ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: KYLE D. SCHONEKAS

DOCKET NUMBER: 21-DB-034

RULING OF THE DISCIPLINARY BOARD

INTRODUCTION

This attorney disciplinary matter arises out of formal charges filed by the Office of Disciplinary Counsel ("ODC") against Kyle D. Schonekas ("Respondent" or "Mr. Schonekas"), Louisiana Bar Roll Number 11817.[1] ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.9 and 8.4(a) and (c).[2]

PROCEDURAL HISTORY

The formal charges were filed on June 11, 2021. Respondent filed an answer to the charges on August 5, 2021. The hearing of this matter was held on March 15, 2022 before Hearing Committee No. 10 ("the Committee").[3] Deputy Disciplinary Counsel Paul E. Pendley and Gregory L. Tweed appeared on behalf of ODC. Respondent appeared with counsel, Dane S. Ciolino and Clare S. Roubion.

On June 30, 2022, the Committee issued its report, finding that there was no violation of Rule 1.9 and only a technical violation of Rule 8.4 which, the Committee concluded, did not merit any type of sanction. Accordingly, the Committee recommended that the formal charges be dismissed.

ODC filed an objection to the Committee's report on July 20, 2022, objecting to the

[1] Respondent was admitted to the practice of law in Louisiana on October 6, 1978. Respondent is currently eligible to practice law.
[2] See attached Appendix I for the text of these Rules.
[3] Members of the Committee included Robert E. Peyton (Chair), Jason P. Waguespack (Lawyer Member), and Chad M. Rachel (Public Member).

Committee's determination that the charges be dismissed. ODC further argued that a period of suspension, partially deferred, should be imposed upon Respondent. ODC's Board Brief was filed on September 27, 2022. Respondent's Reply Brief was filed on October 12, 2022. Oral argument before Panel "B"[4] of the Disciplinary Board was held on October 27, 2022. Mr. Pendley appeared on behalf of ODC. Mr. Ciolino appeared on behalf of Respondent, who was also present.

FORMAL CHARGES

The formal charges read, in pertinent part:

> On October 10, 2018, the ODC received a letter from Complainant Raymond C. Reggie who alleged that Respondent had engaged in a conflict of interest and, when confronted with this conflict, lied about the existence of the conflict.
>
> Complainant is a former client of the law firm of Schonekas, Evans, McGoey & McEachin, LLC. A partner with the Firm, William P. Gibbens, had represented Complainant in 2012, extending into early 2013. Complainant was the target of a federal criminal investigation by the Office of the United States Attorney ("OUSA") for the Middle District of Louisiana. Sometime after the representation by Mr. Gibbens had been terminated (after 2013), Respondent, a partner of Schonekas, Evans, McGoey & McEachin, LLC, was contacted by a former client, Troy Duhon. Mr. Duhon was the owner of the Premier Automotive Group. Mr. Duhon had been contacted by the OUSA, who had wanted to interview him pursuant to the ongoing criminal action against Complainant. Mr. Duhon was eventually subpoenaed by the OUSA for trial as a fact witness for the government.
>
> Respondent and Mr. Duhon met with Special Agent Christopher Schneider of the Internal Revenue Service and Rene Salomon of the OUSA in September of 2014 wherein Mr. Duhon was questioned by federal authorities about facts and circumstances surrounding the fact pattern that created the criminal allegations against Complainant. Per the Memorandum of Interview, Mr. Duhon was represented by Respondent during the meeting. The representation created a conflict because Mr. Duhon was a potential witness for the government and was, therefore, potentially averse [*sic*] to Complainant in the same legal matter in which attorney William P. Gibbens had previously represented Complainant. Respondent and Mr. Gibbens were, and are, members of the same law firm, and any conflict that would attach to Mr. Gibbens under Rule 1.9 would also be imputed to Respondent via Rule 1.10. [fn 1: Imputation of Conflicts of Interest: General Rule.] As such, with respect to the federal matter against Complainant, Respondent was

[4] Members of Panel "B" included Brian D. Landry (Chair), R. Alan Breithaupt (Lawyer Member), and M. Todd Richard (Public Member).

equally bound by Rule 1.9 in the same fashion as Mr. William Gibbens. Respondent's representation of Mr. Duhon violated Rule 1.9.

Complainant's formal complaint to the ODC stated that he had confronted Respondent about the above-described conflict of interest. Respondent, in his reply to Complainant, attempted to mislead him about the existence of the conflict. This was addressed in a letter, dated August 14, 2018, that Respondent had sent to Complainant about the representation of Mr. Duhon. In his letter to Complainant, Respondent advised that his representation of Mr. Duhon was unrelated to the legal matter in which Mr. Gibbens had represented Complainant. This statement to Complainant was false. Respondent's representation of Mr. Duhon was directly related to the matter for which Complainant was represented by Mr. Gibbens. Respondent's letter to Complainant violated Rule 8.4(a)(c).

Respondent, by engaging in the above listed misconduct, has violated Louisiana Rules of Professional Conduct Rule 1.9 and Rule 8.4.

THE HEARING COMMITTEE'S REPORT

As noted above, the Committee filed its report on June 30, 2022. In the report, the Committee summarized the evidence introduced at the hearing as follows:

EVIDENCE

The trial testimony consisted primarily of the direct and cross-examination of the respondent, Kyle Schonekas, and brief testimony from Mr. Billy Gibbens and Dane Ciolino. Both parties introduced exhibits, without objection, and while all exhibits were admitted, reviewed, and considered, the Committee believes that the "Joint Stipulations" concerning the testimony of Rene Salomon was of primary importance.

The Committee continued with its findings of fact and conclusions concerning the rule violations at issue, stating as follows:

FINDINGS OF FACT / RULES ALLEGEDLY VIOLATED

With respect to the alleged violation of Rule 1.9, the Committee relied heavily on the testimony of the Respondent and the Joint Stipulations concerning Rene Salomon. Mr. Schonekas was found to be a very credible witness and it is clear from his testimony that his representation of Mr. Duhon was never intended to prejudice Mr. Reggie and was always designed to keep Mr. Duhon off the witness stand. The Committee does not believe that this representation was "materially adverse" to Mr. Reggie's interest.

The term "materially adverse" is defined by the American Bar Association's Standing Committee on Ethics and Professional Responsibility, Formal Opinion 497 as follows:

> "Material adverseness" under Rule 1.9(a) and [R]ule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client on behalf of a current client in the same or a substantially related matter. It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client. "Material adverseness" may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices. [fn 3: American Bar Association's Standing Committee on Ethics and Professional Responsibility, Formal Opinion 497, 8-9.]

The Committee believes that the various meetings and phone calls between Mr. Schonekas and U.S. Attorney Rene Salomon and IRS agent Christopher Schneider established that Mr. Duhon was, at most, a corroborative witness whose testimony was clearly not necessary to support the criminal charges against Mr. Reggie. This is clear from the Joint Stipulations of Mr. Salomon . . . , and several of his statements support the Committee's finding that no conflict existed because the representation was not "materially adverse" to Mr. Reggie. Mr. Salomon notes that Mr. Schonekas would not have cross-examined Mr. Reggie at trial; that the other evidence against Mr. Reggie was "substantial"; that Mr. Duhon did not supply any incriminating document against Mr. Reggie; and that the case against Mr. Reggie could be proved without Mr. Duhon's testimony. *State v. Tinsley (La. App. 2nd Cir. 2007); 955 So.2d 227; State v. Cisco (La. 12/03/03) 861 So.2d 118.*[5] Also important, although not conclusive to this Committee, was Mr. Salomon's statement that he believes he had a duty to raise any potential conflict of interest

[5] The Board notes that in *State v.Tinsley*, 41,726-KA (La. App. 2 Cir. 4/4/07), 955 So.2d 227, *writ denied*, 2007-K-1185 (La. 12/07/07), 969 So.2d 629, two co-defendants, Kevin Falcon and Jessica Tensley, argued that their rights to conflict-free counsel were violated because Mr. Falcon's trial counsel, Jay Nolen, was not required to withdraw from representing Mr. Falcon. Mr. Nolan at one time represented both Mr. Falcon and Ms. Tensley. At trial, Mr. Nolen cross-examined Ms. Tinsley, his former client. Mr. Falcon argued that his counsel's ability to protect his interests was compromised by his counsel's former representation of Ms. Tinsley. Ms. Tinsley argued that her rights were violated by her former counsel's continued representation of Mr. Falcon, and his eventual cross-examination of her at trial. Citing *State v. Cisco*, 01-2732 (La. 12/3/03), 861 So.2d 118, *cert. denied, Louisiana v. Cisco*, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004), the Second Circuit explained that the Louisiana Supreme Court has consistently held that a defense attorney required to cross-examine a current or former client on behalf of a current client suffers from an actual conflict. The Second Circuit held that the conflict of interest concerning Mr. Nolen's prior representation of both defendants violated their constitutional rights. Their convictions for second-degree murder were reversed, and the case was remanded to the district court. The Committee apparently relied upon *Tinsley* and *Cisco* to support its finding that the interests of Mr. Duhon and Mr. Reggie were not materially adverse because Respondent was never in a position to cross-examine Mr. Reggie at trial.

> and that although he has made objections of this type in the past, he never sought to disqualify Mr. Schonekas. For these reasons, the Committee does not believe that Mr. Schonekas violated Rule 1.9 of the Louisiana Rules of Professional Conduct.
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> With respect to the alleged violation of Rule 8.4, it seems clear that Mr. Schonekas's letter of August 15, 2008 [*sic*], to Mr. Reggie was incorrect, in that the representation was, in fact, related to his firm's prior representation of Mr. Reggie. The Committee believes, however, that this was a minor, technical violation, made through negligence, or perhaps in frustration to the "badgering" actions of Mr. Reggie (Hearing Transcript p. 50). The Committee also finds this conduct caused no harm to Mr. Reggie.
>
> The Committee believes that the following cases support the proposition that not every technical violation of a rule is sanctionable and when Mr. Schonekas's letter is viewed in context, and with the recognition of the pressures of legal practice, the Committee believes that this minor violation does not warrant any type of sanction. *In re Walsh (La. 10/28/16), 203 So.3d 223; In re Hartley (La. 4/2/04), 869 So.2d 799; In re Marullo (La. 4/8/97), 692 So.2d 1019; In re Loughlin, (La. 9/26/14), 148 So.3d 176; In re Dalton (La. 10/2/09), 18 So.3d 749; In re Cabibi (La. 2/22/06), 922 So. 490.*

In summary, the Committee concluded that a violation of Rule 1.9 was not proven, and that the technical violation of Rule 8.4 did not warrant any type of sanction. Accordingly, the Committee recommended that the charges be dismissed.

JOINT STIPULATIONS OF THE PARTIES

The parties entered into the following joint stipulations.

> The Office of Disciplinary Counsel and [R]espondent Kyle Schonekas jointly stipulate that, Rene Salomon, if called as a witness at the hearing in this matter, would testify as follows:
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> 1. Rene Salomon is a Louisiana lawyer who has worked as an Assistant United States Attorney for the Middle District of Louisiana since 1990.
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> 2. Mr. Salomon has served as a member of a hearing committee of the Louisiana Attorney Disciplinary Board.
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> 3. Mr. Salomon was the lead AUSA that handled the investigation of Raymond Reggie that led to Mr. Reggie's wire fraud indictment in 2013 and to Mr. Reggie's convictions in 2014 and 2019.

4. The Government indicted Mr. Reggie for various fraud-related offenses in a matter captioned *United States v. Raymond Reggie*, M.D.La. No. 13-111.

5. Had Mr. Reggie not pleaded guilty and gone to trial, Mr. Salomon or another Assistant United States Attorney would have cross-examined Mr. Reggie at trial. Mr. Schonekas could not and would not have cross-examined Mr. Reggie (or any other witness) at that trial.

6. Mr. Salomon knew that Billy Gibbens represented Mr. Reggie in the criminal investigation in 2012 and early 2013 prior to the Government's indictment of Mr. Reggie. Mr. Gibbens did not represent Mr. Reggie at or after Mr. Reggie's arraignment on the 2013 indictment.

7. The Government had no evidence that Mr. Reggie ever defrauded Mr. Duhon or his business entities. Thus, Mr. Duhon and his business entities were not victims of Mr. Reggie's fraud.

8. Mr. Duhon did not approach the Government to offer evidence against Mr. Reggie. Mr. Duhon's communications with the Government occurred only after the Government served a subpoena on Mr. Duhon in 2014 to produce documents and to appear at the October 2014 trial in the *Reggie* matter.[6]

9. The Government did not attempt to interview Mr. Duhon until approximately September of 2014. By this time the Government's case against Mr. Reggie had been investigated by the IRS and OUSA for many years and the evidence against Mr. Reggie was substantial.

10. Mr. Duhon and his business entities were never a target or subject of the criminal investigation involving Mr. Reggie.

11. Mr. Salomon spoke with Kyle Schonekas several times while Mr. Schonekas represented Mr. Duhon and his business entities. Mr. Salomon believes that he has a duty to raise any actual or potential conflicts of interest that he learns of as an AUSA. Mr. Salomon did not raise the issue of whether a potential conflict existed with Kyle Schonekas representing Mr. Duhon in the *Reggie* matter. Moreover, he never sought to disqualify Mr. Schonekas as Mr. Duhon's lawyer. Note, however, that Mr. Salomon, on behalf of the Government,

[6] The Board notes that the subpoena served on Mr. Duhon in 2014 was dated July 9, 2014.

sought to disqualify several other lawyers who had participated in the *Reggie* matter over the course of the prosecution of Mr. Reggie.

12. Mr. Salomon, at the time of his statement on March 31, 2021, was unaware of the relationship between Respondent and Mr. Gibbens. Mr. Salomon didn't know what their partnership, association, or relationship might be. Mr. Salomon thought Respondent and Mr. Gibbens shared office space together. Mr. Salomon did receive a letter from Mr. Gibbens on the Schonekas, Evans, McGoey & McEachin letterhead and emails from Mr. Gibbens with the firm name and address in his signature line.

13. Mr. Schonekas provided no direction or suggestions to Mr. Salomon about how to prosecute Mr. Reggie.

14. Witnesses in criminal matters do not typically hire counsel to represent them. Mr. Salomon interpreted Mr. Duhon's hiring of Mr. Schonekas as reluctance on behalf of Mr. Duhon to cooperate with the Government.

15. Mr. Salomon initially met with Mr. Schonekas and Mr. Duhon on September 22, 2014, in preparation for the trial in United States vs. RAYMOND REGGIE. Mr. Duhon produced certain documents during this meeting.

16. The documents that the Government subpoenaed from Mr. Duhon and his companies in August 2018 were returnable at a court hearing addressing whether Mr. Reggie was entitled to court-appointed counsel. This hearing had nothing to do with whether Mr. Reggie was guilty of defrauding Alan Krake, Mr. Krake's companies, or anyone else.

17. The documents that Mr. Duhon provided to the Government were not instrumental to the Government's wire fraud investigation, indictment or convictions.

18. The Government served subpoenas on others seeking similar financial information from Mr. Reggie's employers, friends, and family.

19. On or around August 24, 2012, Mr. Salomon received a copy of an email written by Mr. Reggie and sent to Troy Duhon with the subject line "Allen." Mr. Salomon did not receive this email from Mr. Duhon.

20. Mr. Duhon did not provide any documents to the Government that the Government referenced in the "Factual Basis" underlying Mr.

> Reggie's guilty pleas. Furthermore, Mr. Duhon and Premier were not mentioned in the "Factual Basis" or any other documents related to Mr. Reggie's guilty plea. Finally, Mr. Duhon and Premier were not mentioned at Mr. Reggie's sentencing proceedings or in any documents related to those proceedings. This reflects that Mr. Duhon's testimony was not a significant part of the Government's case against Mr. Reggie.
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> 21. Mr. Salomon believes that the Government, if forced to trial, would have established Mr. Reggie's guilt beyond a reasonable doubt without Mr. Duhon's testimony.

ODC-Schonekas Joint Stipulations filed January 13, 2022.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of Louisiana Supreme Court Rule XIX. Rule XIX, Section 2(G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges … and prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/92).

A. The Manifest Error Inquiry

The factual findings of the Committee are not manifestly erroneous, are supported by the record, and are adopted by the Board. Moreover, the joint factual stipulations of the parties are accepted by the Board. In disciplinary proceedings, the parties are free to enter into factual and

legal stipulations, and effect must be given to them unless they are withdrawn. *In re Torry*, 2010-0837, pp. 6-7 (La. 10/19/10), 48 So.3d 1038, 1041-42; *In re Bullock*, 2016-0075, p. 6 (La. 3/24/16), 187 So.3d 986, 990.

B. *De Novo* Review

The Committee correctly found that ODC failed to prove a violation of Rule 1.9 and that the violation of Rule 8.4 was only technical in nature. The Board adopts the Committee's determinations and reasons therefor as cited in its report.

1. The Alleged Rule 1.9(a) Violation

While the formal charges allege that Rule 1.9 has been violated in this matter, in its Prehearing Brief, ODC clarifies that it is alleging that only section (a) of Rule 1.9 is at issue. This section, which addresses a lawyer's duty to his or her former clients, provides, in pertinent part, as follows:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

As Respondent and Mr. Gibbens were, and are, members of the same law firm, any conflict that would attach to Mr. Gibbens under Rule 1.9 would generally be imputed to Respondent via Rule 1.10. Rule 1.10 provides, in pertinent part, as follows:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
>
> . . .
>
> (b) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

The parties do not dispute that: (1) Mr. Gibbens formerly represented the Complainant, Mr.

Reggie, in *United States v. Reggie*, Criminal No. 13-111, Middle District of Louisiana; (2) Respondent represented Mr. Duhon in connection with the same or a substantially related matter in which Mr. Gibbens represented Mr. Reggie*;* and (3) Mr. Reggie did not give his informed consent, confirmed in writing, to waive any disqualifications or conflicts in his criminal matter.[7] However, the parties disagree as to whether Mr. Duhon's interests were "materially adverse" to the interests of Mr. Reggie, the former client of the firm.

a. **The Evidence Upon Which ODC Relies to Support a Rule 1.9(a) Violation**

In supporting its argument that the two clients' interests were materially adverse, ODC relies primarily on the Government's Memorandum of Interview ("MOI"), dated October 5, 2014, which memorializes information from the September 22, 2014 meeting between Respondent, Mr. Duhon, Mr. Salomon, and IRS Agent Schneider.[8] In making its argument, ODC points to the

[7] The engagement letter dated September 12, 2012 sent to Mr. Reggie by Mr. Gibbens on behalf of Schonekas, Evans, McGoey & McEachin, LLC states, in pertinent part, as follows:

> We understand and agree that this is not an exclusive agreement, and you are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnish to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours, in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not, except where we would be disqualified as set forth above, prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.

ODC Exhibit 1, Attachment A, Bates 009.

The copy of the engagement letter which Mr. Reggie submitted with his complaint is signed by Mr. Gibbens, but not by Mr. Reggie. Further, Mr. Reggie states in his August 10, 2018 email to Respondent that:

> Our relationship in its entirety is directly protected under The Attorney Client Privilege – <u>of which I have not waived</u> . . . I did not authorize your recent communications with the Government; and I ask that you CEASE AND DESIST in any further unauthorized communications with the Government or it's [*sic*] agent or agency in regards to me, unless required by law. Should your communications be required by law, I ask that you inform me of the communications and advise under what law you are required or allowed to breach attorney-client privilege, again assuming the reports I received to be true."

ODC Exhibit 1, Attachment E, Bates 024.

[8] See attached Appendix II for a copy of this MOI (R Exhibit 8, Bates R064-68).

following paragraphs of the MOI, to show that Mr. Reggie's and Mr. Duhon's interests were materially adverse:

1. **Paragraph 12:** This paragraph states that Mr. Duhon and Mr. Reggie spoke during a phone conversation about Mr. Reggie's suspected fraud against Allen Krake and the Supreme Automotive Group ("SAG"). Mr. Duhon represented to the Government that Mr. Reggie did not deny committing the fraud against SAG and admitted that the allegations of fraud were true. According to Mr. Duhon, Mr. Reggie "admitted he took the money."
2. **Paragraph 13:** This paragraph states that Mr. Duhon was worried that Mr. Reggie may have defrauded Mr. Duhon's business, Premier Automotive ("Premier") as well.[9]
3. **Paragraph 14:** This paragraph states that Mr. Krake cut off all communication with Mr. Reggie after the fraud was revealed. Mr. Reggie asked Mr. Duhon to reach out to Mr. Krake on Mr. Reggie's behalf. Mr. Duhon believed that Mr. Reggie wanted to meet with Mr. Krake to try and shut down SAG's review and reach a settlement before more of the fraud was revealed. At that time, Mr. Duhon did not believe that Mr. Krake was aware of Mr. Reggie's fraud involving the Super Chevy Dealers of Baton Rouge ("SCDBR"), the local marketing association.
4. **Paragraph 15:** This paragraph states that Mr. Duhon reviewed an email (SAG 01717) which he received from Mr. Reggie. The email was dated August 14, 2012, with the subject name "Allen." Mr. Duhon forwarded the email to Mr. Krake. The email describes Mr. Reggie's desire to pay restitution for the fraud, as well as expresses his

[9]As noted in Paragraph 11 of the MOI, however, an internal audit conducted by Premier did not reveal any irregularities.

remorse for it. The email also shows that Mr. Reggie was concerned about the federal authorities becoming involved in an investigation into his activities related to SAG and SCDBR.

5. **Paragraph 24:** This paragraph states that Mr. Duhon would testify at the trial, "although it is a tough situation." The paragraph also states that Mr. Duhon is not worried that Mr. Reggie "has any dirt on him."[10]

R Exhibit 8, Bates R064, R066-68.

At his deposition, Mr. Reggie also asserted that various statements made by Mr. Duhon, which were recorded in the MOI, were false, and consequently, materially adverse, to his interests. Mr. Reggie also testified that the MOI was a leading factor in his 2014 guilty plea. R Exhibit 37, pp. 108-09, Bates R427-28. These statements are detailed in Appendix III to this recommendation.

b. The Evidence Upon Which Respondent Relies In Defending the Rule 1.9(a) Charge

Respondent also relies on the MOI, as well as the Joint Stipulation of Facts introduced by the parties and other evidence, in making its argument that Mr. Duhon's and Mr. Reggie's interests were not materially adverse. Respondent relies on the following portions of the MOI:

1. **Paragraph 3:** This paragraph states that Mr. Duhon first met Mr. Reggie in 1993 when both men were working at Bill Watson Nissan in New Orleans.
2. **Paragraph 6:** This paragraph states that Mr. Duhon's wife and Mr. Reggie's ex-wife were very close friends.
3. **Paragraph 7:** This paragraph states that after Mr. Reggie was released from prison for bank fraud, Mr. Duhon started using Mr. Reggie as a media consultant. Mr. Duhon

[10] ODC maintains that this later statement implies that any testimony Mr. Duhon was going to provide would be against-interest for Mr. Reggie, to a degree that potential retaliation by Mr. Reggie was a possibility.

believed that Mr. Reggie had paid his dues by serving his sentence and could use Mr. Duhon's help to get a second chance.

4. **Paragraph 11:** This paragraph states that, upon hearing from Mr. Krake, Mr. Duhon instructed his internet marking manager to review all transactions involving Mr. Reggie looking for any possible fraud. His manager's review did not reveal any issues.
5. **Paragraph 12:** This paragraph states that Mr. Reggie did not deny the fraud, and he directly acknowledged the fraud to Mr. Duhon. Mr. Reggie admitted he took the money.
6. **Paragraph 15:** This paragraph states that Mr. Reggie sent Mr. Duhon an email dated August 14, 2012 with the subject name "Allen." The email relates to fraud involving Mr. Krake's dealership, SAG.[11]
7. **Paragraph 16:** This paragraph states that Mr. Reggie asked Mr. Duhon to meet with Mr. Krake.
8. **Paragraph 18:** This paragraph states that Mr. Duhon "really question[ed]" if Mr. Reggie would steal from the local marketing association because that is a "big issue" because "you are messing with the manufacturer."
9. **Paragraph 20:** This paragraph states that Mr. Reggie was a "super dad" during the time period following his release from federal prison for bank fraud (his previous conviction).
10. **Paragraph 24:** This paragraph states that Mr. Duhon will testify, "although it is a tough situation."

[11] In his Board Brief, Respondent points out that the Government had this email in its possession prior to meeting with Mr. Duhon. *See* Exhibit R 03, at 39, Reggie Email to Duhon (dated April 14, 2012); Exhibit R 08, at para. 15, MOI (dated October 5, 2014); ODC-Schonekas Joint Stipulation No. 19.

R Exhibit 8, Bates R064-68.

Respondent also relies on the following joint stipulations, arguing that they support a finding that Mr. Reggie's and Mr. Duhon's interests were not materially adverse:

1. **Stipulation No. 5:** Had Mr. Reggie not pleaded guilty and gone to trial, Mr. Salomon or another Assistant United States Attorney would have cross-examined Mr. Reggie at trial. Mr. Schonekas could not and would not have cross-examined Mr. Reggie (or any other witness) at that trial.
2. **Stipulation No. 7:** The Government had no evidence that Mr. Reggie ever defrauded Mr. Duhon or his business entities. Thus, Mr. Duhon and his business entities were not victims of Mr. Reggie's fraud.
3. **Stipulation No. 8:** Mr. Duhon did not approach the Government to offer evidence against Mr. Reggie. Mr. Duhon's communications with the Government occurred only after the Government served a subpoena on Mr. Duhon in 2014 to produce documents and to appear at the October 2014 trial in the *Reggie* matter.
4. **Stipulation No. 9:** The Government did not attempt to interview Mr. Duhon until approximately September of 2014. By this time the Government's case against Mr. Reggie had been investigated by the IRS and OUSA for many years and the evidence against Mr. Reggie was substantial.
5. **Stipulation No. 10:** Mr. Duhon and his business entities were never a target or subject of the criminal investigation involving Mr. Reggie.
6. **Stipulation No. 11:** Mr. Salomon spoke with Kyle Schonekas several times while Mr. Schonekas represented Mr. Duhon and his business entities. Mr. Salomon believes that he has a duty to raise any actual or potential conflicts of interest that he learns of as an

AUSA. Mr. Salomon did not raise the issue of whether a potential conflict existed with Kyle Schonekas representing Mr. Duhon in the *Reggie* matter. Moreover, he never sought to disqualify Mr. Schonekas as Mr. Duhon's lawyer. Note, however, that Mr. Salomon, on behalf of the Government, sought to disqualify several other lawyers who had participated in the *Reggie* matter over the course of the prosecution of Mr. Reggie.

7. **Stipulation No. 12:** Mr. Salomon, at the time of his statement on March 31, 2021, was unaware of the relationship between Respondent and Mr. Gibbens. Mr. Salomon did not know what their partnership, association, or relationship might be. Mr. Salomon thought Respondent and Mr. Gibbens shared office space together. Mr. Salomon did receive a letter from Mr. Gibbens on the Schonekas, Evans, McGoey & McEachin letterhead and emails from Mr. Gibbens with the firm name and address in his signature line.
8. **Stipulation No. 17:** The documents that Mr. Duhon provided to the Government were not instrumental to the Government's wire fraud investigation, indictment, or convictions.
9. **Stipulation No. 19:** On or around August 24, 2012, Mr. Salomon received a copy of an email written by Mr. Reggie and sent to Troy Duhon with the subject line "Allen." Mr. Salomon did not receive this email from Mr. Duhon.
10. **Stipulation No. 20:** Mr. Duhon did not provide any documents to the Government that the Government referenced in the "Factual Basis" underlying Mr. Reggie's guilty pleas. Furthermore, Mr. Duhon and Premier were not mentioned in the "Factual Basis" or any other documents related to Mr. Reggie's guilty plea. Finally, Mr. Duhon and Premier were not mentioned at Mr. Reggie's sentencing proceedings or in any documents

related to those proceedings. This reflects that Mr. Duhon's testimony was not a significant part of the Government's case against Mr. Reggie.

11. **Stipulation No. 21:** Mr. Salomon believes that the Government, if forced to trial, would have established Mr. Reggie's guilt beyond a reasonable doubt without Mr. Duhon's testimony.

ODC-Schonekas Joint Stipulations filed January 13, 2022.

c. ODC Has Not Proven By Clear and Convincing Evidence that Mr. Duhon and Mr. Reggie were "Materially Adverse" in the *Reggie* Matter

As explained by the Committee, the term "materially adverse" is defined by the American Bar Association's Standing Committee on Ethics and Professional Responsibility, Formal Opinion 497, as follows:

> "Material adverseness" under [Model] Rule 1.9(a) and [Model] Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on behalf of a current client in the same or substantially related matter. It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client. "Material adverseness" may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices.

In discussing the scope of a matter for purposes of the Rule, the comments to ABA Model Rule 1.9 also state that "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Comments to ABA Model Rule 1.9, para. 2.

As pointed out by Respondent in his Board Brief, there are no reported Louisiana cases in which a lawyer was found to have a conflict for representing a witness who responded to subpoenas and provided truthful, nonconfidential information about the lawyer's (or his law firm's) former

client in the same or a substantially related matter. However, the recent federal case of *United States v. Ryan*, 597 F. Supp. 3d 931 (E.D. La. 2022), provides guidance as to what constitutes "material adversity" in a somewhat similar situation. In *Ryan*, the federal court examined the issue of whether a law firm should be disqualified from representing a defendant in a criminal matter involving charges of conspiracy to commit bank fraud, bank fraud, and false entries in bank records. The motion to disqualify filed by the Government was based upon the firm's prior representation of a cooperating witness who had pleaded guilty to conspiracy to commit bank fraud for his part in the scheme. In its opinion, the court applied Louisiana Rule of Professional Conduct 1.9(a), primarily focusing on whether the representation of the defendant and the cooperating witness involved a "substantially related matter" as required by Rule 1.9(a). However, the court's opinion is helpful in that it also describes why the cooperating witness' and the defendant's interests were "materially adverse." The court stated:

> At the outset, the Court notes that the parties do not dispute that Gibbs [the cooperating witness] was a former client of Jones Walker and that Gibbs's interests are materially adverse to those of Calloway [the defendant]. Gibbs has pleaded guilty to conspiracy to commit bank fraud and is awaiting sentencing. He is cooperating with the Government and is expected to be one of its star witnesses, offering testimony that will inculpate Calloway, among others. In return, for his cooperation, it can be assumed that Gibbs hopes that the Government will assist him in obtaining a favorable sentence by filing a motion pursuant to U.S.S.G. Section 5k1.1. with the sentencing judge. Meanwhile, Calloway will likely make attacks on Gibbs's character and credibility a centerpiece of his defense. Clearly, the interests of the former client -- Gibbs -- and the current client -- Calloway -- are diametrically opposed. *See* La. R. Prof. Conduct 1.9(a).
>
> Furthermore, it is important to note that Gibbs has not provided written consent to Jones Walker's representation of Calloway. Thus, Rule 1.9's provision exempting attorneys from disqualification in the event of successive conflicts when the former client gives written consent to the present representation is inapplicable. Because there is no exemption from Rule 1.9, the Court proceeds to apply the Rule's substantial relationship standard.

Id. at 948.

After considering the Rule's substantial relationship standard, the court granted the Government's motion to disqualify Jones Walker from representing the defendant. *Id.* at 958.

Unlike the cooperating witness in *Ryan*, Mr. Duhon was not a target of the federal investigation and did not plead guilty to any charge in connection with the *Reggie* matter. His cooperation with the Government was not based on a hope that the Government would assist him in obtaining a favorable sentence. He cooperated with the Government after initially being served with the July 9, 2014 subpoena; he met with the Government to answer questions pertaining to at least one document already in the Government's possession (the August 14, 2012 email) and his personal and business relationships with Mr. Reggie. It was unlikely that Mr. Duhon would have been called as a witness at the trial.[12] Even if Mr. Duhon was called as a witness, Respondent would not have cross-examined Mr. Reggie concerning any information pertaining to Mr. Duhon; Mr. Salomon or another Assistant United States Attorney would have done so. Under the court's analysis in *Ryan*, Mr. Duhon's interests cannot be categorized as "materially adverse" to those of Mr. Reggie and do not trigger a violation of Rule 1.9(a).[13]

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[12] Respondent credibly testified at the hearing in response to questioning by Mr. Pendley:

> Q. Mr. Duhon's role in this of authenticating the emails where Mr. Raymond Reggie makes statements against interest, how does that make Mr. Duhon not adverse to Mr. Reggie?
>
> A. He's not materially adverse because he is -- he is simply confirming that he received the email from Mr. Reggie, and he in turn, forwarded that on to Mr. Krake. And in fact, the prosecutor acknowledged to me, I can get Krake to acknowledge or authenticate this email. I don't even need your guy. And I was pleased. I -- I was hoping that was going to be the case.
>
> Q. So if Mr. Duhon authenticates these emails, doesn't that help the government?
>
> A. It provides perhaps a -- a link, but they had other people that -- that already did that. In fact, you know, Krake, he told me that even. Salomon said, I can get Krake to do this.

Hr. Tr., pp. 54-55.

Further, as explained above, the stipulations indicate that Mr. Salomon believed that the Government would have proven Mr. Reggie's guilt without the testimony of Mr. Duhon.

[13] In arguing that Mr. Duhon's and Mr. Reggie's interests were not materially adverse because Respondent was never in a position to cross-examine Mr. Reggie at trial, Respondent relies on *State v. Reeves*, 2006-2419, p. 78-80 (La.

Overall, Respondent's conduct cannot be described as negotiating or litigating against the firm's former client, Mr. Reggie, or as attacking the work done for Mr. Reggie by Mr. Gibbens. Although the MOI describes Mr. Duhon's communications to the Government concerning Mr. Reggie's admissions of fraudulent conduct, this was truthful information, which Mr. Reggie later admitted in open court at his re-arraignments. *See* Exhibit R14, Bates R094, R096, Reggie Re-Arraignment (dated October 27, 2014); Exhibit R32, Bates R251-53, Court Minutes from Reggie Re-Arraignment (dated April 23, 2019); Exhibit R6, Bates R054-60, Superseding Indictment for Wire Fraud and Forfeiture Allegation (filed February 20, 2014). He also admitted to the fraudulent conduct in his plea agreement dated April 18, 2019 and other documents submitted throughout his criminal proceedings. *See* Exhibit R31, Bates R232-50, April 18, 2019 Plea Agreement (filed on April 23, 2019); Exhibit R12, Bates R083-86, Streamlined Factual Summary For Rule 11 Guilty Pleas (filed October 27, 2014); Factual Basis (filed October 27, 2014). Further, the August 14, 2012 email sent from Mr. Reggie to Mr. Duhon, and later forwarded to Mr. Krake, was in the Government's possession prior the September 22, 2014 interview of Mr. Duhon, and had been provided by another individual/entity to the Government. While Mr. Duhon authenticated the email, the information found in the email was clear and did not require Mr. Duhon's interpretation for the Government. In the email, Mr. Reggie expresses remorse "for what [he] did," begs Mr. Krake "not to fry [him]," and offers to make restitution to Mr. Krake. Exhibit R6, Bates R038-40, SAG 01717, August 14, 2012 Email from Mr. Reggie to Troy Duhon, forwarded to Allen Krake and others.

5/5/09), 11 So.3d 1031, 1082-83 (Court found that there was no actual conflict of interest as the defense attorney was not called upon to cross-examine any of his former or current clients in the state's prosecution of a first-degree murder trial) and *State v. Tart*, 93-KA-0772, p. 20-21 (La. 2/9/96), 672 So.2d 116, 125-26, *reh'g denied*, (La. 5/10/96) (Court found that because a defense attorney did not cross-examine or try to impeach his former client, no actual conflict arose; former client was cross-examined by separate co-counsel). These cases, along with *Tinsley* and *Cisco*, cited by the Committee in its report, further support Respondent's argument that Mr. Duhon's and Mr. Reggie's interests were not materially adverse.

Further, Respondent credibly testified that when contacted by Mr. Duhon after he received the July 9, 2014 subpoena from the Government, Mr. Duhon made it very clear to Respondent that his objective was two-fold. One, not to hurt his friend, Mr. Reggie, and second, to, at all costs, keep himself off of the witness stand. Hr. Tr., p. 28. Respondent also testified that the Government was "frustrated with Mr. Duhon because he was not -- he was making statements [at the September 22, 2014 Interview] that were helpful to Mr. Reggie, which they didn't like, but were factual." *Id.* at pp. 36-37. In summary, Respondent's representation of Mr. Duhon cannot be justly regarded as "a changing of sides" in the *Reggie* matter. ODC has failed to prove by clear and convincing evidence that Mr. Duhon's interests were materially adverse to those of Mr. Reggie. Consequently, a violation of Rule 1.9(a) has not been established by ODC.

2. The Alleged Violations of Rules 8.4(a) and (c)

Rule 8.4 provides, in pertinent part, that 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;
>
> . . .
>
> (b) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In Mr. Reggie's August 10, 2018 email to Respondent, he alleges that Respondent has a conflict of interest.[14] Respondent replied to Mr. Reggie's email on August 14, 2018.[15] ODC alleges that

[14] See footnote 7, *supra.*

[15] Respondent's letter of response, sent via email, states, in pertinent part, as follows:

> Dear Ray,
>
> This is in response to your e-mail to me of Friday, August 10, 2018. My representation of a client is unrelated to Billy Gibbens [*sic*] prior representation of you. Documents were produced pursuant to a subpoena directed to the client and in no way relates to the firm's prior representation of you.
>
> Sincerely,
>
> Kyle Schonekas

ODC Exhibit 1, Attachment F, Bates 026.

Respondent's assertion in his August 14, 2018 letter -- that his representation of Mr. Duhon was "unrelated" to the legal matter in which Mr. Gibbens had represented Mr. Reggie -- was false and violated Rules 8.4(a) and (c). Respondent has conceded that his response was inaccurate, and that he should have instead indicated to Mr. Reggie that the two matters were not "materially adverse." Hr. Tr., pp. 40-43. He testified that his actions were negligent and that he did not intend to deceive Mr. Reggie. *Id.* at 40-41, 73, 120-21. He also explained that when he wrote his reply, he was focusing on the Government's August 2018 subpoenas, which concerned Mr. Reggie's finances, Mr. Reggie's ability to pay his lawyers, and documents requested by the Government from January 1, 2016 to the time of the subpoenas. *Id.* at 69-73. These subpoenaed documents pertained to whether Mr. Reggie was entitled to court-appointed counsel and had nothing to do with whether he was guilty of defrauding Mr. Krake, Mr. Krake's companies, or anyone else. *See* ODC-Schonekas Joint Stipulation Nos. 16 and 17. The issues related to Mr. Reggie's ability to pay his lawyers differed from the issues surrounding Mr. Reggie's fraud charges which encompassed the years of 2008-2012 and which were the focus of Mr. Gibben's representation of Mr. Reggie. Hr. Tr., p. 43. Respondent also responded in haste as Mr. Reggie had badgered Respondent's secretary for a reply. *Id.* at 50. The Committee found that Respondent's error was "a minor, technical violation [of Rules 8.4(a) and (c)], made through negligence, or perhaps in frustration to the 'badgering' actions of Mr. Reggie." Hrg. Comm. Rpt., p. 5. The Committee also found that this conduct caused no harm to Mr. Reggie. In his Board Brief, Respondent does not dispute that his actions constitute a "negligent, technical violation of Rule 8.4" or a "negligent violation." Respondent's Board Brief, p. 26.

a. Review of Respondent's "Undisputed" Violation of Rule 8.4(c)

The Board must first analyze whether Respondent's actions actually were violative of Rule 8.4(c). While the Board realizes that Respondent does not dispute the Committee's finding that his conduct was a "negligent, technical violation of Rule 8.4" or a "negligent violation," the Board finds it necessary to determine whether, in fact, a Rule 8.4(c) violation, and its derivative 8.4(a) violation, are present. As illustrated in *In re Fontenot*, 2017-1661 (La. 11/28/17), 230 So.3d 185, even though a party does not dispute an alleged rule violation, the issue of whether the rule has been violated still may warrant evaluation. In *Fontenot*, the respondent was charged with violations of Rules 1.3, 1.4, 1.5(c), 1.15(f), 8.4(a), 8.4(b), and 8.4(c). In his answer, he admitted to all rule violations, except for violations of Rules 8.4(a), 8.4(b), and 8.4(c). Later, in his pre-hearing memorandum, his position changed somewhat, and he "did not dispute" that he had violated Rules 8.4(a) and 8.4(c). 2017-1661, p. 4, n. 4, 230 So.3d at 187, n. 4. Despite his concessions, the hearing committee still analyzed whether all admitted or undisputed rule violations, including violations of Rules 8.4(a) and 8.4(c), had been proven by ODC. The Board and Court reviewed these findings. *Id.*, 2017-1661, p. 9, 12, 230 So.3d at 190, 192.

Here, in his answer, Respondent denies that he violated Rules 8.4(a) and 8.4(c). However, in his Board brief, he states that "the hearing committee correctly found that the negligent, technical violation of Rule 8.4 did not warrant any type of sanction." He later refers to his conduct as a "negligent violation." Respondent's Board Brief, p. 26. Taking guidance from *Fontenot*, the Board determines that the issue of whether Rules 8.4(a) and 8.4(c) have been violated warrants further evaluation, particularly because the standard or mental state required to violate Rule 8.4(c), if any, has not been thoroughly addressed by the parties or the Committee.

Moreover, the Board must question whether Respondent's admission that his conduct was a "negligent, technical violation of Rule 8.4" or a "negligent violation" constitutes a judicial confession pursuant to La. Civ. Code art. 1853. This article provides:

> A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.
>
> A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

The case of *Webb v. Webb*, 2018-0320 (La. 12/05/18), 263 So.3d 321, *reh'g denied*, (La. 1/30/19) offers some guidance as to this issue. In *Webb*, Daniel Webb sought to classify a loan secured by a mortgage on the family home as a community obligation in a community property partition proceeding. Mr. Webb, a licensed Louisiana attorney, had taken out the loan during his marriage to Elizabeth Webb. He previously admitted, however, that he caused a forged signature of Mrs. Webb to be placed on the loan documents and that he concealed the existence of the loan and the mortgage on the family home from Mrs. Webb. As a result of the forgery, formal attorney disciplinary charges had been brought against him, and he admitted his misconduct to the Louisiana Supreme Court. He also represented to the Court in his disciplinary matter that he was taking "sole financial responsibility" and "full responsibility" for the loan. *Id*., 2018-0320, pp. 1-2, 263 So.3d at 323.

Notably in *Webb*, the district court ruled that Mr. Webb's representations to the Court in his attorney disciplinary matter amounted to a judicial confession that he alone was responsible for the debt. Mr. Webb appealed, and the appellate court ruled in his favor by classifying the loan as a community obligation and ordering Mrs. Webb to personally reimburse Mr. Webb for loan payments he made after the community property regime was terminated. In reviewing the matter, the appellate court relied on case law addressing extrajudicial confessions or omissions and judicial

estoppel, but failed to specifically focus on the whether the principle of judicial estoppel was applicable and examine more recent and authoritative pronouncements on the issue. *Id.*, 2018-0320, p. 2, 8-9, 263 So.3d at 323-24, 327-28.

Without discussing whether La. Civ. Code art. 1853 applied in disciplinary matters, the Court noted that the district court did not identify the legal construct best suited for the proper analysis in the case. The Court found the same as to the court of appeals' assessment of the case. The Court held that the doctrine of judicial estoppel prevented Mr.Webb from arguing that the fraudulent loan should be characterized as a community obligation in the partition proceeding, due to Mr. Webb's representations to the Court in his disciplinary proceeding that he took "sole financial responsibility" and "full responsibility" for his fraudulent loan. The trial court's ruling, which denied Mr. Webb's reimbursement claims for the fraudulent loan and found that loan to be Mr. Webb's separate obligation, was reinstated by the Court. *Id.*, 2018-0320, p. 19, 263 So.3d at 333.

Justice Crichton concurred in the result, but disagreed with the Court's expansion of the common law doctrine of judicial estoppel in Louisiana. Moreover, the majority opinion had previously explained that a party who has made an extra-judicial confession in a previous suit is not barred from denying the facts contained in that admission in a subsequent suit, unless the adverse party has been prejudiced by his reliance upon that admission. Justice Crichton stated that he would adopt an additional exception to a litigant's allowance to change his stance from prior extra-judicial confessions: that attorney-litigants be barred from denying the facts contained in an admission made in attorney disciplinary matters before the Court in a subsequent suit. *Id.*, 2018-0320, 263 So.3d at 335.

Justice Genovese, in his concurrence in part and dissent in part, stated that he found the Court's opinion relying on the common law doctrine of judicial estoppel to be misplaced. As to the district court's characterization of the relevant statements made by Mr. Webb during the disciplinary proceedings as a "judicial confession," he stated as follows:

> . . . "[T]he district court characterized the relevant statements made by the husband during the disciplinary proceedings as a "judicial confession." I find the district court to be in error in this regard. A judicial confession is a declaration made by a party in a judicial proceeding . . ." La. Civ. Code art. 1853. The jurisprudence has strictly and narrowly construed La. Civ. Code art. 1853. Disciplinary proceedings are "neither civil nor criminal but are "*sui generis*." Louisiana Supreme Court Rule XIX, Section 18(A); *In re Raspani*, 08-0954, p. 8 (La. 3/17/09), 8 So.3d 526, 532, *cert. denied*, 558 U.S. 991, 130 S.Ct. 495, 175 L.Ed.2d 347 (2009). Thus, a disciplinary proceeding cannot be deemed a judicial proceeding, and the husband's statements in said disciplinary proceeding cannot be deemed a judicial confession, thereby making La. Civ. Code art. 1853 inapplicable to the facts in this case. Consequently, the district court erred in relying on La. Civ. Code art. 1853 and in finding the husband's statements in the disciplinary proceeding to be a judicial confession.

Id., 2018-0320, 263 So.3d at 336.

Justice Genovese concurred in the majority opinion's reversal of the court of appeal, but dissented to its doing so on the grounds of judicial estoppel. He found it necessary to vacate the judgments of the lower courts and remand the case to the district court for a new hearing on the characterization of the loan with the application of the correct legal standard applicable to extra-judicial confessions. *Id*., 2018-0320, 263 So.3d at 337.

Without a clear pronouncement from the Court as to whether La. Civ. Code art. 1853 applies in disciplinary matters, and given the dissent of Justice Genovese, the Board declines to find that Respondent's admission that his conduct was a "negligent, technical violation of Rule 8.4" or a "negligent violation" constitutes a judicial confession pursuant to La. Civ. Code art. 1853.

b. Analyzing an Alleged Rule 8.4(c) Violation

As explained above, Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or

misrepresentation." However, unlike other sections of Rule 8.4, the language of the rule gives no guidance as to what standard or mental state should be used in analyzing whether a respondent's conduct violates the rule.[16] Additionally, case law from various states shows that Rule 8.4(c) has been subject to varying and inconsistent interpretations. As to false statements, many courts hold that such a statement violates Rule 8.4(c) only when knowingly or deliberately made, while others find a reckless disregard for the truth or falsity of a statement sufficient.[17] Other jurisdictions find gross negligence or negligence sufficient to impose discipline under Rule 8.4(c).[18] Moreover,

[16] *See generally* Rule 8.4(a) ("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"); Rule 8.4(f) ("It is professional misconduct for a lawyer to: (f) *Knowingly* assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law").

[17] Raymond J. McKoski, *Counsel's Duty of Candor to a Client: It's Time for Model Rule*, 22 No.3 Prof. Law. 37, p. 41, nn. 64-65 (2014), *citing In re Skagen*, 149 P.3d 1171, 1184 (Ore. 2006) (requiring that a misrepresentation or dishonest act be committed knowingly); *Fla. Bar v. Mogil*, 763 So.2d 303, 309-10 (Fla. 2000) ("[T]his Court has held that [i]n order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent," and that "in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing.") (quoting *Fla. Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla. 1999)); *In re Ukwu*, 926 A.2d 1106, 1113-14 (D.C. 2007) ("[E]ven if Respondent's conduct was in reckless disregard of the truth rather than specifically intended to deceive . . . he would have violated Rule 8.4(c)."); *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812, 818 (Iowa 2007) (finding that reckless disregard for the truth warranted discipline under Iowa DR 1-102(A)(4)); *Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441, 445 (Pa. 2000)(applying Rule 8.4(c) "to misstatements made with reckless disregard for the truth or falsity thereof"). *See also Office of Disciplinary Counsel v. Anonymous Attorney A*, 714 A.2d 402, 407 (1998) (a *prima facie* violation of Rule 8.4(c), based upon misrepresentation, is shown where the record establishes that the misrepresentation was knowingly made, or made with reckless ignorance of the truth or falsity of the representation; a culpable mental state greater than negligence is necessary to establish the violation).

The Board notes that more recent cases from these jurisdictions reveal that their standards have remained in tact. *See In re Klemp*, 418 P.3d 733, 754-55 (Ore. 2018) (in order to violate Oregon's Rule of Professional Conduct involving dishonesty, deceit, or misrepresentation, the respondent must have acted with a mental state of knowledge or intent); *Fla. Bar v. Arugu*, 350 So.3d 1229,1234 (Fla. 2022) (the intent element for a finding that a lawyer acted with dishonesty, misrepresentation, deceit, or fraud can be satisfied merely by showing that the conduct was deliberate or knowing); *In re Krame*, 284 A.3d 745, 762-63 (D.C. 2022) (the Court found that the respondent's alteration of his time entries was reckless, in violation of Rule 8.4(c); intentional conduct was not required to find a violation of the rule); *Iowa Supreme Court Attorney Disciplinary Board. v. Heggen*, 981 N.W.2d 701, 708 (Iowa 2022) (an attorney must act with some level of scienter greater than negligence to violate [Iowa's version of Rule 8.4(c)]; an attorney's "casual, reckless, disregard for the truth" also establishes sufficient scienter to support a violation of the rule); *In re Malofiy*, 653 Fed.Appx. 148, 153-54 (3d Cir. 2016) (in a federal court disciplinary proceeding, the district court's conclusion that the attorney knowingly made a false statement of material fact was sufficient to demonstrate a violation of Pennsylvania Rule of Professional Conduct 8.4(c)).

[18] *Id.* at p. 41, nn. 66-67, *citing Walker v. Supreme Court Comm. on Prof'l Conduct,* 246 S.W.3d 418, 424 (Ark. 2007) (finding gross negligence sufficient to violate Rule 8.4(c)); *In re Doughty*, 832 A.2d 724, 735 (Del. 2013) ("[W]e hold that a negligent misrepresentation also may form the basis for a charge of misconduct under the literal terms of DLRPC Rule 8.4(c)."). *But see In re Beauregard*, 189 A.3d 1236, 1241, 1247 (Del. 2018) (the specific conduct referred to in

some courts and ethics advisory committees severely limit the scope of Rule 8.4(c) to encompass only conduct "so egregious that it indicates that the lawyer charged lacks the moral character to practice law."[19] *Id.* at p. 41.

The Board's research reveals that the Louisiana Supreme Court has not directly addressed the issue of the appropriate standard to apply in analyzing Rule 8.4(c) violations. At first glance, cases such as *In re Smith*, 2004-1918 (La. 11/15/04), 887 So.2d 449, *In re Bruzik*, 2022-01576 (La. 2/7/23), 354 So.3d 645, and *Fontentot*, 2017-1661, 230 So.3d 1185 tend to indicate that the Court has taken a "strict liability" approach in determining whether a Rule 8.4(c) violation is proven -- meaning the rule has been violated regardless of the respondent's mental state. The respondent's state of mind is relevant only to the sanction imposed, not whether the rule violation has occurred. However, in contrast, in the cases of *In re Marinoff*, 2001-2584 (La. 6/7/02), 819 So.2d 305 and *In re Schoenberger*, 2021-0191 (La. 6/30/21), 320 So.3d 1125, the Court specifically addresses the respondent's mental state in finding a violation of Rule 8.4(c). In these two cases, the Court appears to have relied on a standard involving deliberate or intentional conduct in order to establish a violation of the rule.

i. The "Strict Liability" Approach

In *In re Smith*, 2004-1918 (La. 11/15/04), 887 So.2d 449, ODC brought formal charges against the respondent alleging violations of Rules of Professional Conduct 1.2(a)(b) (scope of representation); 1.3 (failure to act with reasonable diligence and promptness in representing a

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Rule 8.4(c) implies a state of mind requirement; in other words, a lawyer knows that his or her conduct is something other than truthful, accurate, or forthright, but engages in the conduct anyway).

[19] *Id*. at p. 41, n. 72, *citing In re PRB Docket No. 2007-046*, 989 A.2d 523, 528 (Vt. 2009); Utah State Bar Ethics Advisory Committee. Op. 02-05 (2002) ("In our view, Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law."). *See also In re Wysolmerski*, 237 A.3d 706, 714 (Vt. 2020) (citing *PRB Docket No. 2007-046's* holding that Rule 8.4 applies only to conduct "so egregious that it indicates that the lawyer charged lacks the moral character to practice law;" and stating that "[b]ecause an attorney's mental state determines how his conduct reflects on his moral character, . . some scienter is required to support a violation of Rule 8.4(c).").

client); 1.5 (fee arrangements); 1.15(a) (safekeeping property of clients or third persons); 8.4(a) (violation of the Rules of Professional Conduct); 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(g) (failure to cooperate with ODC). The charges were related to the respondent's representation of a client in a breach of contract matter. *Id.*, 2004-1918, pp. 1, 3, 887 So.2d at 451-52. The Court determined that the respondent violated Rules 1.2(a)(b), 1.5(b), 8.4(a), 8.4(c), and 8.4(g). The respondent was found to have limited the scope of his representation without his client's understanding or consent by not listing himself as the attorney of record in the lawsuit, and he did not adequately explain the fee arrangement to his client. The Court also found that the record supported a finding that the respondent did not adequately explain his status reports to his client, leading to what his client initially considered to be dishonesty and misrepresentation. The respondent also failed to cooperate with the ODC by not responding to the ODC's certified letter and subpoena sent to or served upon him. *Id.*, 2004-1918, pp. 8-9, 887 So.2d at 455. When analyzing whether a violation of Rule 8.4(c) was proven, the Court did not apply a specific standard or pronounce a mental state required to find a violation. Later, however, in its sanction analysis, it determined that Respondent's conduct, as a whole, was negligent. The Court imposed one-year suspension, fully deferred, subject to one year of supervised probation with conditions, upon the respondent. *Id.*, 2004-1918, pp. 8-10, 887 So.2d at 455-56.

In *Bruzik*, ODC brought formal charges against the respondent, alleging violations of Rules of Professional Conduct 1.5 (fee arrangements); 1.5(f)(3) (when the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account); 1.8(e) (conflict of interest); 1.15(a) (safekeeping property of clients or third persons); 8.4(a) (violation of the Rules of Professional Conduct); and 8.4(c) (engaging in conduct involving dishonesty, fraud,

deceit, or misrepresentation). The charges were related to the respondent's fee agreements with his clients. *Id.*, 2022-01576, pp. 1, 4-5, 354 So.3d at 647, 649. The Court found that the respondent violated Rules 1.5(a), 1.5(e)(1), 1.5(e)(3), 1.5(f)(3), 1.8(e)(3), 1.15(a), 8.4(a), and 8.4(c). The Court determined that the respondent structured his written fee agreement as an hourly-fee arrangement and then routinely treated it as a flat-fee arrangement, included provisions in the fee agreement charging unreasonable and improper fees, included provisions in the fee agreement making the advanced fee non-refundable, failed to deposit clients' advanced funds into a trust account, and failed to refund unearned fees totaling $3,524.50 to four clients. *Id.*, 2022-01576, pp. 11-13, 354 So.3d at 653-54. As in *Smith*, the Court did not did not apply a specific standard or pronounce a mental state required to find a violation of Rule 8.4(c). Instead, it found in connection with its sanction analysis that the respondent's conduct was knowing. *Id.*, 2022-01576, p. 14, 354 So.3d at 654. The Court suspended the respondent from the practice of law for one year and one day, fully deferred, subject to a two-year period of probation with conditions. *Id.*, 2022-01576, p. 15, 354 So.3d at 655.

In *Fontentot*, 2017-1661, 230 So.3d 1185, ODC brought formal charges against the respondent, alleging that he violated Rules of Professional Conduct 1.3 (failure to act with reasonable diligence and promptness in representing a client); 1.4 (failure to communicate with a client); 1.5(c) (a contingent fee agreement shall be in writing); 1.15(f) (cash withdrawals and checks made payable to "cash" are prohibited on client trust accounts); 8.4(a) (violation of the Rules of Professional Conduct); 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). *Id.*, 2017-1661, p. 3, 230 So.3d at 187. The respondent represented two clients, a husband and wife, in a personal injury matter. The Court

found that he settled their case without their consent, forged their signatures on the settlement documents, misled them as to the status of the case, and failed to disburse the settlement proceeds for five years. He also failed to reduce the contingent fee agreement with his clients to writing and made case withdrawals from this client trust account. The Court determined that the respondent's conduct constituted a violation of the Rules of Professional Conduct as charged in the formal charges. *Id.*, 2017-1661, p. 12, 230 So.3d at 192. Again, the Court did not did not apply a specific standard or pronounce a mental state required to find a violation of Rule 8.4(c). Instead, it found in connection with its sanction analysis that the respondent's conduct in handling his clients' personal injury case was intentional. The misconduct relating to the contingent fee agreement and the cash withdrawals from the trust account was found to be knowing, if not intentional. The Court disbarred the respondent. *Id.*, 2017-1661, p. 13, 230 So.3d at 192.

ii. Requiring the Mental State of Intent in finding a Rule 8.4(c) Violation

In *In re Marinoff*, the Court addressed, among other charged rule violations, an alleged violation of Rule 8.4(c). In that matter, the respondent, an assistant city/parish attorney in Baton Rouge, went to a bar in Baton Rouge with his secretary. The respondent and his secretary consumed a significant amount of alcohol over the course of the evening, and both were intoxicated when they departed the bar together in the respondent's vehicle. Traveling down River Road in East Baton Rouge Parish at a high rate of speed, the respondent lost control of the vehicle and struck a ditch, causing the car to roll over several times before it came to rest upside-down on the levee, several hundred feet from the point where it first left the road. The respondent received relatively minor injuries in the accident; his secretary was ejected from the car and thrown some distance away. *Id.*, 2001-2584, pp. 1-2, 819 So.2d at 307.

A short time later, two individuals were driving down River Road past the scene of the

accident when they heard someone yelling for help. They stopped and found the respondent standing away from his vehicle, complaining that he had wrecked his car. The respondent also said that everyone in the car was dead and that he had killed everyone in the car. The individuals went immediately to the nearest house and called 911. When they returned, the respondent was standing near the road. He asked them several times to take him away from the scene, indicating that he did not want any attention drawn to himself because he had "already been in trouble once before." Apparently, he was referring to an earlier arrest in 1984 for driving while intoxicated. Contrary to his earlier statements that everyone in the car was dead, the respondent now claimed that there was no one else in the car and that no one was dead. He demanded repeatedly that the individuals not call for help because he did not need any help. When told that an ambulance was already on its way, respondent cursed the individuals, telling them to take him away from the scene and that there was no one in the car. However, one of the individuals spotted a child's car seat near the wreckage and decided to look around to make sure that no one else had been injured in in the accident. She then stumbled over the respondent's secretary, who was sprawled on the ground near a fence, severely injured. *Id.*, 2001-2584, p. 2, 819 So.2d at 307.

A Louisiana State Trooper arrived at the accident scene after everyone had left. He found the respondent's car upside-down on the levee, took some photographs, and called for a tow truck. After learning that the car belonged to the respondent, whom he knew well, the Trooper went to the hospital where the respondent and his secretary were being treated. At the hospital, the respondent claimed to have no recollection of the accident. He repeatedly denied that he was driving the car when the accident occurred; instead, he insisted that he had been asleep and that a man named "Jason" was driving. Knowing there was no other male passenger in the car, the Trooper told the respondent to "get off of the Jason story." Respondent made no further reference

to "Jason" but continued to maintain that he (the respondent) was not the driver. Nevertheless, following an investigation by the district attorney's office, the respondent was indicted by a grand jury on a misdemeanor charge of negligent injuring, a violation of La.R.S. 14:39. The State subsequently filed a bill of particulars alleging that the respondent was driving the car at the time of the accident. *Id*., 2001-2584, pp. 2-3, 819 So.2d at 307-08.

The criminal case proceeded to trial in July 1997. The respondent did not testify during the two-day bench trial. After considering the evidence presented, the district court concluded that sufficient evidence existed to find beyond a reasonable doubt that the respondent was driving the car at the time of the accident and that the accident resulted from criminal negligence which caused grave injuries to the respondent's secretary. The district court also concluded that the respondent made a conscious effort to conceal his involvement in the accident, pointing out that it was clear from the respondent's actions at the scene and at the hospital that he not only remembered the accident, but that he was conscious enough of his own actions to make deliberate efforts to conceal his culpability in the matter.[20] The district court found the respondent guilty of negligent injuring and sentenced him to six months imprisonment with all but fifteen days suspended, which were ordered to be served on alternating weekends. The respondent sought review of his conviction and sentence by application for supervisory writs, which were denied by the Court of Appeal and the Louisiana Supreme Court. *Id*., 2001-2584, pp. 3-4, 819 So.2d at 308.

ODC subsequently filed formal charges against the respondent, alleging violations of Rules of Professional Conduct 8.4(a) (violation of the Rules of Professional Conduct); 8.4(b)

[20] The Louisiana Supreme Court later found that, based upon La. R.S. 14:39 and La.R.S. 14:12, an intent to deceive persons in order to shield the offender from culpability following an accident is not an essential element of the crime of negligent injuring. Accordingly, the district court's factual finding that the respondent intended to deceive others to shield himself from culpability was not essential to the conviction. The respondent, therefore, was not precluded from offering evidence on this issue in a subsequent bar disciplinary proceeding.

(commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 8.4(d) (engaging in conduct prejudicial to the administration of justice). The respondent answered the formal charges, denying that his misdemeanor conviction reflected adversely on his fitness as a lawyer. *Id*., 2001-2584, p. 4, 819 So.2d at 308-09.

The hearing committee recommended that the charges brought against the respondent be dismissed, and the Disciplinary Board agreed. In particular, the Board noted that *in the absence of a finding of intentional, deliberate or calculated behavior on the respondent's part*, there was no conduct that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer [for purposes of Rule 8.4(b)], *nor conduct that was dishonest, deceitful* [for purposes of Rule 8.4(c)], or prejudicial to the administration of justice [for purposes of Rule 8.4(d)]. *Id*., 2001-2584, pp. 5-7, 819 So.2d at 309-10.

In reviewing the matter, the Court found that while the respondent's post-accident conduct was not an essential element of the crime of negligent injuring, it was highly relevant to the question of whether he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation for purposes of Rule 8.4(c). The Court determined that ODC proved by clear and convincing evidence that the respondent made the post-accident statements. The Court also found that taken objectively, the content of the statements *evidenced an intent to deceive or misrepresent the facts*, as the thrust of the statements was that the respondent was the sole occupant of the vehicle, a fact which was unquestionably false. The Court then concluded that ODC satisfied its burden of proving by clear and convincing evidence that the respondent made statements which violated Rule 8.4(c). The Court also noted that at this point, the burden shifted to the respondent to prove his lack of culpability for the statements. The respondent had argued in defense that he

suffered a head injury in the accident, and as a result, he should not be held legally responsible for what he said after the accident. The Court found that on the evidence presented, it could not say that the respondent proved that his head injury was sufficient to deprive him of culpability for his statements. *Id*., 2001-2584, pp. 9-10, 819 So.2d at 311-12.

The Court concluded that the respondent engaged in fraud, deceit, or misrepresentation which had the potential for causing injury, and that the baseline sanction was suspension.[21] Aggravating factors found by the Court included prior disciplinary record, vulnerability of the victim, and the respondent's substantial experience in the practice of law. In mitigation, the Court found full and free disclosure the disciplinary board, good character and reputation, and the imposition of other penalties resulting from his criminal conviction. The Court imposed a six-month suspension from the practice of law upon the respondent. *Id*., 2001-2584, pp. 11-12, 819 So.2d at 313.

Likewise, in *In re Schoenberger*, the Court appears to use an intentional standard in finding a violation of Rule 8.4(c). In this case, an ODC audit of the respondent's trust account identified a total of $59,423.12 in net client proceeds, third-party liabilities, and IOLTA interest as collected but not paid. The respondent's trust account balance was $143.69, which was $59,279.43 short of the outstanding client proceeds, third-party liabilities and IOLTA interest. The audit further revealed that in four client matters, the sequence number on the checks did not agree with other checks issued at that time and the checks were apparently backdated. In the formal charges, ODC alleged that the respondent had violated Rules 1.15

[21] The Court noted that the evidence was insufficient to support the conclusion that the respondent made the post-accident statements with the conscious intent to prevent the bystanders from discovering the respondent's secretary and tending to her injuries. If the evidence had supported such a conclusion, the respondent would almost certainly face disbarment. *Id*., 2001-2584, p. 12, n. 13, 819 So.2d at 313, n. 13.

(safekeeping property of clients or third persons) and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). *Id.*, 2021-0191, pp. 1-3, 320 So.3d at 1127-28.

In finding a violation of Rule 1.15(a), the Court found that the balance of the respondent's trust account dropped below the amount he was holding in trust for payment of his clients and third parties. He placed certain client and third-party funds in his operating account rather than in his trust account. In doing so, the respondent clearly commingled those funds with his own funds and converted them to his own use. The fact that the respondent's actions were negligent did not negate a finding of a violation of Rule 1.15(a). *Id.*, 2021-0191, p. 7, 320 So.3d at 1130.

The Court also found that no Rule 1.15(d) violation was present, based on findings of the hearing committee and the Board. The hearing committee and Board had both determined that no Rule 1.15(d) violation existed because this rule mandated that notice to and prompt delivery of funds received by the attorney was required only to those third parties who had an "interest" in the funds. An interest was defined in the rule as one of which the lawyer had actual knowledge, and was limited to a statutory lien or privilege, a final judgment addressing the disposition of those funds or property, or a written agreement by the client or lawyer on behalf of the client guaranteeing payment out of those funds or property. As the medical providers at issue had no such interests, the respondent's failure to make prompt payment to them did not constitute a violation of Rule 1.15(d). *Id.*, 2021-0191, pp. 4-5, 7, 320 So.3d at 1128-30.

In addressing the alleged Rule 8.4(c) violation, the Court stated that "[t]he question presented for our resolution is whether respondent's backdating of the certain third-party checks was done *with the intent of deceiving the ODC during its investigation.*" *Id.*, 2021-

0191, p. 7, 320 So.3d at 1130. The Court found that there was no legitimate accounting purpose for respondent's backdating of the checks. Rather, his own testimony indicated that if his records were subpoenaed, the backdated checks "would show that I timely paid." *Id.*, 2021-0191, p. 9, 320 So.3d at 1131. The Court noted that the respondent's attempt to sanitize his records in the face of a potential disciplinary investigation revealed a clear lack of honesty and candor. In analyzing the baseline sanction, the Court also pointed out that the respondent knowingly backdated checks to ODC during its investigation. The Court found that the respondent's backdating of certain third-party checks revealed *an intent to mislead ODC* during its investigation of the matter and was a violation of Rule 8.4(c). *Id.*, 2021-0191, pp. 10-11, 320 So.3d at 1131-32.

In determining the sanction, the Court found that the respondent's conduct was knowing, and it recognized as aggravating factors a pattern of misconduct and substantial experience in the practice of law. As mitigation, the Court found an absence of a prior disciplinary record, personal or emotional problems, a cooperative attitude toward the proceedings, good character and reputation, and remorse. Considering the respondent's misconduct as a whole, the Court imposed a one-year and one-day suspension from the practice of law, with all but sixty days of the suspension deferred. The respondent was also placed on supervised probation for a period of two years. *Id.*, 2021-0191, p. 12, 320 So.3d at 1132.[22]

[22] Also of note as to the Board's previous opinion as to the mental state required to find a violation of Rule 8.4(c) is the case of *In re Guilbeau*, 2009-2202, 35 So.3d 207 (La. 3/16/10), *reh'g denied*, (La. 5/7/10). In that matter, ODC brought formal charges against the respondent, alleging that various Rules of Professional Conduct were violated, including Rule 8.4(c). As to the 8.4(c) violation, the Board noted the respondent had misrepresented himself as disinterested in a conflict of interest between his client and an unrepresented individual. In determining the appropriate sanction, the Board found that by its very nature, the respondent's conduct was *knowing and intentional*. *Id.*, 2009-2202, p. 9, 35 So.3d at 213. The Board commented that although the hearing committee had determined that the respondent's conduct was negligent, such a finding was inconsistent with the committee's conclusion that the respondent violated Rule 8.4(c). This comment indicates that the Board was of

From a reading of *Marinoff*, it can be discerned that the Board used an intentional standard in determining whether a violation of Rule 8.4(c) was present ("*in the absence of finding a intentional, deliberate, or calculated behavior on respondent's part*, [there is no] conduct that is dishonest, deceitful . . . for purposes of Rule 8.4"). *Id*., 2001-2584, p. 7, 819 So.2d at 310. Although the Court disagreed with the Board's finding that no rule Rule 8.4(c) violation was present, it used a similar standard in finding a Rule 8.4(c) violation based upon the respondent's post-accident statements ("*the content of the statements evidences an intent to deceive or misrepresent the facts*, as the thrust of the statements was that respondent was the sole occupant of the vehicle, a fact which was unquestionably false"). *Id*., 2001-2584, p. 9, 819 So.2d at 311. In *Schoenberger*, the Court clearly stated, "[t]he question presented for our resolution is whether respondent's backdating of the certain third-party checks was done *with the intent of deceiving the ODC during its investigation.*" *Schoenberger*, 2021-0191, p. 7, 320 So.3d at 1130. Accordingly, based upon this guidance, the Board will use an intentional standard or require a mental state of intent in order to find a violation of Rule 8.4(c) in the instant matter. The question presented to the Board for its resolution, therefore, is whether Respondent's assertion in his August 14, 2018 letter -- that his representation of Mr. Duhon was "unrelated" to the legal matter in which Mr. Gibbens had represented Mr. Reggie -- was made with the intent of deceiving Mr. Reggie. If so, a violation of Rule 8.4(c) is present; if not, no violation can be found.

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the opinion that a violation of Rule 8.4(c) must be knowing and intentional. The Board further explained that the committee's finding that the respondent's conduct was negligent was also inconsistent with the committee's recommendation for the application of certain ABA Standards which require "knowing" misconduct and the respondent's testimony which indicated knowing conduct. *Id*. at 2009-2202, p. 9, n. 4, 35 So.3d at 213, n. 4. The Court did not address the appropriate mental state of a Rule 8.4(c) violation, however. In determining the sanction of a public reprimand, it found only that the respondent's conduct, overall, was negligent. *Id*. at 2009-2202, p. 12, 35 So.3d at 215.

After a careful review of the record, the Board agrees with the Committee's determination that while the assertion in Respondent's August 14th letter was incorrect, this error was made through negligence, or perhaps frustration due to the "badgering" actions of Mr. Reggie. Consequently, absent clear and convincing evidence that Respondent's assertion was made with the intent to deceive Mr. Reggie, a violation of Rules 8.4(c), and the derivative violation of 8.4(a), have not been proven by ODC.

CONCLUSION

The Board adopts the Committee's findings of fact. The Board also adopts the Committee's finding that Rule 1.9(a) was not proven by ODC. The Board further finds that ODC did not prove violations of Rules 8.4(a) and 8.4(c). Accordingly, the Board will order that the formal charges be dismissed. The Board will further order that all costs and expenses of this matter be assessed to the Board.

RULING

For the foregoing reasons, the Board hereby orders that the formal charges in this matter filed against Respondent, Kyle D. Schonekas, be dismissed. The Board further orders that all costs and expenses of this matter be assessed to the Board.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Paula H. Clayton
Todd S. Clemons
Albert R. Dennis III
Susan P. DesOrmeaux
Brian D. Landry
Aldric C. Poirier, Jr.
M. Todd Richard
Lori A. Waters

DocuSigned by:

By _____
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R. Alan Breithaupt
FOR THE ADJUDICATIVE COMMITTEE

APPENDIX I

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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;

…

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

…

Respondent's Ex. 8

A

DEPARTMENT OF THE TREASURY
Internal Revenue Service
Criminal Investigation

Memorandum of Interview

Investigation #:	1000253124	**Location:**	Offices of Kyle Schnonekas 909 Poydras Streeet New Orleans, LA 70112
Investigation Name:	RAYMOND REGGIE		
Date:	September 22, 2014		
Time:	Approx. 10:33am - 12:05pm		
Participant(s):	Troy Duhon, Owner, Premier Automotive Christopher J. Schneider, Special Agent Rene Salomon, Assistant United States Attorney Kyle Schonekas, Attorney		

On the above date and time, Special Agent ("SA") Schneider and Assistant United States Attorney ("AUSA") Rene Salomon met with Troy Duhon ("Duhon") and Kyle Schonekas, attorney for Troy Duhon, in preparation for the trial, United States vs. RAYMOND REGGIE. Duhon agreed to be interviewed and provided the following information:

1. Troy Joseph Duhon was born on October 2, 1964. Duhon's cell phone number is (504) 338-9525. Duhon's home address is 812 Lakeshore Boulevard, Slidell, LA 70461.

2. Duhon is the owner of Premier Automotive. Duhon first became an owner in December 1995. Premier Automotive now consists of 21 automobile dealerships, including dealerships in New Orleans, Los Angeles, San Diego, San Francisco, Kansas City, Nashville and other locations. Premier has 5 dealerships in the New Orleans area including Toyota of New Orleans, Premier Honda, Premier Chrysler, Premier Nissan, and Premier Kia.

3. Duhon first met RAYMOND REGGIE ("REGGIE") when both Duhon and REGGIE worked at Bill Watson Nissan in New Orleans in 1993.

4. Around 1994 or 1995, REGGIE left the retail car business and began working in the media business.

5. REGGIE first worked for Duhon at Toyota of New Orleans as a media consultant around 1996. REGGIE worked as a media consultant with Duhon's dealerships up until he pleaded guilty to bank fraud.

6. Duhon's wife was very close friends with REGGIE's ex-wife.

7. After REGGIE was released from prison for the bank fraud, Duhon started using REGGIE as a media consultant. Duhon believed REGGIE had paid his dues by serving his sentence and could use Duhon's help to get a second chance.

8. REGGIE negotiated media buys and helped in creating advertising ideas.

9. Duhon was aware REGGIE worked for Supreme Automotive Group ("SAG") doing similar work. Duhon understood REGGIE had more autonomy at SAG than in his role at Premier Automotive. REGGIE did not have access to check writing or handle any checks at Premier Automotive.

10. Around August 2012, Duhon recalls Allen Krake ("Krake"), SAG owner, called Duhon on a Saturday. Krake told Duhon SAG had discovered a fraud perpetrated by REGGIE. Krake told Duhon about allegations of REGGIE stealing from SAG by depositing or cashing checks made out to adverstisers.

11. Upon hearing from Krake, Duhon instructed Molly Moran, Premier Automotive's intenet marketing manager, to review all transactions involving REGGIE looking for any possible fraud. Molly Moran's review included reviewing checks to advertising vendors and comparing payments to advertising run sheets. The review did not reveal any issues.

12. Shortly after Krake's phone call, Duhon spoke to REGGIE about the allegations during a phone call. Duhon recalls asking REGGIE "Dude, what is going on?" REGGIE did not deny the fraud. Duhon asked directly if the allegations of fraud were true. REGGIE said "Yes." REGGIE admitted he took the money.

13. In Duhon's opinion, REGGIE couldn't hide from the allegations because the evidence was overwhelming. Duhon was hurt by REGGIE's actions because Duhon, REGGIE, and Krake were all close friends. Duhon was worried REGGIE may have defrauded Premier Automotive as well.

14. Krake cut off all communications with REGGIE after the fraud was revealed. REGGIE asked Duhon to reach out to Krake on REGGIE's behalf. Duhon believes REGGIE wanted to meet with Krake to try and shut down SAG's review and reach a settlement before more of the fraud was revealed. At that time, Duhon does not believe Krake was aware of REGGIE's fraud involving Super Chevy Dealers of Baton Rouge ("SCDBR"), the local marketing association.

15. Duhon reviewed an email (SAG 01717) from REGGIE to Duhon, which Duhon forwarded to Krake. The email from REGGIE to Duhon was dated August 14, 2012 with the subject name "Allen." Duhon provided the following information:

    a. Duhon remembers receiving the email from REGGIE.

b. Duhon identified his email address and REGGIE's email address.
c. Duhon forwarded the email to Krake.
d. The phrase "speaking into him life" is a Christian saying referencing looking at the best of someone.
e. Duhon reviewed each of the numbered points in REGGIE's email.
    i. The first point states, "I am worth more to Allen by repaying and NOT going through a very expensive legal battle." From Duhon's viewpoint, REGGIE is stating he wants to repay Krake to avoid a legal battle.
    ii. The second point states, "I would take the money for a lawyer and put it towards what I am paying him. Lawyers are not cheap!" From Duhon's viewpoint, REGGIE is offering to pay restitution instead of paying for lawyers.
    iii. The third point states, "Refinance my house and give him a chunk of cash." From Duhon's viewpoint, REGGIE is offering to refinance his house to get cash to pay Krake and SAG back for the stolen money.
    iv. The fourth point states, "Then pay off the balance." From Duhon's viewpoint, REGGIE will pay the remainder of the money he owes back to Krake and SAG.
f. REGGIE's email states "I'm sorry what I did." From Duhon's viewpoint, REGGIE is saying sorry for stealing from Krake.
g. REGGIE's email states "Co-op was filed and paid. He can track the ad campaigns." Duhon assumes REGGIE is stating advertising invoices were sent to manufacturers and advertising support is available.
h. REGGIE's email states, "If he pushes it with the bank, they will call the Feds on me. Most people would be ok, I would fry for looong time, b/c of my name." From Duhon's viewpoint, REGGIE is worried about being a prior felon and he will get in a lot of trouble.
i. REGGIE was begging Duhon to contact Krake on REGGIE's behalf.

16. REGGIE asked Duhon to meet with Krake. Duhon called Krake and set up a meeting. Duhon drove to the SAG dealership in Slidell and picked Krake up. Krake and Duhon drove around and spoke for about twenty minutes. Duhon told Krake, REGGIE was begging for mercy. Duhon asked Krake if he would sit down with REGGIE. Krake would not commit to sitting down with REGGIE. Duhon believed Krake had mixed emotions because REGGIE and Krake had been so close and then REGGIE stole from Krake.

17. At a later time, not at the same time as REGGIE's admissions, REGGIE said Krake received money from REGGIE for wine, prostitutes, etc. At a much later time after REGGIE's admissions, REGGIE told Duhon, "I may go down, but I'm not going down alone."

18. Duhon really questions REGGIE stealing from the local marketing association because that is a "big issue" because you are messing with the manufacturer.

19. Duhon still talks with REGGIE, but does not discuss the fraud or related issues.

Duhon does not approve of what REGGIE did.

20. Duhon believes REGGIE was really happy when he was released from federal prison for the bank fraud. Duhon recalls REGGIE being a "super dad" during that time period. Duhon believes things went south for REGGIE when REGGIE started dating Kay Joyner.

21. Kay Joyner ("Joyner") is a cute, attractive lady. Joyner worked in automobile advertising. Joyner and REGGIE had a business franchise named Bargain Bee. REGGIE implied Joyner did very well when she sold off her share in Bargain Bee. Joyner and her son live with REGGIE in Mandeville.

22. Duhon has been to REGGIE's house in Mandeville. Duhon stopped by REGGIE's house at some point, but did not attend parties at REGGIE's house. Duhon had heard the parties at REGGIE's house always involved a lot of wine and liquor.

23. Duhon provided documents summarizing payments to REGGIE for consulting services from 2012 through 2014. REGGIE has provided consulting services for internet sales and marketing to Premier dealerships in California, which are run by Duhon's partner, Vincent "Chi Chi" Castro ("Castro"). Castro runs the Buena Park Chevrolet and Poway Toyota dealerships.

24. Duhon will testify, although it is a tough situation. Duhon is not worried that REGGIE has any dirt on Duhon.

25. In the early to mid-1990's, there were allegations against Duhon and others regarding the flooding of vehicles and a subsequent insurance claim. The issue was resolved and Duhon subsequently separated from a partner in the dealership. Around 1996, an undercover IRS-CI tried to structure a cash purchase of vehicle at the Toyota of New Orleans. At the time, Krake worked for Duhon at the dealership and called Duhon to tell him about the situation. Unbeknownst to Duhon and Krake, the salesman pushed the transaction through. Nothing ever came of either of the above allegations.

I prepared this memorandum on October 5, 2014, after refreshing my memory from notes made during and immediately after the interview with Troy Duhon.

Christopher J. Schneider
Special Agent

APPENDIX III

MR. DUHON'S STATEMENTS IN THE MOI WHICH MR. REGGIE CLAIMS ARE "MATERIALLY ADVERSE" TO HIS INTERESTS

1. **Paragraph 12:** This paragraph states that "Duhon asked directly if the allegations of fraud were true. Reggie said 'Yes.' Reggie admitted that he took the money." In response, Mr. Reggie testified that "he never would have said that, so if it did happen, that's not correct." R Exhibit 37, pp. 93, 95, Bates R412, 414.
2. **Paragraph 13:** This paragraph states that, in Duhon's opinion, Mr. Reggie could not hide from the allegations because the evidence was overwhelming. In response, Mr. Reggie testified that "if that's a fact, I disagree." He later conceded that this was only Mr. Duhon's opinion. *Id.* at 91-92, Bates R410-11.
3. **Paragraph 13:** Paragraph 13 also states that "Duhon was worried Reggie may have defrauded Premier Automotive as well." In response, Mr. Reggie testified that this statement "obviously did not look good for me. It creates harm for me." *Id.* at 93, Bates R412.
4. **Paragraph 15:** This paragraph states that Mr. Duhon reviewed an email (SAG 01717) from Mr. Reggie to Mr. Duhon, which Mr. Duhon forward to Mr. Krake. The email was dated August 14, 2012. In response, Mr. Reggie testified that he could not state that he even sent the email. *Id.* at 101, Bates R420.
5. **Paragraph 15:** Paragraph 15 also states that "Reggie was begging Duhon to contact Krake on Reggie's behalf." In response, Mr. Reggie testified that "[he'd] have to take exception with [Mr. Duhon's suggestion that Mr. Reggie would be] begging anybody for anything." *Id*. at 103, Bates R422.
6. **Paragraph 16:** This paragraph states that "Reggie asked Duhon to meet with Krake."

In response, Mr. Reggie first testified that he had "no recollection of that whatsoever . . . [m]aybe my lawyers did." He later testified that he thought this statement in the MOI was inaccurate. *Id*. at 101-02, 104, Bates R420-21, 423.

7. **Paragraph 17:** This paragraph states that "At a much later time after Reggie's admissions, Reggie told Duhon, "I may go down, but I'm not going down alone." In response**,** Mr. Reggie testified that this does not sound like something he [Mr. Reggie] would say, and he doesn't remember saying this. *Id*. at 104-05, 112, Bates R423-24, 431.
8. **Paragraph 19:** This paragraph states that "Duhon still talks with Reggie, but does not discuss the fraud or related issues." In response, Mr. Reggie testified that this statement was not accurate. *Id*. at 113. Bates R 432.
9. **Paragraph 20:** This paragraph states that "Duhon believes that things went south for Reggie when Reggie started dating Kay Joiner." In response, Mr. Reggie testified that he had to take exception to this statement, as Mr. Duhon has no relationship with Ms. Joiner. *Id.*
10. **Paragraph 22:** This paragraph states that "Duhon had heard the parties at Reggie's house always involved a lot of wine and liquor." In response, Mr. Reggie testified that Mr. Duhon may have heard this, but the statement was not true. *Id*. at 106, Bates R425.
11. **Paragraph 24:** This paragraph states that "Duhon is not worried that Reggie has any dirt on Duhon." In response, Mr. Reggie testified that he did not know how this could come into play or what this meant. *Id*. at 114, Bates R433.