil lawsuit against the school system prescribed; however, such a possibility exists.

injury to a client.” Here, the Respondent failed to act with reasonable diligence in representing Ms. Colbert-Cormier. Specifically, the Respondent failed to act with diligence following the failed mediation process. Despite Ms. Colbert-Cormier’s repeated requests as to the status of her matter and what future action should be taken, he failed to timely and meaningfully communicate to her that he no longer represented her or what her options concerning further action against the school system might entail. As noted above, while the record is inconclusive as to whether Ms. Colbert-Cormier’s claim via a civil lawsuit against the school system prescribed, such a possibility exists.

Standard 7.2 provides that “suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.” Here, the Respondent failed to cooperate with ODC in both Counts I and II by initially failing to respond to its requests for information. By doing so, he caused the agency to unnecessarily use its limited resources to repeatedly seek the information. Given the chronic nature of Respondent’s failure to cooperate with ODC during its investigation of his misconduct, the baseline sanction in this matter is suspension.

A review of caselaw indicates that the sanction recommended by the hearing committee is too lenient and that an actual period of active suspension should be served by the Respondent in this matter. In cases of misconduct involving just one count of neglect, failure to communicate and failure to cooperate with the ODC, the Louisiana Supreme Court has typically imposed a one year and one day suspension, with none of the suspension deferred. See, e.g., *In re Kurzweg*, 03-2902 (La. 4/2/04); 870 So.2d 978 (attorney neglected a legal mater, failed to communicate with his clients, and failed to cooperate with ODC in its investigation; no mitigating factors were present, and the aggravating factors included the attorney’s ineligibility to practice law); *In re*

*Turnage*, 01-1240 (La. 6/22/01); 790 So.2d 620 (attorney neglected a legal matter, failed to communicate with her client, failed to return her client's file, failed to refund an unearned fee, and failed to cooperate with ODC in two separate investigations; numerous aggravating factors were present but not mitigating factors); *In re Bergeron*, 00-1386 (La. 9/15/00); 768 So.2d 595 (attorney knowingly and intentionally neglected his client's legal matter, failed to communicate with his client, failed to return his client's file, and failed to cooperate with ODC in its investigation). Further, in the case of *In re Taylor*, 14-0646 (La. 5/23/14); 139 So.3d 1004, the respondent was suspended for one year and one day and was ordered to make restitution to the complainant. In that matter, the respondent was retained to represent his client in connection with a post-conviction relief matter and paid \$2,500. He neglected the legal matter, failed to communicate with his client, failed to refund the unearned fee to the complainant and failed to cooperate with ODC in its investigation of the complaint. Mr. Simmons' conduct is similar to that of the respondents discussed above in that he neglected a client's matter, failed to communicate with his client and failed to cooperate with ODC. Unlike some of the above respondents, however, Mr. Simmons' misconduct does not involve the failure to return a client's file or unearned fee.

Moreover, the cases of *In re Hall*, 16-0025 (La. 2/26/16); 184 So.3d 1279 and *In re Richard*, 16-0076 (La. 4/4/16); 188 So.3d 1035 offer guidance here. *Hall* was a consent discipline matter in which the respondent was suspended for a period of six months, deferred in its entirety, after it was determined that he commingled personal funds with client funds in his two trust accounts, allowed his accounts to become overdrawn on two occasions, and made a trust account check payable to "cash" to accommodate a client's request.

*In Richard*, the respondent was suspended from the practice of law for one year and one day, with all but sixty days deferred, followed by a one-year period of unsupervised probation.



Here, the respondent negligently violated his duty owed to his clients by converting money in his trust account on one occasion. In that instance, the respondent's trust account did not have a sufficient balance to cover a \$250 check payable to the Acadia Clerk of Court. The bank paid the check anyhow, resulting in an overdraft of \$228.43. Although the client had given Mr. Richard \$250 in cash to cover the filing fees, Mr. Richard negligently failed to timely deposit the funds into his trust account. The conversion did not cause any actual harm and was quickly remedied. The Court found, however, that his most egregious misconduct was his failure to cooperate with ODC in its investigation of the matter. Unlike Mr. Simmons, Mr. Richard had a disciplinary history that included failure to cooperate with ODC in four investigations, and less than two months after being admonished by the Disciplinary Board, he had again engaged in the same misconduct.

Given the above caselaw and the numerous aggravating factors present, the Board must recommend that an actual period of suspension be served by Mr. Simmons.

### **CONCLUSION**

The Board adopts the hearing committee's findings of fact, except for its finding that no client funds in Respondent's client trust account were misappropriated. Although the Respondent's conduct was negligent, Ms. Marcellino's audit report shows that \$3,599.98 in funds that were due to nine parties at the end of the audit period had not yet been disbursed and that the funds in the Respondent's trust account at that same time were insufficient to cover all of these pending disbursements. Moreover, the parties stipulated that conversion of client funds had occurred. The Board also finds the aggravating and mitigating factors as discussed above. The hearing committee's findings as to rules violated by the Respondent are adopted by the Board.

As to the sanction, the Board adopts the hearing committee's proposed sanction, with modifications, including the recommendation that the Respondent serve an actual period of active suspension. The Board finds that an appropriate sanction is a suspension from the practice of law for one year and one day, with all but sixty days deferred, conditioned upon (1) successful completion of the LSBA Trust Accounting School; (2) successful completion of the LSBA Ethics School<sup>10</sup>; and (3) a two-year supervised probationary period during which Respondent's trust account would be audited on a quarterly basis. The probationary period should commence from the date Respondent and ODC execute a formal probation plan. Any failure of the 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. Respondent should also be assessed with all costs and expenses of these proceedings.

### **RECOMMENDATION**

Based on the above, the Board finds that the Respondent, Mark G. Simmons, has violated Rules of Professional Conduct 1.3, 1.4, 1.15, 1.16(d), 8.1(c) and 8.4(a). The Board recommends that the Respondent be suspended from the practice of law for one year and one day, with all but sixty days deferred, conditioned upon: (1) successful completion of the LSBA Trust Accounting

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<sup>10</sup> The Ethics School curriculum generally includes the following topics:

- 1) the lawyer disciplinary system;
- 2) the attorney-client relationship including formation of the relationship, client screening, accepting the representation, billing, fees and costs, solicitation and terminating the relationship;
- 3) conflicts of interest;
- 4) advertising;
- 5) law office management including supervising personnel, computer use, opening and closing files, file organization, communication with clients, the office manual, trial notebook, tickler systems and time management;
- 6) substance abuse, stress and the Judges and Lawyers Assistance Program;
- 7) handling client property including trust accounting; and
- 8) how to handle fee disputes.

School; (2) successful completion of the LSBA Ethics School; and (3) a two-year supervised probationary period during which Respondent's trust account would be audited on a quarterly basis. The probationary period should commence from the date Respondent and ODC execute a formal probation plan. Any failure of the 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. The Board also recommends that Respondent be assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

**LOUISIANA ATTORNEY DISCIPLINARY BOARD**

**Linda G. Bizzarro  
Pamela W. Carter  
Laura B. Hennen  
Sheila E. O'Leary  
Evans C. Spiceland, Jr.  
Melisa L. Theriot  
Walter D. White**

**BY:**



**Charles H. Williamson, Jr.  
FOR THE ADJUDICATIVE COMMITTEE**

**Anderson O. Dotson, III – Recused.**

## APPENDIX

Violations of the following Rules of Professional Conduct were alleged by ODC. These rules read in pertinent part as follows:

### **Rule 1.3.**

A lawyer shall act with reasonable diligence and promptness in representing a client.

### **Rule 1.4. Communication**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

### **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.

### **Rule 1.16. Declining or Terminating Representation**

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which

the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

**Rule 8.1. Bar Admission and Disciplinary Matters**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (c) Fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.

**Rule 8.4. Misconduct**

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . .