

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: KENNETH M. PLAISANCE

DOCKET NO. 21-DB-066

REPORT OF HEARING COMMITTEE # 9

INTRODUCTION

This attorney disciplinary matter arises out of formal charges filed by the Office of Disciplinary Counsel (“ODC”) against Kenneth M. Plaisance (“Respondent”), Louisiana Bar Roll Number 19738.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.4, 1.7(a), 3.3, and 8.4(d).²

PROCEDURAL HISTORY

The formal charges were filed on December 13, 2021. Respondent filed an answer to the charges on January 4, 2022. A scheduling conference was held on February 2, 2022, at which time the parties selected May 11-12, 2022, as hearing dates. On April 11, 2022, Respondent filed a motion to continue the hearing, stating that he was still attempting to retain an attorney and that discovery was incomplete. The motion was denied by order signed April 18, 2022. On April 25, 2022, Respondent filed a motion for summary judgement, which was denied by order signed April 27, 2022. On May 9, 2022, via a filing, attorney Luke Fontana enrolled as counsel for Respondent and filed a motion to continue, again stating that discovery was incomplete. The motion was denied by order signed the same day. On May 11, 2022, another motion to continue was filed by

¹ Respondent was admitted to the practice of law in Louisiana on October 6, 1989. Respondent is currently eligible to practice law.

² See the attached Appendix for the text of these Rules.

Like Fontana, attaching a doctor's note that indicated, in pertinent part, that Respondent was "unable to attend scheduled meeting due to health concerns." Mr. Plaisance and Mr. Fontana did not appear for the hearing on May 11, 2022 and attempts to contact Mr. Fontana were unsuccessful. The motion was denied, and the hearing proceeded. Deputy Disciplinary Counsel Robert S. Kennedy appeared on behalf of ODC.

After the May 11th hearing, ODC and Respondent filed briefs with the Board which contained conflicting evidence as to whether Mr. Fontana was actually retained to represent Respondent. By order signed August 10, 2022, the Committee Chair reopened the proceeding for the limited purpose of determining whether Mr. Fontana represented Respondent. A hearing was scheduled for September 23, 2022 and was held on that date. Deputy Disciplinary Counsel Christopher Kiesel appeared on behalf of ODC. Respondent failed to appear, and no one appeared on his behalf.

SUMMARY OF RECOMMENDATIONS

For the following reasons, the Committee finds that the ODC has, through the presentation of clear and convincing evidence, established that all of ODC's charged violations of the Rules are proven. Specifically, as alleged, the evidence offered by the ODC establishes that through his acts and omissions, respondent Kenneth Plaisance has knowingly and intentionally violated:

- Rule of Professional Conduct 1.4 (failure to communicate the existence of an unwaivable conflict of interest in his representation);
- Rule of Professional Conduct 1.7(a) (concurrent conflict of interest);
- Rule of professional Conduct 3.3 (seeking to collect attorneys' fees in pursuit of a conflicted representation); and
- Rule of professional Conduct 8.4(d) (conduct prejudicial to the administration of justice).

Considering the proof of ODC’s charges—as well as consideration of the aggravating and mitigating factors set forth hereinbelow, along with an analysis of baseline sanction considerations and caselaw—the Committee recommends that the Respondent Kenneth M. Plaisance be suspended from the practice of law for two (2) years and one (1) day, *with one year deferred*; and further that in accordance with Louisiana Supreme Court Rule XIX 24, Respondent be required to present evidence before a Hearing Committee demonstrating his fitness to resume the practice of law in Louisiana as a condition of reinstatement; and also recommends that the Respondent be assessed with the costs and expenses of the proceeding pursuant to Rule XIX, §10,1.

FORMAL CHARGES

The formal charges read, in pertinent part:

On June 15, 2017, Respondent consulted with and agreed to jointly represent two personal injury claimants, Larry Taylor (“Taylor”), an adult, and Lawan Roussel (“Lawan”), the minor child of Melvia Hodges, who had been injured in a motor vehicle accident in New Orleans. At the time of the accident, Taylor was driving a vehicle when he rear-ended an eighteen-wheeler making an illegal U-turn, which raised issues of comparative negligence. Lawan was a passenger in the front seat of the vehicle. Taylor was ticketed by police for the offense of following too closely and was later found to have the controlled substance THC in his system, indicating recent ingestion of marijuana.

At the time he was retained, Respondent failed to disclose the existence of a concurrent conflict of interest inherent in his joint representation of both clients. On July 27, 2017, on behalf of Lawan, Respondent granted a full release of all claims against Taylor to Progressive Insurance Company (Taylor’s auto insurer), in exchange for payment of the \$15,000 policy limits. Thereafter, on October 18, 2017, he filed a personal injury action in state court in Orleans Parish against Progressive (who was also the defendant’s insurer) on behalf of both Taylor and Lawan as co-plaintiffs, alleging the truck driver’s negligence. The defendant insurer later removed the matter to federal court in New Orleans. [FN1. This suit was later dismissed without prejudice and re-filed under a different case number: No. 18-cv-05889.] The respondent’s lawsuit failed to include any claims by Lawan alleging the comparative negligence of Taylor.

In the latter part of 2017, the respondent approached the Covington firm of Leger and Shaw about enrolling as co-counsel on all claims. On December 26, 2017, an attorney with the firm expressly advised Respondent of conflict concerns

with his joint representation of Taylor and Lawan and declined to participate in the case. Respondent then asked a Texas law firm, Derryberry, Zipps, and Wade, PLC, (“DZW”), to enroll as co-counsel on behalf of Lawan and Taylor. After agreeing to represent Lawan, lawyers at DZW independently advised Respondent of his concurrent conflict of interest in the dual representation and asked that he withdraw from Taylor’s defense. Respondent initially agreed to do so, then retrenched by enrolling on Taylor’s behalf. When DZW learned of this, the Texas firm enlisted the New Orleans law firm of Gainsburgh, Benjamin, David, Meunier, and Washauer as local counsel and met with the client to apprise her of the conflict issues. Ms. Hodges, on behalf of her son, thereafter discharged Respondent and executed a separate contingency fee agreement exclusively with DPW and GB.

A mediation was held between the parties in May 2018, with the respondent attempting to participate as counsel, but no settlement was reached at that time. On June 14, 2018, GB filed a federal complaint on behalf of Ms. Hodges and Lawan in the Eastern District of Louisiana. On October 16, 2018, Respondent filed a Motion to Intervene in federal court asking to re-open the earlier action that he had filed and seeking attorneys’ fees for representing Lawan on the subject claims. [FN2. After receiving the Motion to Intervene, the clerk of the Eastern District served a “Notice of Deficiency” upon Respondent instructing him to correct the filing, and further advised him that failure to do so within 7 days would result in his filing would be rejected. The respondent thereafter failed to correct the deficiency and the clerk later withdrew the filing.] In May 2019, the parties reached an amicable settlement following a second mediation. Attorneys for Lawan thereafter petitioned the Orleans Parish Civil District Court for authority to enter into a settlement of the minor’s claims, which was later granted.

On August 15, 2019, Respondent forwarded a peremptory e-mail to the DZW firm warning the client’s lawyers not to disburse any settlement funds pending resolution of his fee claim. Because of uncertainty regarding the validity of such claims, attorneys for Lawan sought guidance from the federal court to determine whether the respondent could ethically share in attorneys’ fees derived from settlement. On September 4, 2019, DZW and GB filed a pleading styled “Motion to Determine Conflict-Free Status and Entitlement to Attorneys’ Fees.” Respondent was served with a copy of the pleading but did not file a response. Thereafter, the federal judge assigned to the case, Jane Milazzo Triche, issued a ruling on October 7, 2019, confirming the existence of Respondent’s conflict of interest and declared him ineligible to receive a fee because of his conflicted representation of Lawan.

Despite his failure to appear and oppose the motion, the Respondent nonetheless appealed Judge Triche Milazzo’s ruling to the U.S. Fifth Circuit Court of Appeals. That court later dismissed the appeal as being untimely filed.

By his acts and omissions, respondent Kenneth Plaisance has knowingly and intentionally violated Rules of Professional Conduct 1.4 (failure to communicate the existence of an unwaivable conflict of interest in his representation); 1.7(a) (concurrent conflict of interest); 3.3 (seeking to collect attorneys’ fees in pursuit of a conflicted representation); 8.4(d) (conduct prejudicial to the administration of justice).

EVIDENCE

The evidence presented by ODC and admitted—and which was carefully considered by the hearing Committee in arriving at this finding, consisted of:

ODC Exhibits 1 through 22 as contained in the record of the proceedings and offered/introduced at the first hearing on May 11, 2022; and an additional nine ODC exhibits bearing on the issue of the legitimacy, vel non, of Respondent’s asserted reasons in support of his motions to continue the May 11, 2022 hearing—consisting of ODC Exhibits 23 through 31.

Respondent Plaisance did not appear, nor did Counsel or any representative on his behalf, at the May 11, 2022 hearing on the merits, at which time the following evidence was adduced, as charged.

On June 15, 2017, Respondent consulted with and agreed to jointly represent two personal injury claimants, Larry Taylor (“Taylor”), an adult, and Lawan Roussel (“Lawan”), the minor child of Melvia Hodges, who had been injured in a motor vehicle accident in New Orleans. At the time of the accident, Taylor was driving a vehicle when he rear-ended an eighteen-wheeler making an illegal U-turn, which raised issues of comparative negligence. Minor child Lawan was a passenger in the front seat of the vehicle and was also injured. Taylor was ticketed by police for the offense of following too closely and was later found to have the controlled substance THC in his system, indicating recent ingestion of marijuana.

At the time he was retained, Respondent *failed to disclose* the existence of a concurrent conflict of interest inherent in his joint representation of both clients Talyor and the minor child (Lawan). On July 27, 2017, on behalf of Lawan, Respondent granted a full release of all claims against Taylor to Progressive Insurance Company (Taylor’s auto insurer), in exchange for payment of the \$15,000 policy limits. Thereafter, on October 18, 2017, he filed a personal injury action in state court in Orleans Parish against Progressive (which was also the defendant’s insurer) *on behalf of both Taylor and Lawan* as co-plaintiffs, alleging the truck driver’s negligence. The defendant insurer later removed the matter to federal court in New Orleans. (This suit was later dismissed without prejudice and re-filed under a different case number: No. 18-cv-05889.) The Respondent’s lawsuit *failed to include any claims by Lawan* alleging the comparative negligence of Taylor.

In the latter part of 2017, the Respondent approached the Covington firm of Leger and Shaw about enrolling as co-counsel on all claims. On December 26, 2017, an attorney with that firm *expressly advised Respondent of conflict concerns* with his (Respondent's) joint representation of both Taylor and Lawan and declined to participate in the case.

Disregarding that admonition, Respondent then asked a Texas law firm, Derryberry, Zipps, and Wade, PLC, ("DZW"), to enroll as co-counsel on behalf of both Lawan and Taylor. After agreeing to represent Lawan, *lawyers at DZW independently advised Respondent of his concurrent conflict of interest* in the dual representation and asked that he withdraw from Taylor's defense.

Respondent initially agreed to do so, but thereafter reversed his position by enrolling on Taylor's behalf.

When DZW learned of this, the Texas firm enlisted the New Orleans law firm of Gainsburgh, Benjamin, David, Meunier, and Washauer (Gainsburgh) as local counsel and met with the client (Ms Hodges, Lawan's mother) to apprise her of the conflict issues. Ms. Hodges, on behalf of her son, thereafter *discharged Respondent* and executed a separate contingency fee agreement exclusively with DPW and GB.

A mediation was held between the parties in May 2018, with the respondent attempting to participate as counsel, but no settlement was reached at that time. On June 14, 2018, Gainsburgh filed a federal complaint on behalf of Ms. Hodges and Lawan in the Eastern District of Louisiana. *On October 16, 2018, Respondent filed a Motion to Intervene in federal court asking to re-open the earlier action that he had filed and seeking attorneys' fees for representing Lawan on the subject claims.* (After receiving the Motion to Intervene, the clerk of the Eastern District served a "Notice of Deficiency" upon Respondent instructing him to correct the filing, and further advised him that failure to do so within 7 days would result in his filing would be rejected.) The Respondent thereafter failed to correct the deficiency and the clerk later withdrew the filing.

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On August 15, 2019, Respondent forwarded a peremptory e-mail to the DZW firm warning the client's lawyers not to disburse any settlement funds pending resolution of his fee claim. Because of uncertainty regarding the validity of such claims, attorneys for Lawan sought guidance from the federal court to determine whether the respondent could ethically share in attorneys' fees derived from settlement. On September 4, 2019, DZW and Gainsburgh filed a pleading styled "Motion to Determine Conflict-Free Status and Entitlement to Attorneys' Fees." *Respondent was served with a copy of the pleading but did not file a response.*

Thereafter, the federal judge assigned to the case, the Honorable Jane Triche Milazzo, *issued a ruling on October 7, 2019, confirming the existence of Respondent's conflict of interest and declared him ineligible to receive a fee because of his conflicted representation of Lawan.*

Despite his failure to appear and oppose the motion, the Respondent nonetheless appealed Judge Triche Milazzo's ruling to the U.S. Fifth Circuit Court of Appeals. That court later dismissed the appeal as being untimely filed.

EVIDENCE ADDUCED

The testimony presented –unrebutted—by ODC consisted of a witness and the introduction of 22 relevant, probative documents:

The testimony of Attorney Michael Ecuyer of Gainsburg in New Orleans, established that he was involved in litigation concerning the respondent Kenneth Plaisance in which Plaisance and had been prior counsel for plaintiffs and established the following:

Ecuyer received a phone call from attorney Brian Katz at the Herman Herman law firm, who advised that he (Katz) had been contacted by some Texas attorneys who had been retained to represent individuals in Louisiana involved in a vehicle accident. (The accident in question involved the father running into the back of an 18-wheeler, resulting in injury to the minor son Lawan.)

These three individuals were a father, child, and the mother of the child, presenting a potential conflict between the father and the child (Lawan, represented by his mother), and counsel was therefore seeking to affiliate Gainsburgh as counsel for one of the two cases. (The Texas attorneys advised that they were not licensed to practice in the state of Louisiana, and therefore requested a *pro hac vice* admission.)

The Texas attorney had received a call shortly before the case had prescribed and was advised that there had been an earlier state court case filed by Respondent that had been removed

to federal court. Additionally, it was learned that the matter had been settled on behalf of the minor child against the father's insurer for the policy limits. (Notwithstanding the fact that Lawan's father, the driver of the vehicle, was also Respondent's client at the time, Respondent had filed suit *on behalf of all three individuals* in a state court pleading—filing an action on behalf of both the driver and the passenger in the vehicle, the minor child (Lawan) and further signed as attorney for both plaintiffs.)

Respondent Plaisance insisted on sharing the fee because he (Plaisance) claimed to have done work and was therefore entitled to a fee. The Texas attorneys then advised Respondent about his *conflict of interest, specifying that he (Plaisance) could not represent both the father and the child*. Although Respondent insisted that he had obtained waivers, Ecyuer advised Respondent that it was an unwaivable conflict. Therefore, Ecyuer *fashioned and prepared* to file a motion to determine conflict – free status of Respondent Plaisance.

Ecyuer then explained to the son (Lawan) and mother—and to Respondent himself—that a conflict of interest existed with Plaisance's representation, because the father could have some fault in this case, and also because of that fault it was a nonwaivable conflict. Therefore, Ecyuer explained that *this would require separate counsel* for the father and minor child and that his firm was prepared to represent the mother and also the child in this claim.

Importantly, with that explanation, Respondent expressed an understanding that he could not represent both sides because they had spent a good deal of time talking about the conflict.

However, it was later determined that Respondent had actually enrolled as counsel for the father Larry Taylor Jr. Once again, *this was after the discussion in which Ecyuer and his co-counsel had explained to Respondent Plaisance that he could not represent both sides of the litigation.*

This was explained to the mother and child by Ecuyer. Thereafter, the clients understood that they could not go forward with Respondent as counsel on the matter and signed a new retainer without Respondent Plaisance in it.

However, after concluding a substantial six-figure settlement, which was arrived at pursuant to mediation, *Respondent Plaisance nevertheless filed a petition to collect attorney's fees (demanding 32.5% of the settlement) in the portion of the case involving the settlement for Melvin and Lawan's claims, following the mediation.* Having received the petition from Respondent, Ecuyer and his fellow attorneys attempted to have a conversation with the Respondent, which was followed by an exchange of emails stressing that there was a conflict, and that he (Respondent) could not receive a fee. They further indicated that such conduct would place Respondent Plaisance in violation of the Professional Rules of Conduct. When Respondent Plaisance persisted, counsel filed with the court the aforementioned "Motion to Determine Conflict – Free Status".

Based on this filing, the presiding federal judge ruled that because Plaisance had received a fee from the settlement of the father's (Taylor) claims, Respondent was not entitled to share in the fees from the settlement of plaintiff claims of Melvia and Lawan. *However, even after U.S. District Judge Triche Milazzo entered her ruling, the Respondent persisted and filed a Notice of Appeal with the US 5th Circuit Court of Appeals, further delaying distribution of the settlement funds to the clients.*

Ecuyer further testified that the delay was significant, because at the time Judge Triche Milazzo entered her order, the funds were ready to be disbursed to the plaintiffs by order of the Orleans Parish Civil District Court. Therefore, because of the appeal, the settlement money was held in trust, delaying it until the ruling of the Fifth Circuit, which occurred on March 23, 2020. As a result, the case did not become final until March 23, 2020.

FINDINGS OF FACT

Considering all of the testimonial and supporting documentary evidence presented—including all corroborative records and court filings, the Committee has determined that the totality of ODC’s evidentiary presentation was complete, credible and reliable—and thus all facts presented fully supported all charges, to wit:

That by and through his acts and omissions, Respondent Kenneth Plaisance has knowingly and intentionally violated Rules of Professional Conduct 1.4 (failure to communicate the existence of an unwaivable conflict of interest in his representation); 1.7(a) (concurrent conflict of interest); 3.3 (seeking to collect attorneys’ fees in pursuit of a conflicted representation); and 8.4(d) (conduct prejudicial to the administration of justice).

RULES VIOLATED

As set forth hereinabove, the Committee finds that the evidence presented has proven by clear and convincing evidence that the respondent has—as charged by ODC—violated the following Rules of Professional Conduct:

- 1.4 (failure to communicate the existence of an unwaivable conflict of interest in his representation);
- 1.7(a) (concurrent conflict of interest);
- 3.3 (seeking to collect attorneys’ fees in pursuit of a conflicted representation); and
- 8.4(d) (conduct prejudicial to the administration of justice).*

The Respondent’s knowing and repeated insistence on continuing to represent both the plaintiff father and minor child in spite of his conflict —is clearly established by compelling, unqualified testimony and supporting evidence—including:

- Respondent’s documented insistence on receipt of a prohibited fee from which he had been disqualified by virtue of his having been explicitly advised by both Texas and Louisiana counsel of his unwaivable conflict;

- Respondent’s exclusion from the conflicted representation of both the father and minor child plaintiffs by finding and order of the U.S. District Court; and
- His persistent—unsuccessful—appeal of said disqualification to the U.S. Fifth Circuit Court of Appeals.

Regarding Respondent’s violation of Rule of Professional Conduct 8.4(d) (conduct prejudicial to the administration of justice), the evidence presented unequivocally established that the Respondent’s protracted insistence on representing the interests of both the father and minor child following the auto accident and injuries *additionally prejudiced the administration of justice* in the following ways:

- Respondent evidenced a significant disregard for the requirement of conflict-free representation of at least two clients, thus jeopardizing their constitutional 6th Amendment rights;
- In so doing, Respondent also jeopardized their recovery of damages for their injuries;
- Respondent caused additional work by and placed additional burdens upon legal counsel in at least two firms who were required to attempt to prevent the violation of the Rules by Respondent;
- Respondent further increased unnecessarily the workload of both the U.S District Court for the Eastern District of Louisiana and the U.S. Fifth Circuit Court of Appeals;
- Respondent contributed to the erosion of trust in the integrity of the bar and the judicial system;
- Respondent significantly delayed the payment of damages in the form of settlement funds to three plaintiffs and their families for approximately *eight or nine months* due to Respondent’s persistent litigation;
- Respondent caused added expenses—including costs and attorney’s fees—on behalf of all parties, especially due to Respondent’s motion to intervene in the federal court settlement and his subsequent frivolous appeal to the U.S.Fifth Circuit; and
- Increased the attorney's fees and thereby reduced the recovery by the parties at issue.

SANCTION

Louisiana Supreme Court Rule XIX, §10(C), states that when imposing a sanction after a finding of lawyer misconduct, a committee 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 the actual or potential injury caused by the lawyer's misconduct; and
- (4) The existence of any aggravating or mitigating factors.

Here, Respondent violated duties owed to his client(s); the legal system, (including the Federal and state of Louisiana courts); other counsel involved in the litigation; and the legal profession.

Respondent *acted with knowledge and intent* in that he had been expressly advised and made aware of the conflict.

Respondent's misconduct caused *actual, tangible* harm, including:

- Delayed payment to the family of approximately six to eight months due to his persistent litigation;
- Additional expenses on behalf of all parties, especially due to Respondent's motion to intervene in the federal court settlement and his subsequent appeal to the U.S. Fifth Circuit; and
- Additional attorney's fees by requiring other legal counsel to do an extensive amount of otherwise unnecessary work—therefore reducing recovery by the injured parties as the direct result of the protracted delay of resolution and litigation Respondent caused.

ABA Standards for Imposing Lawyer Sanctions suggest that is the baseline sanction for Respondent's misconduct.

Those *Standards* require that the discipline to be imposed “should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances” (Standard 7.1) [See generally Rule 10, ABA MRLDE].

Thus, with regard to each category of misconduct, the Sanctions Committee provides the following:

-Discussion of what types of sanctions have been imposed for similar misconduct in reported cases;

-Discussion of policy reasons which are articulated in reported cases to support such sanctions; and

-Finally, a recommendation as to the level of sanction imposed for the given misconduct, absent aggravating or mitigating circumstances.

Violations of the Rules of Professional Conduct.

Respondent is found to have violated all rules as charged:

- Rule of Professional Conduct 1.4 (failure to communicate the existence of an unwaivable conflict of interest in his representation);
- Rule of Professional Conduct 1.7(a) (concurrent conflict of interest);
- Rule of professional Conduct 3.3 (seeking to collect attorneys' fees in pursuit of a conflicted representation); and
- Rule of professional Conduct 8.4(d) (conduct prejudicial to the administration of justice).

Duties Violated.

- Duty to the Client
- Duty to the Legal System
- Duty to the Profession

Mental State

- Intentional

Harm and Extent of Harm

- Actual

MITIGATING and AGGRAVATING FACTORS

The Committee has considered the following *Mitigating Factors*:

1. The Respondent's absence of any prior disciplinary infractions or issues.
2. The fact that the harm caused, while real, is moderate, based on a review of available relevant case law.

The Committee has considered the following *Aggravating Factors*:

1. The evidence establishes that the Respondent negligently or deliberately failed to engage *at all* in the LADB process.

He was given multiple opportunities to provide the committee with mitigation, to express remorse, or to contest, challenge or explain the ODC's claims; or to assist in any way in the fact-finding process. To the contrary, he at best failed to do so to any degree whatsoever.

2. A pattern of conduct evidenced by Respondent's continued insistence on conflicted representation of two parties.
3. Refusal of Respondent to acknowledge the wrongful nature of the conflict—and refusal to heed multiple admonitions, warnings and rulings.
4. A selfish, clearly financially driven motive for Respondent's pattern of maintaining the conflicted representations in question.

Summary of Evidence bearing on additional aggravating circumstances:

Testimony:

Ms. Janine Telio

Mr. Luke Fontana, Attorney

Documentary Evidence:

At a hearing on September 16, 2022, ODC further supplemented Exhibits 1-22 with an additional nine ODC Exhibits, 23-31, which had been previously introduced at the initial hearing on May 11, 2022.

According to evidence and testimony adduced and considered by the Committee:

- Respondent Plaisance did not appear at the scheduled hearing on the merits on May 11, 2022, nor did legal counsel or any representative for him.
- On the morning of the May 11 hearing, the committee received for the first time a motion filed at 9:06am, requesting a continuance, and indicating that respondent was under the care of a medical doctor for health reasons—and that on May 10, 2022 (the day before), Dr. Michelle Lagarde-May MD, had restricted Respondent from any work – related activities, and based upon that, counsel for Respondent was asking for an order continuing the proceedings.
- The file document bore a signature purported to be that of Dr. Lagarde-May, stating precisely the same thing.
- The motion bore the signature of a person purported to legal counsel, Mr. Luke Fontana. (However, Mr. Fontana was not present.)
- Mr. Robert Kennedy for ODC noted that it is incumbent upon the Respondent to at least make a telephone call and represent the true facts to the committee, in order to give the Hearing Committee an opportunity to question him. This was acknowledged by the Committee.
- This placed the Committee in the position of not having an enrollment of counsel.
- The Committee further noted that the Respondent had not indicated a willingness to communicate with the Committee or anyone for that matter.
- The Hearing Committee chair asked ODC representative Kennedy or ODC to attempt to contact the Respondent...noting that Respondent had hung up the phone and refused to talk to any representative of ODC the day before.
- It is important note that according to ODC attorney Robert Kennedy, the Board attempted to reach the number provided, with no success, and additionally represented that the day before, the Disciplinary Board clerk's office contacted Respondent who refused to speak to them.
- In response to ODCs assertion that the evidence presented possibly suggested and artifice to attempt to gain a continuance, the committee in an abundance of caution determined that it would be appropriate to investigate whether the effort was legitimate with the committee concluding that “What we’re looking for is... something that... can authenticate the assertions made in [Respondents] motion and the legitimacy of the [asserted] grounds.

- Having identified attorney Fontana’s registered address, ODC attorney Kennedy requested the opportunity to make a note of evidence of ODC’s efforts to try to locate Mr. Fontana.
- To that end, ODC representative Janine Telio testified under oath that she accompanied ODC attorney Kennedy to Mr. Fontana’s address at 1827 Burgundy St. in New Orleans, where they found no one to answer the door. Moreover, there was no sign of anyone being present, and no name on the front door.
- There was also nothing indicating the identity of the persons living at the address, and no signage whatsoever, including no doorbell.
- The witness, Ms. Telio, also represented and wrote that neither she nor her office had received any contact or communication from attorney Fontana prior to the filing of the motion.
- They additionally attempted to call the telephone number provided and received a voicemail immediately, with no ring.
- She also texted a telephone number and left a message identifying herself, asking Mr. Fontana to return the call.

At the follow-up hearing on September 16, 2022, the Committee—in an effort to determine the legitimacy *vel non*, of Respondent’s assertions of medical unavailability, heard the testimony of 2 witnesses:

Mr. Luke Fontana, attorney

ODC Investigator Alan Grimace

Mr. Fontana provided testimony under oath as follows:

- He does not practice law, therefore currently ineligible (for the past week prior to the testimony)...and was previously an active member of the Louisiana bar; for the past year prior to the hearing, he was a sole practitioner.
- Referring to the previous May 11, 2022 hearing date... prior to that day, Mr. Fontana testified he never spoke with Respondent, and since May 11, 2022, he has had no communications with Respondent.
- The witness was not aware whether his former paralegal, Chase Campbell, had any communications with the Respondent.

- Fontana testified that he never authorized Campbell to make this or any representation to the board... nor did he ever speak with Mr. Campbell regarding representing Mr. Plaisance nor any other attorney in this or any other matter.
- The witness testified that at some point, Campbell did work for him (Fontana). However, after a point, he never heard from Campbell again.
- The witness examined the motion for continuance and testified that had never seen that motion before. He further noted that he did not sign the document; did not recognize the telephone number printed on it (504-732-5348); did not recognize the ZIP Code; did not recognize the post office box on the document; and contrary to page 1 of the motion continue, he (Fontana) was not retained as represented.
- Fontana further testified that he did see a signature which resembled his own signature, but that his signature was not authorized on this document.
- Fontana also testified that he did not sign the certificate of service.
- Exhibit number 24 was introduced– which was presented as another motion for continuance filed for the Respondent (ostensibly by Attorney Fontana) on May 11, 2022. Once again, the witness testified that he did not recognize the document or the information contained in it, nor did he file it.
- Further, contrary to representations in the request for a continuance filed on May 11, the witness testified that he never communicated with the individual named Dr. Michelle Lagarde-May; did not see the letter bearing her signature; and never sought nor authorized or signed the motion contrary to its indication.
- ODC Exhibit number 26 was produced, identified as a memorandum filed Respondent Plaisance on August 3, 2022, indicating the Respondent “believed he was represented by attorney Fontana.”
- ODC introduced Exhibit 26, a which is a message in which Respondent purports to have paid \$1000 to chase Campbell.
- Once again, witness Fontana had no knowledge of any such payment; nor did he authorize Campbell to collect \$1000; nor did he receive \$1000 for anyone regarding this matter.
- Witness Fontana testified that he never asked Campbell to handle this matter for him.
- During his testimony, Fontana added that at one point, he had discovered that his driver’s license had disappeared, and that his name had been used in a manner indicating incorrectly that he had appeared before a notary public. He also

discovered unauthorized intrusions into his computer and his bedroom, which he concluded likely had been carried out by Campbell.

ODC investigator Alan Grimace, as witness:

- ODC investigator Grimace testified, inter alia, that he had emailed a subpoena duces tecum to respondent but had received no records nor a response.

Conclusions

The Committee collectively believes that although it is possible that Respondent believed he was represented for the May 11, 2022 hearing, pursuant to Mr. Fontana's testimony, that belief would have, under the circumstances, been unreasonable, since witness (attorney) Luke Fontana testified that the two men had never spoken. Therefore:

1. Even if the Respondent Plaisance *believed* he was represented at the May 11, 2022 Committee hearing, he has since learned that he was not, yet has still not provided the committee with any mitigation or even an explanation for his absence.
2. The single medical form provided to the committee was presented by, we now know, fraudulent means, either by Mr. Plaisance himself or by attorney/witness Fontana's former paralegal referenced in his testimony. The committee has received no subsequent information explaining Mr. Plaisance's absence; nor the apparently fraudulent filings; nor Mr. Plaisance's position as to the underlying charges.
3. The Committee finds that since the September 16, 2022 hearing, we can reach no conclusion as to whether Respondent Plaisance's absence was due to his own attempted fraud on the committee, or because he was a victim of the paralegal

It is important to note that because the evidence tending to indicate an intent to obstruct the proceedings through false and fraudulent representations and forgery is not, as of the date of the writing of this Report, conclusive—*the Committee will refrain from any consideration of such in fashioning its recommended sanction.*

Nonetheless, the Respondent's persistent non-participation in this process and failure to engage the LADB is unto itself a significant aggravator, which considered with the underlying

conflict-based conduct, demands a significant sanction. Such a carefully measured sanction will ensure that the Respondent must engage in an LADB process if he wants to practice in this state again.

In light of Respondent's failure to engage with LADB and the persistent unanswered factual questions surrounding the filings in this case, the Committee believes that requiring the respondent Plaisance to engage with process is a necessary component of any appropriate sanction in this matter, as discussed below.

Caselaw Analysis

The Board and/or Court have imposed sanctions ranging from public reprimand to short suspensions based upon concurrent conflicts of interest similar to the facts present in this matter. In *In re Vidrine*, the Court upheld the Board's imposition of a public reprimand for engaging in a concurrent conflict of interest and for making false representations to a tribunal. 2011-1209 (La. 10/7/11), 72 So.2d 345. *See also In re Vidrine*, 10-DB-015, Ruling of the Louisiana Attorney Disciplinary Board (6/3/11). Mr. Vidrine was initially retained by two siblings seeking to probate the wills of their deceased parents. The siblings were named co-executors in the wills. The wills disinherited three other siblings. However, the two siblings decided not to proceed with the probate. Rather, Mr. Vidrine prepared and filed a petition on behalf of all five siblings seeking to proceed with the matter as an intestate succession. The petition falsely stated that there was no will. Subsequently, the two siblings favored by the wills had a change of heart and Mr. Vidrine filed the wills for probate on their behalf, which was detrimental to the three other siblings. The Board found that Mr. Vidrine negligently engaged in a conflict of interest and knowingly filed pleadings containing misrepresentations. The Board determined that Mr. Vidrine's misconduct

caused actual harm in the form of frustration and delay, but it did not cause actual financial harm. The only aggravating factor was Respondent's substantial experience in the practice of law. There were several mitigating factors: absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely effort to rectify the consequences of the misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceeding, character and reputation, and remorse.

In *In re Beevers*, the Board publicly reprimanded Mr. Beevers based upon a conflict of interest he had with the executor of a succession that was determined to be Mr. Beevers' client. 16-DB-014, Ruling of the Louisiana Attorney Disciplinary Board (1/22/18). Mr. Beevers represented the executor's father in a contested succession. Mr. Beevers took certain actions against the executor in the succession matter, including filing a motion to have him removed as executor. It was determined that the executor was, in fact, represented by Mr. Beevers and his law firm. The Board upheld the Committee's findings that Mr. Beevers acted negligently and did not cause any actual injury. The following aggravating factors were present: two prior disciplinary offenses and substantial experience in the practice of law. Mitigating factors included full and free disclosure to ODC and cooperative attitude toward the proceedings, absence of dishonest or selfish motive, character or reputation, remorse, and remoteness of the prior offenses.

In *In re Cook*, the Court suspended Mr. Cook for six months, with all but thirty days deferred, for engaging in the conflict of interest in a succession matter. 2018-1076 (12/5/2018), 319 So.3d 272. Three siblings hired Mr. Cook to complete the succession of their deceased mother. At the direction of two of the siblings, Mr. Cook prepared a judgement of possession contrary to the interest of the third sibling. Upon realizing this, the third sibling hired another attorney to protect and pursue his interests. Despite this conflict, Mr. Cook continued to represent the other

two siblings. The Court found that Mr. Cook acted negligently. The following mitigating factors were present: the absence of a prior disciplinary record, the absence of a dishonest or selfish motive, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, inexperience in the practice of law (admitted 2012), and remorse. The only aggravating factor present was Mr. Cook's indifference to making restitution.

In *In re August*, the Court suspended Ms. August for two years, with all but sixty days deferred, for allowing a wrongful death action to prescribe, misleading the client about the prescription, and failing to withdraw from the matter after being sued for malpractice by the client (thereby creating a conflict). 2010-1546 (10/15/10), 45 So.3d 1019. The Court found that Ms. August acted knowingly and caused actual harm. The Court recognized the following aggravating factors: prior disciplinary offenses, a dishonest or selfish motive, and substantial experience in the practice of law. The mitigating factors of full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings and remoteness of prior offenses were also present.

COMMITTEE'S RECOMMENDED SANCTION

Baseline Sanctions:

There is here is no clear and convincing evidence of economic or other obstruction, as discussed above.

There is however, clear and convincing evidence of no attempt by Respondent to cooperate; or even to address the tribunal.

The Court has imposed up to one year and a day for failure to cooperate.

The actual offense produced actual harm to the individuals represented. In this case, the clients' recovery of monetary damages they were due was delayed, with additional increased expenses of unnecessary, protracted litigation.

The Respondent was nevertheless aggressive to hang onto the representation and pursue this matter notwithstanding clear warnings that he had a conflict, and these were aggravators.

Additional aggravators:

No remorse.

No admission.

No remediation.

Failing to show, communicate or respond.

CONCLUSION and RECOMMENDATION

Respondent Plaisance either negligently or deliberately failed to engage in the LADB process, despite having received multiple opportunities to provide the Committee with mitigation, to express remorse, to explain or to contest the ODC's claims.

We conclude that even if Respondent Plaisance believed he was represented at the May 11, 2022 hearing, he since learned that he was not, yet has still not provided the Committee with any mitigation or explanation for his absence. The single medical form provided to the committee was presented by, we now know as set forth hereinabove, fraudulent means—either by Respondent himself or by the former paralegal. We have received no subsequent information explaining Plaisance's absence; or the apparently fraudulent filings; or Respondent's position as to underlying charges.

The Committee therefore agrees that, despite our September 16, 2022 hearing, we can reach no conclusion as to whether Respondent Plaisance's absence was due to his own attempted fraud on the committee or because he was a victim of the former paralegal.

Nonetheless, Respondent's persistent absence in this process and failure to engage with LADB is a significant aggravator, such that the Committee concludes that a recommended sanction of two years and one day (with one year deferred) is appropriate.

Carefully considering the clear and convincing, unrefuted and even compelling evidence of the Respondent's conduct—as well as the aggravating and mitigating factors present—the Committee recommends that the Respondent Kenneth M. Plaisance be suspended from the practice of law for two (2) years and one (1) day, *with one year deferred*; and further that according to Louisiana Supreme Court Rule XIX 24, Respondent be required to present evidence before a Hearing Committee demonstrating his fitness to resume the practice of law in Louisiana as a condition of reinstatement; and the Hearing Committee also recommends that the Respondent be assessed with the costs and expenses of the proceeding pursuant to Rule XIX, §10,1.

This opinion is unanimous and has been reviewed by each Committee member, all of whom concur and who have authorized James B. Letten, Hearing Committee #9 Chair, to sign on their behalf.

New Orleans Louisiana, this *8th* day of *DECEMBER*, 2022.

**Louisiana Attorney Disciplinary Board
Hearing Committee # 9**

**James B. Letten, Committee Chair
Colin W. Reingold, Lawyer Member
Robert P. Ventura, Public Member**

BY:



**James B. Letten, Committee Chair
For the 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 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

...

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

...

(d) Engage in conduct that is prejudicial to the administration of justice;

...