ORIGINAL

Louisiana Attorney Disciplinary Board
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Docket# 23-DB-039
Filed-On 4/30/2024

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: MICHAEL S. BRANDNER, JR.

NUMBER: 23-DB-039

RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

INTRODUCTION

This is an attorney discipline matter based upon the filing of formal charges by the Office of Disciplinary Counsel ("ODC") against Michael S. Brandner, Jr. ("Respondent"), Louisiana Bar Roll Number 27973.[1] ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.4 (communication); 1.8(k) (conflict of interest: current clients); 1.16(d) (obligations upon terminating representation); 8.4(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); and 8.4(c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation).[2] The hearing committee ("Committee") assigned to the matter concluded that Respondent did not violate Rules 1.4, 1.16(d), 8.4(a), or 8.4(c). The Committee found that there may have been a technical violation of Rule 1.8(k) but that such technical violation did not warrant sanction. Therefore, the Committee recommended that the charges against Respondent be dismissed.

For the following reasons, the Board adopts the Committee's factual findings. The Board further concludes that ODC did not meet its burden of proving the charged rule violations by clear and convincing evidence and that the formal charges should be dismissed, with all costs and expenses to be borne by the Board.

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[1] Respondent was admitted to the Louisiana Bar on October 18, 2002. His primary registration address is 3621 Veterans Memorial Blvd., Metairie, LA 70002. Respondent is currently eligible to practice law in Louisiana. Respondent accepted a private admonition in 2021 for failure to satisfy certain requirements in connection with an advertisement. Respondent immediately took down the ad upon receiving notice of a complaint by ODC.
[2] *See* attached Appendix for full text of the Rules.

PROCEDURAL HISTORY

The formal charges were filed on May 25, 2023. The charges state, in pertinent part:

2.

Wilbert Johnson and Claire Ford hired you on approximately September 28, 2020, to pursue their claims for injuries sustained in a motor vehicle accident. On December 6, 2021, you terminated the representation of Mr. Johnson and Ms. Ford. After you withdrew from their case, Mr. Johnson and Ms. Ford contacted their insurance company, GEICO, and were told checks were previously issued by GEICO, and you negotiated those checks. Mr. Johnson and Ms. Ford deny signing the checks and claim they knew nothing about these settlement checks.

3.

You have confirmed that on November 3, 2020, GEICO sent you two checks, each for $1,000, representing a policy limits settlement under the medical payments coverage of Mr. Johnson and Ms. Ford's GEICO policy. Accepting these checks resolved all claims Mr. Johnson and Ms. Ford may have had against GEICO under the terms of their policy's medical payments coverage.

4.

You further admit that you had someone from your office endorse the signatures of Mr. Johnson and Ms. Ford and deposited the funds into your trust account, where they remained as of the filing of a complaint by Mr. Johnson and Ms. Ford.

5.

You claim your contract with Mr. Johnson and Ms. Ford authorizes you to endorse the name of your clients on checks received by your office.

6.

There is no indication you advised your clients that you received these funds from GEICO or discussed the ramifications of accepting these funds, such as GEICO's right to subrogation, with Mr. Johnson and Ms. Ford.

7.

The *Power of Attorney* clause executed by Mr. Johnson and Ms. Ford on September 28, 2020, states explicitly that they were giving you authority to endorse their names "on any and all settlement checks for claims against Go Auto or GEICO." By relying on the *Power of Attorney* clause to endorse the names of Mr. Johnson and Ms. Ford, you tacitly acknowledged these checks were *settlement* checks. If these were not *settlement* checks, then you had no authority to sign the names of Mr. Johnson or Ms. Ford. Regardless, including this provision in your attorney-client contract contradicts the Rules of Professional Conduct.

8.

You appeared for a sworn statement, where you were advised that the *Power of Attorney* language was prohibited by Rule 1.8(k) of the Rules of Professional Conduct. You claimed you stopped using the language and confirmed that you would not seek to enforce the *Power of Attorney* provision against any current clients.

9.

During your statement, you were also asked about your intentions for disbursing the medical payments funds from your trust account. The following day, you provided documentation indicating you disbursed the funds received from GEICO from your trust account. However, the documents confirm you paid yourself $1,235.61 and paid a third-party medical provider $764.39. No funds were given to Mr. Johnson or Ms. Ford, and neither Mr. Johnson nor Ms. Ford was consulted about the proposed distribution of funds.

There is clear and convincing evidence that MICHAEL S. BRANDNER, JR. knowingly and intentionally violated Rules 1.4, 1.8(k), 1.16(d), 8.4(a) and 8.4(c) of the Rules of Professional Conduct.

Respondent answered the formal charges, through his counsel, Clare S. Roubion, on June 22, 2023. Respondent denied all alleged rule violations.

The hearing in this matter was held on September 18, 2023, before Hearing Committee No. 45.[3] First Assistant Disciplinary Counsel Gregory L. Tweed appeared on behalf of ODC. Respondent appeared with counsel, Dane S. Ciolino. The Committee heard testimony from the following: Respondent, Laurie A. White, Robert H. Cooper, and Todd C. Comeaux.[4] Exhibits ODC-1 through ODC-6 and Exhibit Joint-1[5] were admitted into evidence at the hearing.

The Committee filed its report on October 26, 2023. On November 2, 2023, Respondent filed a notice of no objection to the Committee's report. On November 8, 2023, ODC filed an objection to the report.

ODC filed its brief to the Board on December 20, 2023. ODC asserted that the record supports a finding that Respondent violated Rules 1.4, 1.8(k), 1.16(d), 8.4(a), and 8.4(c), as charged. ODC further argued that a sanction of "at a minimum, a public reprimand, if not a period

[3] Hearing Committee No. 45 was comprised of Charles A. Cerise, Jr. (Committee Chair), Brandi F. Ermon (Lawyer Member), and Mary E. Bordelon (Public Member).
[4] Ms. White, Mr. Cooper, and Mr. Comeaux are all attorneys. Their testimony is summarized in detail in the excerpt from the Committee's report quoted later herein.
[5] Exhibit Joint-1 is a "Stipulation of Facts," signed by Respondent, Mr. Ciolino, and Mr. Tweed, which includes two factual stipulations. The text of the two stipulations is included in the attached appendix.

of suspension, with perhaps some consideration given to deferring all or part of the suspension" should be imposed. ODC Brief, p. 16.

On January 4, 2024, Respondent filed his brief in support of the Committee's recommendation to dismiss.

Oral argument of this matter was held on February 29, 2024, before Board Panel "B."[6,7] Mr. Tweed appeared on behalf of ODC. Respondent appeared with counsel, Mr. Ciolino.

HEARING COMMITTEE REPORT

In its report filed on October 26, 2023, the Committee provided a summary of the testimony and made findings and conclusions, as follows:

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> For the following reasons, the Committee finds that while Respondent's conduct may constitute a technical violation of the Rules of Professional Conduct, his actions were not the result of an evil or dishonest motive, did not cause any actual harm, and do not rise to the level of sanctionable misconduct. Accordingly, the Committee recommends dismissal of the charges. [FN3]
>
> [FN3 See *In re Hartley*, 2003-2828 (La. 4/2/04), 869 So.2d 799.]
>
> ***
>
> **EVIDENCE**
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> ***
>
> The following witnesses were called to testify by ODC:
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> (1) Respondent Michael S. Brandner, Jr., in person
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> Respondent graduated from Loyola Law School in New Orleans, Louisiana in 2002. He passed the Louisiana Bar Examination and was licensed in October 2002. Respondent was employed by Reich, Meeks, and Treadaway until 2004, by the Moreau Firm until 2005, and by the Oreck Firm until 2007, at which time he opened his own law firm on March 10, 2007. He has a general civil plaintiffs' litigation practice. Respondent received and consented to an advertising violation admonition in December 2021.

[6] Board Panel "B" was composed of Erica J. Rose (Chair), R. Alan Breithaupt (Lawyer Member), and M. Todd Richard (Public Member).

[7] Oral argument was originally scheduled for January 25, 2024. However, due to a major water outage on the entire East Bank of Jefferson Parish where the Board offices are located and continuing issues with water service thereafter, the docket for January 25, 2024 had to be canceled. The matter was later rescheduled for argument on February 29, 2024.

Wilbert Johnson and Claire Ford ("Claimants") hired Respondent's law firm in connection with an auto accident in which they alleged injury. A petition was filed and listed Respondent in the signature block; however, Respondent was not the lawyer who signed the petition.[8] The matter was assigned to the firm's head of litigation, not Respondent, and another firm attorney to handle the case. On November 3, 2020, GEICO sent two $1,000 checks for medical payments to Respondent's office. Those checks were endorsed and deposited into Respondent's trust account. Respondent had an accounting department supervised by another firm attorney and was not aware of the checks or their endorsement.

On December 6, 2021, Respondent became aware of an issue with Claimants when he was advised by the litigation attorney Claimants were making accusations of racism in the handling of their case. At that point, Respondent was consulted, and a termination letter signed by the litigation lead attorney was sent to Claimants.

Respondent's firm held the GEICO money in trust waiting for contact from Claimants' new attorney. Respondent testified the medical bills were in excess of $1,000 for each Claimant, which is the reason GEICO tendered these first-party funds. Payment of $1,000 to each Claimant exhausted the policy limits and was made by GEICO to avoid statutory penalties. Respondent noted his firm had a priority lien under Louisiana law for costs expended in representation of Claimants. He further noted no consent was required to accept GEICO's tender of the medical policy limits, and it was clear there would be no subrogation. This was not a settlement of the entire claim. The Claimants did not suffer any detriment.

Respondent explained that when a new client contact is received, the new client is advised about rights under insurance law. Respondent testified he had a claims supervising attorney who handled business for the firm, and Respondent primarily was involved in managing and marketing functions. Respondent was in the middle of a contentious divorce and custody battle and relied on his office to follow established procedures. Respondent noted that in 2018, he hired ethics counsel, Richard Stanley, to audit his firm's processes, including his power of attorney, and followed the advice of the auditing counsel. Respondent further noted he endeavored to comply with the Rules of Professional Conduct at all times.

Respondent believed he had a power of attorney to sign settlement checks until he was advised otherwise by the ODC. At that point, he changed his firm's procedure and the firm's client contract.

[8] It is noted that in its brief to the Board, ODC has included what it purports to be the signature block on the petition filed on behalf of Complainants. However, while there was testimony about the signature block, the petition was never introduced into evidence at the hearing in this matter. Therefore, the quoted signature block included in ODC's brief should not be considered.

After Claimants hired new counsel, they settled their case. New counsel contacted Respondent's office to inquire whether Respondent had any outstanding expenses or fees. Respondent advised the expenses had been paid and he was waiving his fee.

On May 17, 2022, Respondent gave a sworn statement to the ODC. The next day, his firm disbursed funds from the trust account – partly to cover expenses protected by a priority lien and partly for medical expenses incurred. There was no residual balance after payment of the expenses and medical portion. Respondent did not communicate with Claimants upon disbursing the funds. At that time, they were represented by other counsel, and he did not send the GEICO funds to Claimants' new counsel. Respondent testified the ODC complaint was his notice of an issue with Claimants.

The following witnesses were called by Respondent:

(1) Laurie White, in person
White has been a Louisiana licensed attorney since 1987. She previously worked for Aetna and the Orleans Parish District Attorney. She also served as an Orleans Parish Criminal District Court Judge for many years. More recently, she has gone into private criminal defense practice. White became friends with Respondent through the Loyola Inn of Court and has known Respondent for more than five years. She described Respondent as spirited and "a little naïve."

White read the allegations against Respondent. She testified there was no affirmative duty for Respondent to communicate with Claimants about the GEICO funds and considered Respondent had the authority to endorse the GEICO checks based on the power of attorney. Her testimony was based on her experience working on similar matters as defense counsel for Aetna.

(2) Robert H. Cooper, in person
Cooper has been a licensed Louisiana lawyer since 1980. He has experience working for the Porteous, Hainkel; Blue Williams; and Pelleteri, Weidorn firms handling insurance defense and fraud cases. He performed substantial work for Respondent's uncle, who was a State Farm fraud auditor. After Hurricane Katrina, Cooper transitioned to plaintiffs' litigation. He is a solo practitioner who receives referral work from Respondent. He also uses Respondent's firm for paralegal and office assistance. Cooper described Respondent as "quick on his feet," "creative," and "scrupulously honest."

Cooper explained the difference between first- and third-party claims. He testified it depends upon the circumstances whether there is a duty to advise a client about receipt of medical payment funds, but generally agreed an attorney has a duty to communicate with his or her client. Cooper testified

that when there is a medical pay tender, there is no release to be signed. He further testified the claimant is entitled to the medical pay funds if there are no liens to be satisfied, and the claimant is entitled to the balance after payment of the liens.

(3) Todd Comeaux, in person

Comeaux is a 1994 Louisiana law graduate with experience working at the Cave Law Firm and Maley and Comeaux. He now is a solo practitioner, handling personal injury cases. Comeaux works with Respondent's firm on a regular basis. He primarily interacts with Respondent's firm's litigation counsel. He described Respondent as "a first rate lawyer." He has handled 40 to 50 cases with Respondent's firm and finds Respondent to be "honest and straightforward."

Comeaux testified he would let a client know if he resolved part of the client's claim and would let the client know when he had money belonging to the client. However, he distinguished first-party claim and *McDill* tender situations.

(4) Michael Brandner, in person

Respondent testified he did not sign the letter terminating representation of Claimants. Litigation counsel for his firm signed the letter. Respondent learned of Claimants' case shortly before the termination of the engagement. He had never talked to Claimants. Litigation counsel from his firm talked to Claimants and handled their case.

Respondent testified he kept the GEICO funds in trust because he was unsure what to do with them. He noted the liens on the funds exceeded the total. After meeting with the ODC to give his statement, Respondent went to his office to set up the disbursements and sent all documents to the Claimants and ODC. Respondent admitted there was no separate letter from his firm advising Claimants about the GEICO funds when they were received.

Respondent testified he did not know his firm's power of attorney was improper. However, he changed the power of attorney after meeting with the ODC. He advised the ODC that he would not use any of the similarly executed powers of attorney that may still have been in effect. Respondent testified he cooperated with the ODC and went "above and beyond" to try to do things the right way. Respondent reiterated he was not the attorney handling Claimants' case and was embarrassed to find himself in this matter. Respondent testified there were firm procedures in place, particularly with regard to client communication, but they were not followed correctly by his firm's responsible attorneys in this instance.

FINDINGS OF FACT

Respondent was credible. Respondent corrected his firm's power of attorney and ceased using any existing problematic powers of attorney upon learning of the ODC's position with respect to whether the power of attorney complied with the Rules of Professional Responsibility. Respondent was not the attorney in charge of handling Claimants' case. Other attorneys in his firm were responsible for handling the case and communicating with Claimants. The statutory liens on the GEICO funds exceeded the amounts paid by GEICO. There was no harm suffered by Claimants. When Claimants' new counsel settled their case, he called Respondent's firm to resolve any outstanding costs and fees, for which there is a legal lien. Respondent had been paid the costs and waived his fees. Respondent appears to have been cooperative with ODC.

RULES VIOLATED

The Committee does not find a violation of Rules 1.4, 1.16(d), 8.4(a), or 8.4(c) and dismisses those charges. Respondent was not the attorney tasked with handling Claimants' case or communicating with them about the case. While Respondent was not the attorney handling the case, his office protected the Claimants' interests. The GEICO money was held in trust and was insufficient to cover all liens on the funds. There was no allegation that Claimants' file was not forwarded to new counsel. When the trust funds were distributed, Respondent sent notice to the ODC and Claimants. When new counsel settled the case and called to protect Respondent's firm's interest in the settlement funds, Respondent's office advised the costs had been satisfied and the fees waived. The Committee finds Respondent did not violate or attempt to violate the Rules of Professional Conduct and previously engaged a third-party auditor to assist with compliance with the Rules. Further, the Committee finds that Respondent did not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. While there may have been a technical violation of Rule 1.8(k), Respondent took action to correct the issue upon learning the ODC's position and did not enforce existing powers of attorney. Under the circumstances, the Committee finds no sanction is warranted. *See In re Hartley*, 2003-2828 (La. 4/2/04), 869 So.2d 799; *In re Cabibi*, 2005-1217 (La.2/22/06), 922 So.2d 490; and *In re Oestreicher*, 2015-0204 (La. 6/1/15), 182 So.3d 934.

CONCLUSION

In sum, the Committee finds the charges against Respondent should be dismissed and no sanction should be assessed against Respondent. The costs and expenses of this proceeding should be borne by the Disciplinary Board. This opinion is unanimous and has been reviewed by each committee member, who fully concurs …

Committee Report, pp. 1, 3-7.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. Rule XIX, §2(G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law and recommendations of hearing committees with respect to formal charges, and petitions for reinstatement and readmission, 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 Committee provided an accurate summary of the testimony provided by the witnesses. The Committee's findings of fact do not appear to be manifestly erroneous, are supported by the record, and are adopted by the Board.

B. *De Novo* Review

The Board concludes that ODC did not prove the alleged rule violations as follows.

<u>Rule 1.4</u>: Rule 1.4 generally requires that an attorney maintain communication with a client regarding information relevant to the client's matter. Here, the parties to the contracts for legal services were Complainants, Wilbert Johnson and Claire Ford, and Michael Brandner Law Firm, LLC ("the law firm"), not Respondent individually. The powers of attorney relating to the endorsement of settlement checks were granted in favor of the law firm. *See* Ex. ODC-1, Bates

pp. 15-20. Other attorneys in the law firm were assigned to handle, and actually handled, the claims. Respondent did not sign any pleadings in the case. He had no knowledge that the med pay checks had been received and endorsed at the time they were received and endorsed. The Committee was correct in determining that Respondent did not violate any duty to communicate with Complainants at the time of these events.[9]

Respondent's first knowledge of the med pay checks was from the disciplinary complaint filed by Complainants after the law firm's representation had been terminated. Through his counsel, he provided a timely response to the complaint and he voluntarily appeared for a sworn statement taken by ODC shortly thereafter. The day after his sworn statement was taken, Respondent disbursed the funds from the law firm's trust account in payment of the law firm's expenses and medical bills of Complainants. At that time, Respondent provided Complainants with a written explanation and a detailed accounting of the disbursements. He also explained that the firm waived any fee on the funds. Respondent gave uncontradicted testimony that he disbursed the funds from the firm trust account in order of statutory priority of liens. Because the amount of the funds was not sufficient to cover all of the liens, no funds were disbursed to Complainants. Considering these facts, Respondent did not violate Rule 1.4.

Rule 1.8(k): The only potential violation of Rule 1.8(k) with respect to Respondent would be related to the form power of attorney Complainants signed with their contracts. With respect to the actual receipt and endorsement of the specific med pay checks, again, Respondent was not the attorney assigned to handle the case and had no knowledge of the receipt or endorsement of the checks. He did not receive the checks, he did not endorse the checks, and he did not instruct

[9] Complainants should have been informed of the receipt of the med pay checks, but Respondent was not the attorney handling the case responsible for doing so. He had no knowledge of the checks when they were received and endorsed.

anyone to endorse the checks on behalf of Complainants. He did not know anything about the checks until after the disciplinary complaint was filed.

With respect to the power of attorney, the question is did the wording of the power of attorney violate Rule 1.8(k). This Rule provides:

> (k) A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement.

ODC argues that the wording of the last sentence of the rule means that an attorney cannot obtain authorization to endorse a settlement check until after the client has approved a specific settlement. Respondent argues that the attorney may obtain authorization to endorse and negotiate a settlement check prior to a settlement being reached, but the attorney cannot act on the authorization until the client has approved the settlement. *See* detailed argument of Respondent at pp. 10-18 of Respondent's brief to Board.

The Board finds that the rule is ambiguous and that neither of the interpretations is necessarily unreasonable. Does the last sentence mean that an attorney may obtain authorization only after the client has approved the settlement or that an attorney may obtain authorization in advance of settlement but may actually endorse and negotiate an instrument given in settlement only after the client has approved the settlement? Additionally, what effect does the first sentence of the rule and its phrasing have on the second sentence? It is noted that the first sentence of Rule 1.8(k) requires that the attorney have the client's consent to enter into a binding settlement agreement on behalf of the client. In the normal course of settlements, the client's consent would be obtained prior to the settlement and prior to receipt of a settlement check. If the attorney has

complied with the first sentence of Rule 1.8(k), then the client would have given consent to the settlement before a settlement check is issued.

Because the Board finds that the rule is ambiguous, the ambiguous provision must be construed in favor of the Respondent, and therefore, a rule violation has not been proven by clear and convincing evidence. *See In re Andry*, 59 F.4th 203, 209 (5th Cir. 2023) (““Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged.” *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995) (citing *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988))”).

Further even if the Board were to accept ODC’s interpretation of Rule 1.8(k) and a rule violation had been proven, the Committee is correct that the violation would be a technical violation which does not warrant sanction. The Court has stated that “not every violation of the Rules of Professional Conduct warrants the imposition of formal discipline.” *In re Dalton*, 2009-1288 (La. 10/2/09), 18 So.3d 743, 747. In certain cases, the Court has held that under the totality of the circumstances presented, formal discipline is not warranted despite a finding of a rule violation. *Id.*

In *In re Hartley*, 2003-2828 (La. 4/2/04), 869 So.2d 799, the respondent attorney directed another attorney in his firm to notarize a document although the affiant and one witness had not personally appeared before the notary attorney. The hearing committee dismissed the charges, but the disciplinary board reversed and imposed a public reprimand. On appeal, the Louisiana Supreme Court dismissed the charges stating:

> We agree that respondent’s actions constitute a minor violation of the Rules of Professional Conduct. However, we find his actions were not the product of an evil or dishonest motive nor did they cause any actual harm. Respondent has been a practicing attorney since 1971 and has an unblemished disciplinary record. Under

> the totality of the circumstances, we do not find formal discipline is warranted by this court. *See*, *e.g.*, *In re: Marullo*, 96-2222 (La. 4/8/97), 692 So.2d 1019.

Id. at 800.

In *In re Cabibi*, 2005-1217 (La. 2/22/06), 922 So.2d 490, the respondent's daughter, who was employed by the respondent and was a notary public, prepared a codicil to a will giving the respondent a substantial gift from his client. The respondent did not draft the codicil but reviewed it after it was written and notarized and filed a petition to probate the olographic codicil and several olographic wills of the client in his possession after the client's death. A niece of the client filed a motion for summary judgment challenging the bequest to the respondent. The motion was granted and the respondent did not appeal the trial court's decision.

In the disciplinary matter, the hearing committee recommended that Mr. Cabibi be reprimanded. On review, the Board recommended that the respondent be suspended for three months. While "in no way [condoning] respondent's actions," the Court dismissed the charges. *Id.* at 497. The Court determined that objectively the conduct constituted a violation of Rules 1.8(c) (conflict of interest) and 8.4(a). The Court, however, further found that no harm was caused as a result of the misconduct, which was unintentional and attributable to the fact that respondent did not think of the decedent as a client, but only as a longtime family friend. In deciding to dismiss the charges, the Court stated:

> Furthermore, the applicable mitigating factors are entitled to great weight. Respondent has been a practicing attorney since 1962 and has an unblemished disciplinary record. We also consider the absence of any dishonest or selfish motive and respondent's good character and reputation. Under the totality of the circumstances, the board's recommendation of an actual period of suspension is unduly harsh and formal discipline is not warranted. *See In re Hartley*, 03–2828 (La.4/2/04), 869 So.2d 799; *In re Marullo*, 96–2222 (La.4/8/97), 692 So.2d 1019.

Id. at 497.

In *In re Loughlin*, 2014-0923 (La. 9/26/14), 148 So.3d 176, ODC filed formal charges against the respondent in 2012 relating to the respondent's website during the years 2007 to 2009. The website included a statement that the firm was a "plaintiff-oriented pure litigation firm specializing in maritime personal injury and death cases." It was determined that the reference to "specializing" violated Rule 7.4 as it existed prior to 2009. The hearing committee recommended and the Board ordered that the respondent be reprimanded. On appeal by the respondent, the Court dismissed the charges. Finding that "the respondent's actions were not taken with a culpable mental state," stating in a footnote that the respondent's mental state did not rise to even the lowest level of culpability (negligence), and finding that his actions caused no harm to the public, the Court concluded that the respondent's actions did not rise to the level of sanctionable misconduct. *Id.* at 178.

The evidence presented in this matter shows that if the wording of the power of attorney form used by Respondent's law firm was in violation of Rule 1.8(k), such violation was unintentional and not the product of a dishonest or evil motive. To the contrary, the evidence supports that Respondent had attempted to ensure that the law firm's practices were in compliance with all ethical rules. Within two to three years before Complainants retained the law firm, Respondent had engaged an attorney ethics advisor to audit the entire firm practices and forms to ensure that the firm was meeting all ethical standards. Nothing about the power of attorney was brought to the firm's attention at that time. T.41-45. Additionally, when ODC raised an issue about the use of the power of attorney after the disciplinary complaint was filed, Respondent stopped using the power of attorney in the law firm and stopped enforcing then existing powers of attorney. Further, no harm was suffered by Complainants in this matter. Considering the totality of the circumstances here, even had ODC met its burden of proof by clear and convincing evidence

that Respondent violated Rule 1.8(k), such violation would not rise to the level of sanctionable misconduct.[10]

Rule 1.16(d): Rule 1.16(d) sets forth obligations of an attorney upon termination of representation and includes surrendering papers and property to which the client is entitled. Respondent was not the attorney responsible for handling Complainant's case or the termination of the law firm's services. To the extent any obligation may not have been fulfilled, he was not responsible. Further, the evidence reflects that Complainants were provided with a copy of their entire file as provided in Rule 1.16(d). Ex. ODC-1, Bates p. 5. Additionally, ODC has not proved by clear and convincing evidence that Complainants were entitled to any of the funds which were held in the law firm's trust account at that time.

Rule 8.4(c): Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. In the recent ruling in *In re Schonekas*, Disciplinary Board Ruling, 21-DB-034 (7/31/23), after reviewing Louisiana Supreme Court jurisprudence regarding the interpretation of Rule 8.4(c) relating to the required mental element, the Board has now applied an intentional standard or requirement of a mental state of intent in order to find a violation of Rule 8.4(c).

The Board finds that there is no evidence to support a finding that Respondent engaged in dishonesty, fraud, deceit or misrepresentation, intentionally or otherwise. Respondent had no knowledge of the med pay checks or their endorsement until over a year later when Complainants filed their disciplinary complaint. Respondent took steps to investigate and address the situation

[10] It is noted that the Court has stated that "the purpose of lawyer disciplinary proceedings is not primarily to punish the lawyer, but rather to maintain appropriate standards of professional conduct to safeguard the public, to preserve the integrity of the legal profession, and to deter other lawyers from engaging in violations of the standards of the profession." *In re Torry*, 2010-0837 (La. 10/19/10), 48 So.3d 1038, 1042 (citing *Louisiana State Bar Ass'n v. Guidry*, 571 So.2d 161 (La.1990).

promptly after receiving notice of the complaint. Further, to the extent some type of dishonesty could be arguably inferred from the fact of the powers of attorney, there is no evidence to support such an argument. To the contrary, the evidence reflects that Respondent had taken steps to attempt to ensure that the law firm's practices complied with all ethical standards. Within two to three years before Complainants retained the law firm, Respondent had engaged an attorney ethics advisor to audit the entire firm practices and forms to ensure that the firm was meeting all ethical standards. Nothing about the power of attorney was brought to the firm's attention at that time. T.41-45.

Rule 8.4(a): Because the Board finds that violation of Rules 1.4, 1.8(k), 1.16(d), and 8.4(c) were not proven by clear and convincing evidence, there is no violation of Rule 8.4(a) which provides that it is professional misconduct to violate or attempt to violate the Rules of Professional Conduct. Further, there is no evidence that Respondent knowingly assisted or induced another to violate the Rules of Professional Conduct or violated the Rules of Professional Conduct through the acts of another.

CONCLUSION

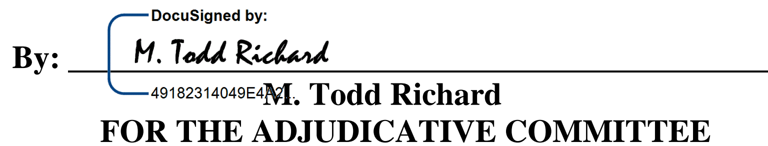
In light of the above, the Board adopts the Committee's factual findings. The Board further concludes that ODC did not meet its burden of proving the charged rule violations by clear and convincing evidence and that the formal charges should be dismissed, with all costs and expenses to be borne by the Board.

RULING

For the foregoing reasons, the Board hereby dismisses the formal charges that were filed against Respondent, Michael S. Brandner, Jr., bearing number 23-DB-039. The costs and expenses of this proceeding are to be borne by the Disciplinary Board.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

R. Alan Breithaupt
Todd S. Clemons
Albert R. Dennis III
Valerie S. Fields
James B. Letten
Ronald J. Miciotto
Erica J. Rose
Lori A. Waters

By: 

M. Todd Richard
FOR THE ADJUDICATIVE COMMITTEE

APPENDIX

Rule 1.4. Communication

(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.
(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

…
(k) A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement.
…

Rule 1.16. Declining or Terminating Representation

…
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Rule 8.4. 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;

…

Text of Stipulations:

1. Michael S. Brandner, Jr. did not advise Wilbert Johnson or Claire Ford about his receipt of the GEICO med pay checks.

2. Wilbert Johnson and Claire Ford learned of the fact that GEICO had issued checks under the med pay provisions of their policy only after Michael S. Brandner, Jr. withdrew from their case, and after they made direct contact with GEICO.