

ORIGINAL

Louisiana Attorney Disciplinary Board
FILED by: *Donna P. Burgos*
Docket# 16-DB-035 Filed-On 10/4/2016

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE: ROGER WAYNE KITCHENS
DOCKET NO. 16-DB-035

REPORT OF THE HEARING COMMITTEE #09

INTRODUCTION

This attorney disciplinary matter arises out of formal charges consisting of four counts filed by the Office of Disciplinary Counsel (“ODC”) against Roger Wayne Kitchens (“Respondent”), Louisiana Bar Roll Number 25130.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: Rule 1.1(c), 1.3, 1.4(a), 1.5(a), 1.5(b), 1.5(f)(5), 5.5(a), 1.16(d), 8.1(b), 8.1(c), 8.4(a), and 8.4(b).

PROCEDURAL HISTORY

On March 24, 2016, ODC filed the formal charges in this matter. By letter dated March 28, 2016, the formal charges were mailed via certified mail to Respondent’s primary registration address.² Respondent failed to file an answer to the charges. Accordingly, on May 6, 2016, ODC filed a motion to deem the factual allegations admitted pursuant to Louisiana Supreme Court Rules XIX, §11(E)(3).³ By order of May 20, 2016, the factual allegations contained in the formal charges were deemed admitted. On July 15, 2016, ODC filed its submission on sanctions.

¹ Respondent is currently eligible to practice law.

² Respondent’s primary registration address at the time formal charges were filed was 5534 S. Johnson St., New Orleans, LA 70125.

³ This rule states:

The respondent shall file a written answer with the Board and serve a copy on disciplinary counsel within twenty (20) days after service of the formal charges, unless the time is extended by the chair of the hearing committee. In the event Respondent fails to answer within the prescribed time, or the time as extended, the factual allegations contained within the formal charges shall be deemed admitted and proven by clear and convincing evidence. Disciplinary Counsel shall file a motion with the chair of the hearing committee to which the matter is assigned requesting that the factual allegations be deemed proven with proof of service of the formal charges upon the respondent. The order signed by the hearing committee chair shall be served upon respondent as provided by Section 13C. Within twenty (20) days of the mailing of the order of the hearing committee chair deeming the factual allegations contained in the formal charges proven, the respondent may move the hearing committee chair to recall the order thus issued upon demonstration of good cause why imposition of the order would be improper or would result in a miscarriage of justice.

For the following reasons, the hearing committee finds that Respondent violated the Rules of Professional Conduct as alleged. Moreover the hearing committee finds that Louisiana Supreme Court Rule XIX, the ABA Standards for Imposing Lawyer Sanctions and interpretative Louisiana Supreme Court jurisprudence demonstrate that the sanction of disbarment is appropriate.

FORMAL CHARGES

The formal charges allege, in pertinent part:

COUNT 1 (ODC 0033309: Richard Breaux, Complainant)

On May 20, 2015, the Office of Disciplinary Counsel received a complaint from Richard Breaux. The matter was opened as investigative file number ODC 0033309. On July 1, 2015, a copy of the complaint and a request for an initial response were forwarded to Respondent via certified mail to his primary address registered with the Louisiana State Bar Association (LSBA). This address also is registered as Respondent's secondary and preferred address. *See* Louisiana Supreme Court Rule XIX, § 8C. The certified mail was received on July 7, 2015; however, no response was submitted. On August 10, 2015, a second request for an initial response was sent to Respondent at the address registered with the LSBA as his primary, secondary, and preferred address. The correspondence was sent via regular and certified United States mail. Because neither letter was returned to the ODC, both letters presumably were received by Respondent. Thus, despite receiving multiple requests for an initial response, Respondent has not responded to or cooperated with the ODC.

In regard to the underlying complaint, Richard Breaux contacted Respondent, seeking legal representation regarding an earlier entered plea of guilty in the matter of *State v. Breaux*, 515,387 and 512,464, Orleans Parish Criminal District Court, State of Louisiana. Because Breaux is incarcerated, arrangements were made for the fee to be delivered to Respondent by Breaux's civil attorney, Marcus Poulliard. Breaux, Poulliard, and Respondent were to meet at the prison facility; however, Respondent did not appear. When Poulliard called Respondent on behalf of Breaux to inquire about his whereabouts, Respondent offered that he was at the prison but was unable to enter. Respondent made arrangements with Breaux for Respondent to retrieve his legal fee from Poulliard's office. Respondent indicated to Breaux that upon receipt of the fee, an engagement contract would be forwarded to Breaux. Respondent picked up the fee from Poulliard's office. Poulliard provided the ODC with a front and back image of negotiated check number 25021, dated December 4, 2014, written on the account of Frischhertz, Poulliard, Frischhertz, & Impastato, LLC to Respondent for the sum of \$5,000. The subject line reads "Richard Breaux." Respondent never sent an engagement contract to Breaux or to Poulliard on Breaux's behalf. Since Respondent received his legal fee, Breaux has been unable to contact Respondent. Respondent will not answer his telephone or return telephone messages. Breaux enlisted the assistance of family members, including his grandmother, Helen Davis; but none were able to reach Respondent. Ms. Davis advises that she called the Respondent approximately 50 times on behalf of her grandson, but she only spoke with him once over the telephone. During that call, Respondent advised that he would

be meeting Breaux at the prison, but Respondent did not go. Poulliard also attempted twice to contact Respondent on behalf of Breaux, but Respondent did not answer his calls. Because Breaux was unable to reach Respondent, he hired Muriel Van Born for the fee of \$3,000. As was done with Respondent, Breaux arranged for Poulliard to deliver the \$3,000 fee to Van Horn, which Poulliard did.

By letter dated February 19, 2016, the ODC was advised by the Louisiana State Bar Association that Breaux had submitted a claim with the LSBA Client Assistance Fund.

Respondent's conduct in ODC 0033309 is in violation of the Rules of Professional Conduct, Rule 1.3 (lack of diligence); Rule 1.4(a) (inadequate communication); Rule 1.5(a) (reasonable fee); Rule 1.5(b) (scope of representation and basis of fee); Rule 1.5(f)(5) (return of unearned fee); Rule 8.1(b) (respond); Rule 8.1(c) (cooperate); and Rule 8.4(a) (violate or attempt to violate Rules of Professional Conduct).

Count 2 (ODC 0033643: Watt Jones, Complainant)

On September 21, 2015, the Office of Disciplinary Counsel received a complaint from Watt Jones. The matter was opened as investigative file number ODC 0033643. On September 28, 2015, a copy of the complaint was forwarded to Respondent via certified mail to his primary address registered with the Louisiana State Bar Association. This address also is registered as Respondent's secondary and preferred address. *See* Louisiana Supreme Court Rule XIX, § 8C. Respondent was directed to file a written response with the Office of Disciplinary Counsel. The certified mail was not returned to ODC and, presumably, was received by Respondent; however, no response was received. On October 12, 2015, a second request for an initial response was sent to Respondent at his primary, secondary, and preferred address registered with the Louisiana State Bar Association via both certified and regular United States mail. The correspondence sent via regular United States mail was not returned and, presumably, was received by Respondent. Regarding the correspondence sent to Respondent via certified mail, the ODC received return of the undated, unsigned certified mail receipt. The correspondence, itself, was not returned to the ODC and, presumably, was received by Respondent. Despite receiving multiple requests for an initial response to the complaint, Respondent did not respond to or cooperate with the ODC.

Later, while investigating this complaint, the ODC became aware of Respondent's ineligibility to practice law due to his failure to pay his 2015-2016 LSBA annual membership dues, his failure to pay his 2015-2016 Louisiana Attorney Disciplinary Board assessment, and his failure to submit his 2015-2016 Attorney Registration Statement. Despite his ineligibility, Respondent continued to appear in court on behalf of clients. On December 1, 2015, the ODC sent to Respondent notice of these findings and requested that he submit a response thereto. This notice was sent to Respondent via certified mail and regular mail to the address registered with the LSBA as his primary, secondary, and preferred address. The regular United States mail was not returned to the ODC and, presumably, was received by Respondent. The usps.com tracking information for the certified mail states, "Your item was undeliverable as addressed at 7:58 pm on December 3, 2015 in NEW ORLEANS, LA 70125. It is being returned if appropriate information is available." The certified mail never was returned to the ODC and, presumably, was received by Respondent. Respondent

did not submit a response to the ODC regarding the allegation of practicing law during a period of ineligibility.

In regard to the underlying complaint, Jones hired Respondent in December of 2012 to assist him with a child support matter. *See In re BLJ v. Jones*, 2013-NS-27, Juvenile Court, Jefferson Parish, State of Louisiana. The two agreed to a fee of \$1,500, which Jones paid in full by way of four installments. The first time the two men met it was in an office; however, other meetings were held at Dino's Bar & Grill. It was at the Dino's meetings that Jones delivered his payments to Respondent. Jones was not given receipts; however, Jones had carbon copies for three of the checks written to Respondent.

1. Check no. 1176, dated 08/22/2013, payable to Roger Kitchens, for "Attorney Fees" in the amount of \$350.
2. Check no. 1182, dated 09/20/2013, payable to Roger W. Kitchens, for "Attorney Fees" in the amount of \$500.
3. Check no. 1183, dated 10/24/2013, payable to Roger Kitchens, for "Attor. Fee" in the amount of \$150.

The district court record reflects that Respondent first appeared with Jones on September 23, 2013; Respondent filed a motion to enroll on July 18, 2014. Attorney Rudy W. Gorrell, Jr. enrolled on behalf of Jones on September 22, 2014. Jones' repeated requests to Respondent for the return of his client file have been unsuccessful. Jones never requested a refund from Respondent because he was concerned that it would interfere with his attempts to retrieve his client file, which contained important personal documents (tax information, cancelled checks, etc.).

Respondent has an extensive history of failing to timely comply with his annual professional obligations. In regard to Respondent's current ineligibility, on August 7, 2015, the LSBA sent to Respondent at his LSBA registered primary, secondary, and preferred address a Notice of Delinquency for his failure to submit his 2015-2016 LSBA dues, LADB assessment, and Attorney Registration Statement. Because Respondent did not cure the deficiencies set forth on the Notice of Delinquency, on September 10, 2015, the LSBA sent to Respondent a Certification of Ineligibility, effective September 9, 2015. On September 10, 2015, the Louisiana Supreme Court issued its Certification of Ineligibility for Respondent's failure to submit his LADB assessment and his failure to file his annual attorney registration statement. *See La. S. Ct. Rules, Rule XIX, §8*. Respondent remains ineligible to practice law. Despite Respondent's ineligibility, the public record reflects that Respondent has appeared in court on behalf of clients on more than 10 occasions.

1. *State v. Young*, 15-04462, 24th J.D.C., Parish of Jefferson (11/19/2015)
2. *State v. Constanza*, 15-05123, 24th J.D.C., Parish of Jefferson (09/28/2015; 10/26/2015; 12/04/2015)
3. *State v. Creppel*, F1998649, 24th J.D.C., Parish of Jefferson (09/10/2015; 10/28/2015)
4. *State v. Growe*, 14-02333, 24th J.D.C., Parish of Jefferson (09/14/2015; 10/13/2015)
5. *State v. Greene*, 15-00092, 24th J.D.C., Parish of Jefferson (09/21/2015; 10/08/2015; 10/16/2015)

Respondent's conduct in ODC 0033643 is in violation of the Rules of Professional Conduct, Rule 1.1(c) (professional obligations); Rule 1.4(a) (communication); Rule 1.5(a) (reasonable fee); Rule

1.16(d) (obligations upon termination); Rule 5.5(a) (practicing law while ineligible); Rule 8.1(b) (respond); Rule 8.1(c) (cooperate); and Rule 8.4(a) (violate or attempt to violate Rules of Professional Conduct).

Count 3 (ODC 0033822: Darva Mason Pierre, Complainant)

On October 15, 2015, the Office of Disciplinary Counsel received a complaint from Darva Mason Pierre. The matter was opened as investigative file number ODC 0033822. On November 17, 2015, a copy of the complaint was forwarded to Respondent via certified mail and regular mail to his primary address registered with the LSBA. *See Louisiana Supreme Court Rule XIX, § 8C.* This address also is registered with the LSBA as Respondent's secondary and preferred address. Respondent was directed to file a written response with the ODC. The certified mail was received on or about November 21, 2015. The regular mail was not returned to the ODC and, presumably, was received by Respondent. Despite receiving multiple notices of the complaint, Respondent did not respond to or cooperate with the ODC.

In regard to the underlying complaint, Respondent was hired in February of 2015 to represent Pierre's fiancé, James J. Lewis, in two criminal matters pending in the Orleans Parish Criminal District Court. *See State v. Lewis, 519353, 523899, Orleans Parish Criminal District Court.* The agreed-to-fee was \$8,000. Respondent identified the following payments made to Respondent, totaling \$4,050; she did not receive receipts;

1. 02/03/2015 ATM Withdrawal- \$100
2. 02/20/2015 Withdrawal- \$1,000
3. 02/23/2015 ATM Withdrawal- \$300
4. 03/02/2015 ATM Withdrawal- \$200
5. 03/18/2015 Withdrawal- \$250
6. 03/20/2015 ATM Withdrawal- \$200
7. 05/04/2015 Cash Received from Westside Credit Corp.- \$2,000

In docket number 519,353, the docket summary reflects that Respondent first appeared in court with Lewis on February 23, 2015, for a rule to show cause why Lewis' probation should not be revoked. The matter was continued. On July 1, 2015, Lewis appeared without Respondent and advised the court that he had retained new counsel. In docket number 523,899, the docket summary reflects that Respondent first appeared in court with Lewis on March 17, 2015, for the purposes of naming counsel. On May 14, 2015, Arthur Harris enrolled to represent Lewis.

Respondent's conduct in ODC 0033822 is in violation of the Rules of Professional Conduct, Rule 8.1(b) (respond); Rule 8.1(c) (cooperate); and Rule 8.4(a) (violate or attempt to violate Rules of Professional Conduct).

Count 4 (ODC 0032637: ODC, Complainant)

On or about January 7, 2015, while attempting to locate Respondent for purposes of obtaining an initial response in the matter of *In re Kitchens*, 15-DB-027, the ODC became aware that Respondent was arrested for driving under the influence on November 1, 2011, and that on February 28, 2012, Respondent was charged with violating:

Count 1: La. Rev. Stat. Ann. § 14:98A-B (driving while intoxicated, first offense); and
Count 2: La. Rev. Stat. Ann. § 32:56B (failure to obey a traffic sign).

See State v. Kitchens, F1906510, First Parish Court, Parish of Jefferson. The ODC opened an investigation under ODC 0032637. On January 29, 2015, Respondent was notified of the complaint via hand-delivery of written correspondence from the ODC. Respondent signed for receipt of the ODC January 29, 2015, letter. Respondent initially expressed an interest in contacting the Lawyers Assistance Program, now the Judges and Lawyers Assistance Program, signing an authorization for the release of medical information. However, Respondent did not respond to the ODC, and on April 23, 2015, the ODC wrote to Respondent a second time, therein seeking an initial response to the complaint. The correspondence was received on April 28, 2015, and on that same date, Respondent emailed the ODC, offering in pertinent part, "I am pleased to inform you that I have already been evaluated. . . . Please contact me upon receipt if you have any more questions about my evaluation." Hearing nothing from Respondent, on June 5, 2015, the ODC again wrote to Respondent, inquiring about the status of his efforts. The ODC has received no further correspondence from Respondent and has not received an initial response to the complaint.

Regarding the November of 2011 arrest, on November 1, 2011, at approximately 10:45 p.m., Lieutenant Frank Budo of the Jefferson Parish Sheriff Department observed a vehicle make an illegal left turn. The intersection was marked with a "No Left Turn" sign, and the vehicle was stopped. Upon approach, the officer smelled the odor of alcohol originating from the vehicle interior. Respondent, who was identified by his driver's license, was the driver of the vehicle. Respondent was smoking a cigarette. Lt. Budo observed that both of Respondent's eyes were "glassy." Lt. Budo asked that Respondent exit the vehicle and observed that Respondent's "gait was somewhat slow and deliberate, as if being cautious of his steps." As the two men spoke, Lt. Budo detected a strong odor of an unknown alcoholic beverage on Respondent's breath. Respondent refused to perform a field sobriety test. He was placed under arrest and given his *Miranda* rights. Respondent was transported to Jefferson Parish Sheriff's Office First District for chemical testing. Respondent was read his rights relative to chemical testing, acknowledged those rights, and signed the prescribed form. Respondent refused to submit to the chemical breath test. Lt. Budo, with the assistance of Deputy Scott Nelson, prepared the affidavit for a search warrant for the seizure of a whole blood sample from Respondent. Commissioner Patricia M. Joyce of the 24th Judicial District Court signed the search warrant. The warrant was executed on November 2, 2011, at 12:12 a.m., at the First District Station. EMS-P.A. Osborne, who is employed by East Jefferson Emergency Medical Services, drew the sample, which was secured in an authorized blood kit (#BA 335666). The blood kit was received as evidence by Jefferson Parish Crime Scene Technician Brian Sharp (No. 115828) on November 2, 2011, at 12:30 a.m. The blood sample was analyzed at the Louisiana State Police Crime Laboratory in Baton Rouge, Louisiana, and results reflected a blood alcohol concentration of .08 grams percent.

according to the docket summary, Respondent entered a plea of not guilty at his April 16, 2012, arraignment. The docket summary reflects the following continuances on defense motion: 07/20/2012; 12/06/2012; 04/02/2013; 04/03/2013; 06/19/2013; 09/30/2013; 01/08/2014; 04/07/2014; 06/02/2014; 08/09/2014; 11/20/2014; 02/04/2015; 04/20/2015; 06/17/2015; and 08/05/2015. On two occasions, Respondent was held in contempt of court for missing trial; bench warrants were issued (04/02/2013; 11/06/2014). On September 17, 2015, the charges were dismissed so that Respondent might enroll in the pretrial diversion program. Respondent's participation in pretrial diversion was unsuccessful, and on November 23, 2015, the district attorney's office re-filed charges against Respondent. Arraignment was set, but Respondent failed to appear, and a bench warrant was issued. On January 28, 2016, Respondent, through counsel, entered a plea of not guilty. Trial arising from the November of 2011 incident currently is set for May 4, 2016

Respondent's conduct in ODC 0032637 is in violation of the Rules of Professional Conduct, Rule 8.1(b) (respond); Rule 8.1(c) (cooperate); Rule 8.4(a) (violate or attempt to violate rules); and Rule 8.4(b) (criminal conduct).

EVIDENCE

The formal charges were deemed admitted on May 20, 2016. Subsequently, on July 15, 2016 ODC submitted written argument and multiple exhibits, Exhibit 1 through Exhibit 58. Moreover, there are multiple exhibits within various number ranges that have number and letter designations, i.e. 13(a)-(f), 21(a)-(jj), etc. For ease of reference, Appendix 2 is a listing of all ODC documentary evidence, which the committee has accepted into evidence and considered.

FINDINGS OF FACT

Count 1

The committee finds that the deemed admitted formal charges contained in Count 1 have been substantiated by clear and convincing evidence and that Count 1 of the formal charges is in fact true. The evidence that we have relied upon is found in Exhibits ODC 1, 2, 2(a)-(b), 3, 4, 4(a), 5, 6, 7, 8, 9, 10, 11, 12, 55, 57 and 58. For the avoidance of any doubt, we find that the documentary evidence submitted by ODC provides a separate and independent basis of proof of the factual allegations set forth in Count 1 by clear and convincing evidence, independent of the committee's deemed admitted order.

Count 2

The committee finds that the deemed admitted formal charges contained in Count 2 have been substantiated by clear and convincing evidence and that Count 2 of the formal charges is in fact true. The evidence that we have relied upon is found in Exhibits ODC 13, 13(a)-(f), 14, 14(a),

15, 15(a)-(b), 16, 17, 18, 19, 20, 21, 21(a)-(jj), 22, 22(a)-(e), 23, 24, 24(a), 25, 26, 27 and 56. For the avoidance of any doubt, we find that the documentary evidence submitted by ODC provides a separate and independent basis of proof of the factual allegations set forth in Count 2 by clear and convincing evidence, independent of the committee's deemed admitted order.

Count 3

The committee finds that the deemed admitted formal charges contained in Count 3 have been substantiated by clear and convincing evidence and that Count 3 of the formal charges is in fact true. The evidence that we have relied upon is found in Exhibits ODC 28, 28(a), 29, 29(a)-(b), 30, 31, 32, 33, 34 and 35. For the avoidance of any doubt, we find that the documentary evidence submitted by ODC provides a separate and independent basis of proof of the factual allegations set forth in Count 3 by clear and convincing evidence, independent of the committee's deemed admitted order.

Count 4

The committee finds that the deemed admitted formal charges contained in Count 4 have been substantiated by clear and convincing evidence and that Count 4 of the formal charges is in fact true. The evidence that we have relied upon is found in Exhibits ODC 36, 36(a)-(b), 37, 37(a)-(n), 38, 38(a)-(b), 39, 40, 41, 42, 43, 43(a), 44, 45, 46, 46(a)-(b), 47, 48, 49, 50, 51, 52, 53 and 59. For the avoidance of any doubt, we find that the documentary evidence submitted by ODC provides a separate and independent basis of proof of the factual allegations set forth in Count 4 by clear and convincing evidence, independent of the committee's deemed admitted order.

RULES VIOLATED

The committee finds the following violations of the Rules of Professional Conduct:

COUNT 1: Rules 1.3; 1.4(a); 1.5(a); 1.5(b); 1.5 (e)(5); 8.1(b); 81.(c) and 8.4(a).

COUNT 2: Rules 1.1(c); 1.4(a); 1.5(a); 1.16(d); 5.5(a); 8.1(b); 8.1(c); and Rule 8.4(a).

COUNT 3: Rules 8.1(b); 8.1(c); and Rule 8.4(a).

COUNT 4: Rules 8.1(b); 8.1(c); 8.4(a); and Rule 8.4(b).

Appendix 1 contains relevant excerpts of each of the Rules of Professional Conduct that is implicated.

SANCTION

Louisiana Supreme Court Rule XIX, Section 10(C) states that when considering imposing a sanction after a finding of lawyer misconduct, the court or board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
2. whether the lawyer acted intentionally, knowingly, or negligently;
3. the amount of actual or potential injury caused by the lawyer's misconduct; and
4. the existence of any aggravating or mitigating factors.

In addition, the Louisiana Supreme Court relies on the *ABA Standards for Imposing Lawyer Sanctions (ABA Standards)* to determine the baseline sanction by "the type of duty violated, the lawyer's mental state and the extent of the injury caused; and then adjust[s] the sanction in accordance with the aggravating and mitigating factors present." *In re Quaid*, 1994-1316, p.13 (La. 11/30/94), 646 So. 2d 343, 350. The Court contrasts the offending lawyer's blameworthiness with the magnitude of the client's harm, and it "should be considered in tandem as flexible and dynamic elements influencing the level of sanction to be chosen." *Louisiana State Bar Association v. Amberg*, 553 So. 2d 448, 451 (La. 1989).

Duties Violated

The *ABA Standards* analysis requires that we consider the duties Respondent violated. Under the *ABA Standards*, we find that Respondent has violated duties owed to his clients,⁴ the public⁵ and the legal profession.⁶

⁴ Standard 4.0

⁵ Standard 5.0

⁶ Standard 7.0

Mental State

We must also consider the Respondent's mental state. The *ABA Standards* define "negligence" as the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. Finally, "intent" is the conscious objective or purpose to accomplish a particular result.

We find Respondent's Rule violations to be knowing, if not intentional. Respondent demonstrated a consistent pattern of lack of response or cooperation in each of the four counts. In Count 1 (Breaux), Respondent lacked diligence, failed to communicate and converted client funds. The conversion of Mr. Breaux's funds is, perhaps, the most serious of the Rule violations that we find in this matter. Respondent's actions reflect a deliberate indifference to Mr. Breaux, who went so far as seeking help from family members and attorney Poulliard to contact and achieve cooperation from Respondent.

In Count 2 (Jones), Respondent ignored Jones' repeated requests for return of his client files. ODC argues that in *In re Watts*, 2001-2060, p.3 (La. 11/2/01), 800 So. 2d 365, 266, an attorney's behavior was categorized as "knowing" because, on two occasions, the client twice wrote the attorney, and the attorney ignored the client's inquiries. We find *Watts* applicable here. ODC argues, and we agree, that Respondent has an extensive history of failing to comply with his annual professional requirements. During the most recent period of ineligibility, Respondent appeared in court on numerous occasions despite being notified by the Louisiana State Bar Association and the Louisiana Supreme Court of his ineligibility. The number and scope of the

improper representations while ineligible is beyond that which could reasonably be argued to be neglectful. We find it knowing, if not intentional.

Extent of Injury and Harm

Next, we are called upon to assess the extent of injury and harm caused by Respondent's misconduct. We find that Respondent's misconduct has caused actual harm. In Count 1, Respondent converted \$5,000 from Mr. Breaux. This is an actual injury and harm, not potential or theoretical harm. After receiving funds, there is no evidence to suggest that Respondent did anything whatsoever to have any colorable claim for a fee. Following Respondent's abandonment of Breaux's matter, Breaux hired attorney Muriel Van Horn at an additional cost of \$3,000. On February 19, 2016, Breaux submitted a claim with the Louisiana State Bar Association Client Assistance Fund. In addition, in Count 2, complainant Watts suffered actual harm. He made repeated requests for his client file went unanswered. The client file contained important client confidential materials, including tax and banking materials. Watts eventually retained the services of attorney Rudy Gorrell, who was able to assist Watts with recreating his file.

In Count 4, the committee finds that ODC has proven by clear and convincing evidence that Respondent committed the crime of driving under the influence of alcohol. The commission of this crime poses significant, unacceptable risks to the public. Moreover, when lawyers commit crimes, it casts aspersion on the entire professions, thus harming the profession.

Finally, ODC argues and we agree that ODC has been unfairly forced to expend its limited resources attempting to investigate and address Respondent's multiple Rule violations in the face of Respondent's complete lack of cooperation. *See In re: Waltzer*, 2004-1032, pp. 15-16 (La. 10/8/04), 883 So. 2d 973, 982 (per curiam); *see In re: Ford*, 2014-0831, p.4 (La. 6/20/14), 141

So. 3d 800, 802-803 (per curiam) (deemed admitted).

Baseline Sanction

We agree with ODC's argument that the baseline sanction here is disbarment. Respondent's conversion of client funds and files, along with his other multiple rule infractions which the committee finds to be knowing and intentional in many instances, combined with the significant harm and risks he posed, are precisely the types circumstances contemplated by *ABA Standards* 4.11, 4.16, 4.41(b), 5.11(b) and 7.1.

Mitigating and Aggravating Factors

ABA Standards, Standards 9.22 and 9.32 set out certain aggravating and mitigating factors that the Rules and Court require hearing committees to take into consideration. We find that the following aggravating factors are present:

1. Dishonest or selfish motive;
2. Pattern of misconduct;
3. Multiple offenses;
4. Refusal to acknowledge wrongful nature of conduct;
5. Substantial experience in the practice of law (license received October 10, 1997); and
6. Indifference to making restitution.

Other than correcting his ineligibility, after the fact of the ODC investigation, Respondent has shown a complete disregard for and lack of interest in the formal charges or disciplinary process. There is no evidence of remorse that has been presented to the committee.

In mitigation, Respondent has no prior disciplinary record.⁷ ODC adequately addresses the possible argument whether Respondent's possible substance abuse issues should serve in mitigation. The burden of establishing mitigating circumstances rests with Respondent. Respondent has not participated nor has he met his burden of establishing any other mitigating circumstances beyond the lack of a prior disciplinary record.

Louisiana Jurisprudence

Respondent's pattern of misconduct, particularly the conversion of client funds, lack of cooperation in the investigation of the complaints against him and disregard for his lack of eligibility to practice law sink to the level that merits disbarment under the Louisiana jurisprudence. For example, for a single act of conversion, the Court imposed disbarment in *In re: Weber*, 2015-0982 (La. 8/28/15), 177 So. 3d 106. In light of Respondent's conversion of client funds, combined with his multiple other instances of misconduct, disbarment is appropriate. See *In re Hall*, 2015-1208 (La. 9/18/15), 181 So. 3d 643; *In re: Stolzle*, 2013-1176 (La. 10/15/13), 130 So. 3d 801; *In re: Baer*, 2009-1795 (La. 11/20/09), 21 So. 3d 941; *In re: Hatfield*, 2008-2632 (La. 2/20/09), 2 So. 3d 425; *In re: Jones*, 2006-2702 (La. 3/30/07), 952 So. 2d 673; *In re: Williams*, 2004-1364 (La. 10/15/04), 885 So. 2d 519; *In re: Deshotels*, 2003-2060 (La. 12/12/03), 863 So. 2d 507; *In re: Dobbins*, 2001-2022 (La. 1/15/02), 805 So. 2d 133; *In re: Poirrier*, 2001- 1116, 2001-1118 (La. 6/29/01), 791 So. 2d 94; and *Louisiana State*

⁷ We are aware of and acknowledge that Respondent is the subject of other disciplinary matters, one of which is presently stayed before the Board, pending the outcome of these formal charges (*Kitchens I*, 15-DB-027) (see Exhibit ODC 53) and another filed after the instant charges one, which is in process (*Kitchens III*, 16-DB-047) (see Exhibit ODC 54). However, ODC does not argue that the violations in *Kitchens I* and subsequent ones in *Kitchens III* would not be considered a prior disciplinary record for the purpose of this analysis, nor it appear that they should be.

Bar Association v. Hinrichs, 486 So. 2d 116 (1986).

CONCLUSION

Based on deemed admitted facts and the extensive supportive evidence provided by ODC, we recommend that Respondent, Roger Kitchens, be disbarred. We further recommend that Respondent be ordered to pay all costs and expenses incurred in this matter, consistent with La. S. Ct. Rule XIX, § 10.1.

New Orleans, Louisiana this 19th day of September 2016.

**Louisiana Attorney Disciplinary Board
Hearing Committee #09
Donald C. Massey Chairman
Racquel B. Pettigrew, Lawyer Member
Jennifer L. Steel-Bourgeois, Public Member**



**BY: Donald C. Massey, Chairman
FOR THE COMMITTEE**

APPENDIX 1

RULES OF PROFESSIONAL CONDUCT IMPLICATED

Rule 1.1(c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

Rule 1.3 A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4(a) A lawyer shall keep the client reasonably informed about the status of the matter/ and promptly comply with reasonable requests for information.

Rule 1.5(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

Rule 1.5(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Rule 1.5(e)(5) Payment of fees in advance of services shall be subject to the following rules: When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

Rule 1.16(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 5.5(a) A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

Rule 8.1(b) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions, or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.1(c) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: Fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.

Rule 8.4(a) It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct.

Rule 8.4(b) It is professional misconduct for a lawyer to: commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

APPENDIX 2
ODC EXHIBITS

COUNT 1

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| ODC-1 | Richard Breaux's complaint received by the ODC on May 20, 2015 |
| ODC-2 | July 1, 2015, letter from the ODC to Respondent, via certified mail no. 9214 7969 0099 9790 1602 4294 59, forwarding complaint and requesting an initial response (first request) |
| ODC-2a | Signed receipt for certified mail no. 9214 7969 0099 9790 1602 4294 59 |
| ODC-2b | usps.com tracking information for certified mail no. 9214 7969 0099 9790 1602 4294 59 |
| ODC-3 | August 10, 2015, letter from the ODC to Respondent, via regular United States mail, forwarding complaint and requesting an initial response (second request no. 1) |
| ODC-4 | August 10, 2015, letter from the ODC to Respondent, via certified mail no. 9214 7969 0099 9790 1603 0283 54, forwarding complaint and requesting an initial response (second request no. 2) |
| ODC-4a | usps.com tracking information for certified mail no. 9214 7969 0099 9790 1603 0283 54 |
| ODC-5 | August 10, 2015, correspondence from the ODC to Mr. Breaux requesting additional information |
| ODC-6 | Supplemental correspondence from Mr. Breaux to the ODC, received by the ODC on August 17, 2015 |
| ODC-7 | Docket Master in the matter of <i>State v. Richard Breaux</i> , 512464, Orleans Parish Criminal District Court |
| ODC-8 | Docket Master in the matter of <i>State v. Richard Breaux</i> , 515387, Orleans Parish Criminal District Court |
| ODC-9 | Check number 25021, payable to Roger Kitchens, in the amount of \$5,000, subject line "Richard Breaux" |
| ODC-10 | Correspondence from Mr. Breaux to the ODC, received by the ODC on January 11, 2016 |
| ODC-11 | ACTS printout of current contact information. |
| ODC-12 | ACTS printout of historical contact information |

COUNT 2

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| ODC-13 | Complaint submitted to the ODC on September 21, 2015, by Watt Jones |
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| ODC-13a | May 30, 2014, minute entry in the matter of <i>State ex. rel. BLJ v. Watt Jones</i> , 2013-NS-27, Jefferson Parish Juvenile Court, State of Louisiana [FILED UNDER SEAL] |
| ODC-13b | "Review of a Temporary Order" in <i>In re BLJ</i> [FILED UNDER SEAL] |
| ODC-13c | May 30, 2014, Family Support Order Recommendation for Judgment in <i>In re BLJ</i> [FILED UNDER SEAL] |
| ODC-13d | Carbon for check number 1176, dated August 22, 2013, in the amount of \$350, payable to Respondent, for "Attorney Fees" and notation |
| ODC-13e | Carbon for check number 1182, dated September 20, 2013, in the amount of \$500, payable to Respondent, for "Attorney Fees" |
| ODC-13f | Carbon for check number 1183, dated October 24, 2013, in the amount of \$150, payable to Respondent, for "Attor. Fee" |
| ODC-14 | September 28, 2015, letter from the ODC to Respondent forwarding complaint and requesting an initial response via certified mail no. 9214 7969 0099 9790 1604 0269 15 |
| ODC-14a | usps.com tracking information for certified mail no. 9214 7969 0099 9790 1604 0269 15 |
| ODC-15 | October 12, 2015, letter from the ODC to Respondent forwarding complaint and requesting .an initial response via certified mail no. 9214 7969 0099 9790 1604 2960 42 (second request no. 1) |
| ODC-15a | Receipt for certified mail no. 9214 7969 0099 9790 1604 2960 42 |
| ODC-15b | usps.com tracking information for certified mail no. 9214 7969 0099 9790 1604 2960 42 |
| ODC-16 | October 12, 2015, letter from the ODC to Respondent forwarding complaint and requesting an initial response via regular United States mail |
| ODC-17 | October 12, 2015, letter from the ODC to Jones requesting additional information |
| ODC-18 | Minute Entries in the matter of <i>State in re BLJ</i> , 2013-NS-27, Jefferson Parish Juvenile Court [FILED UNDER SEAL] |
| ODC-19 | "Court Record Details" in the matter of <i>State in re BLJ</i> , 2013-NS-27, Jefferson Parish Juvenile Court [FILED UNDER SEAL] |
| ODC-20 | February 4, 2016, correspondence from Rudy W. Gorrell to the ODC |
| ODC-21 | LSBA and LASC documents setting forth Respondent's periods of ineligibility |
| ODC-21a | August 4, 2004, LSBA Notice of Delinquency |
| ODC-21b | September 7, 2004, LSBA Certification of Ineligibility (eff. 09/07/2004) |
| ODC-21c | 2004-2005 Attorney Registration Statement |

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| ODC-21d | August 11, 2006, LSBA Notice of Delinquency |
| ODC-21e | September 11, 2006, LSBA Certification of Ineligibility (eff. 09/11/06) |
| ODC-21f | 2006-2007 Attorney Registration Statement |
| ODC-21g | September 28, 2006, letter from LSBA to LASC regarding payment of dues (eff. 09/12/2006) |
| ODC-21h | Trust Account Disclosure & Overdraft Notification Authorization signed on September 28, 2007 |
| ODC-21i | August 8, 2008, LSBA Notice of Delinquency |
| ODC-21j | October 1, 2008, LSBA Notice of Delinquency |
| ODC-21k | 2008 Trust Account Disclosure & Overdraft Notification Authorization (received by LSBA on October 6, 2008) |
| ODC-21 l | 2008-2009 Attorney Registration Statement |
| ODC-21m | October 7, 2008, LASC Certification of Ineligibility (eff. 10/02/2008) |
| ODC-21n | October 8, 2008, receipt no. 5874 for \$50 trust account fee |
| ODC-21o | October 20, 2008, letter from LSBA to LASC regarding payment of membership dues (eff. 10/06/2008) |
| ODC-21p | November 7, 2008, LASC Notice regarding reporting of Trust Account Disclosure and Overdraft Notification Authorization (eff. 10/06/2008) |
| ODC-21q | Trust Account Disclosure and Overdraft Notification Authorization (signed 06/08/2009) |
| ODC-21r | Trust Account Disclosure and Overdraft Notification Authorization (received 07/07/2010) |
| ODC-21s | Trust Account Disclosure and Overdraft Notification Authorization (received 06/22/2011) |
| ODC-21t | September 25, 2012, LASC Certification of Ineligibility (eff. 09/19/2012) |
| ODC-21u | Trust Account Disclosure & Overdraft Notification Authorization (received 10/17/2012) |
| ODC-21v | Money Order no. 9450407395, payable to the LADB, dated October 17, 2012, in the amount of \$50 |
| ODC-21w | October 24, 2012, LASC notice regarding Trust Account Disclosure and Overdraft Notification reporting (eff. 10/17/2012) |
| ODC-21x | August 8, 2013, LSBA Notice of Delinquency |
| ODC-21y | September 10, 2013, LSBA Certification of Ineligibility (eff. 09/09/2013) |
| ODC-21z | September 10, 2013, LASC Certification of Ineligibility (eff. 09/09/2013) |
| ODC-21aa | 2013-2014 Attorney Registration Statement, received October 2, 2013 |
| ODC-21bb | October 7, 2013, letter from the LSBA to LASC regarding payment |

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| | of dues (eff. 10/02/2013) |
| ODC-21cc | October 11, 2013, LASC Notice regarding Trust Account Disclosure and Overdraft Notification Authorization reporting (eff. 10/02/2013) |
| ODC-21dd | August 8, 2014, LSBA Notice of Delinquency |
| ODC-21ee | September 10, 2014, LSBA Certification of Ineligibility (eff. 09/09/2014) |
| ODC-21ff | 2014-2015 Attorney Registration Statement, received 09/22/2014) |
| ODC-21gg | September 26 2014, letter from LSBA to LASC regarding payment of dues (eff. 09/22/2014) |
| ODC-21hh | August 7, 2015, LSBA Notice of Delinquency |
| ODC-21ii | September 10, 2015, LSBA Certification of Ineligibility (eff. 09/09/2015) for failure to submit annual attorney registration statement, pay LSBA annual dues, or pay LADB annual assessment |
| ODC 21jj | September 10, 2015, LASC Certification of Ineligibility (eff. 09/09/2015) for failure to pay annual disciplinary assessment or to submit annual attorney registration statement |
| ODC-22 | Docket Summaries setting forth various court appearances by Respondent on behalf of clients during period of ineligibility |
| ODC-22a | <i>State v. Young</i> , 15-04462, 24th J.D.C., Parish of Jefferson, State of Louisiana (11/19/2015) |
| ODC-22b | <i>State v. Constanza</i> , 15-05123, 24th J.D.C., Parish of Jefferson, State of Louisiana (09/28/2015, 10/26/2015; 12/04/2015) |
| ODC-22c | <i>State v. Creppel</i> , F1998649, 24th J.D.C., Parish of Jefferson, State of Louisiana (09/14/2015; 10/13/2015) |
| ODC-22d | <i>State v. Grawe</i> , 14-02333, 24th J.D.C., Parish of Jefferson, 10/13/2015) |
| ODC-22e | <i>State v. Greene</i> , 15-00092, 24th J.D.C., Parish of Jefferson, 09/21/2015; 10/08/2015; 10/16/2015) |
| ODC-23 | December 1, 2015, letter from ODC to Respondent, sent via regular United States mail, notifying him of ineligibility issues and requesting a response |
| ODC-24 | December 1, 2015, letter from ODC to Respondent, sent via certified mail no. 9214 7969 0099 9790 1605 09,80 65, notifying him of ineligibility issues and requesting a response |
| ODC-24a | usps.com tracking information for certified mail no. 9214 7969 0099 9790 1605 0980 65 stating item "not deliverable as addressed" |
| ODC-25 | January 15, 2016, letter from ADA Blair C. Constant to the ODC |
| ODC-26 | ACTS printout of current contact information. |
| ODC-27 | ACTS printout of historical contact information. |

COUNT 3

ODC-28 Complaint submitted by Darya Mason Pierre to the ODC on October 15, 2015

ODC-28a Text message communications between Respondent and Pierre. Note telephone number is the one registered with the LSBA as Respondent's contact number.

ODC-29 November 17, 2015, letter from the ODC to Respondent forwarding complaint and requesting an initial response, via certified mail no. 9214 7969 0099 9790 1604 9341 28

ODC 29a Certified mail receipt no. 9214 7969 0099 9790 1604 9341 28

ODC 29b usps.com tracking information for certified mail no. 9214 7969 0099 9790 1604 9341 28

ODC 30 November 17, 2015, letter from the ODC to Respondent forwarding complaint and requesting an initial response, via regular United States mail

ODC 31 Financial information from Pierre to reflect payments to Respondent

ODC 32 Docket summary in the matter of *State v. Lewis*, 519353, Orleans Parish, Criminal District Court, Parish of Orleans

ODC 33 Docket summary in the matter of *State v. Lewis*, 523899, Orleans Parish, Criminal District Court, Parish of Orleans

ODC 34 ACTS printout of current contact information

ODC 35 ACTS printout of historical contact information

COUNT 4

ODC-36 Docket Summary in *State v. Kitchens*, F1906510, Parish of Jefferson

ODC-36a Bill of Information

ODC-36b Summons (11/02/2011)

ODC-37 Jefferson Parish Sheriff's Office Documents (PLACED UNDER SEAL AT REQUEST OF AGENCY; *See* La. Rev. Stat. Ann. § 44:3)

ODC-37a Arrest Register

ODC-37b Intoxilyzer 5000 Operational Checklist

ODC-37c Arrestee's Rights Form

ODC-37d Certification of Arrest

ODC-37e Arrestee's Rights Form

ODC-37f Louisiana Uniform DWI Arrest Report

ODC-37g Intoxilyzer 5000 Certification Card

ODC-37h Jefferson Parish Sheriff's Office Arrest Report and Probable Cause Affidavit (11/02/2011)

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| ODC-37i | Field Sobriety Checklist |
| ODC-37j | Affidavit for Search Warrant |
| ODC-37k | Search Warrant |
| ODC-37l | Return on Search Warrant |
| ODC-37m | Louisiana Uniform DWI Arrest Report (12/12/2011) |
| ODC-37n | Louisiana State Police Crime Lab Scientific Analysis Report (11/08/2011) |
| ODC-38 | January 29, 2015 correspondence from ODC to Respondent. |
| ODC-38a | Signed receipt for January 29, 2015, correspondence |
| ODC-38b | January 29, 2015, sworn statement in 15-DB-027 (ODC 0031171) |
| ODC-39 | January 29, 2015, Medical Release Authorization |
| ODC-40 | March 2, 2015, correspondence from the ODC to LAP |
| ODC-41 | March 26, 2015, correspondence from LAP to the QDC |
| ODC-42 | March 30, 2015, correspondence from the ODC to Respondent |
| ODC-43 | April 23, 2015, letter from the ODC to Respondent, via certified mail no. 9214 7969 0099 9790 1601 3790 90, requesting an initial response |
| ODC-43a | Signed receipt for certified mail no. 9214 7969 0099 9790 1601 3790 90 and usps.com tracking information |
| ODC-44 | April 28, 2015, email correspondence from Respondent to the ODC |
| ODC-45 | April 28, 2015, correspondence from the ODC to LAP |
| ODC-46 | May 5, 2015, correspondence from LAP to the ODC |
| ODC-46a | April 21, 2015, facsimile transmittal from Dr. Alexandra Casalino LLC to LAP (PLACED UNDER SEAL BY THE ODC) |
| ODC-46b | June 5, 2015, correspondence from the ODC |
| ODC-47 | June 5, 2015, correspondence from the ODC to Respondent |
| ODC-48 | June 25, 2015, correspondence from the ODC to LAP |
| ODC-49 | July 1, 2015, correspondence from LAP to ODC |
| ODC-50 | February 2, 2016, correspondence from the Jefferson Parish District Attorney's office |
| ODC-51 | ACTS printout of current contact information |
| ODC-52 | ACTS printout of historical contact information |

ADDITIONAL ODC EXHIBITS

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| ODC-53 | Hearing Committee Report in <i>Kitchens I</i> |
| ODC-54 | Deemed admitted order in <i>Kitchens III</i> |
| ODC-55 | February 19, 2016, Notice of Client Assistance Fund Claim 2016-CAF- 1690, Richard Breaux v. Roger W. Kitchens (Count 1). |

ODC-56 July 12, 2016, affidavit of ODC Staff Investigator Danny Williamson regarding March 4, 2016, interview of Mr. Watt Jones (Count 2).

ODC-57 July 12, 2016, affidavit of ODC Staff Investigator Danny Williamson regarding February 29, 2016, interview of Ms. Helen Davis (Count 1).

ODC-58 July 12, 2016, affidavit of ODC Staff Investigator Danny Williamson regarding February 29, 2016, interview of Mr. Marcus Poulliard (Count 1).

ODC-59 Jefferson Parish Docket Summary from “JeffNet” electronic docket system (Count 4).