



Aug. 08, 2018

Board of Disciplinary Appeals

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

IN THE MATTER OF RICHARD E. SMITH STATE BAR CARD NO. 18669550	§ § §	CAUSE NO. 60519
--	-------------	------------------------

FIRST AMENDED PETITION FOR RECIPROCAL DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), brings this action against Respondent, Richard E. Smith, (hereinafter called "Respondent"), showing as follows:

1. This action is commenced by Petitioner pursuant to Part IX of the Texas Rules of Disciplinary Procedure. Petitioner is also providing Respondent a copy of Section 7 of this Board's Internal Procedural Rules, relating to Reciprocal Discipline Matters.

2. Respondent is a member of the State Bar of Texas and is licensed but not currently authorized to practice law in Texas. Respondent may be served with a true and correct copy of this First Amended Petition for Reciprocal Discipline at Richard E. Smith, 212 E. 5th Street, Russellville, Kentucky 42276.

3. On or about September 11, 2017, a Joint Petition for Consent Discipline Pursuant to Rule XIX, § 20, (Exhibit 1) was filed in the Supreme Court of Louisiana in a matter styled: *In Re: Confidential Party*, Docket No. 17-B-1537.

4. On or about October 16, 2017, an Order/Per Curiam (Exhibit 2) was entered by the Supreme Court of the State of Louisiana in a matter styled: *In Re: Richard E. Smith*, No. 2017-B-1537, which states in pertinent part as follows:

... IT IS ORDERED that the Petition for Consent Discipline be accepted and that Richard E. Smith, Louisiana Bar Roll number 27723, be suspended from the practice of law for a period of one year and one day. It is further ordered that all but sixty days of this suspension shall be deferred. Following completion of the active portion of the suspension, respondent shall successfully complete a two-year period of unsupervised probation governed by the conditions set forth in the petition for consent discipline...

4. In the Joint Petition for Consent Discipline Pursuant to Rule XIX, § 20 it was established that Respondent, in ODC complaint number 033708, ODC received information indicating that the Respondent had been declared ineligible to practice law, effective May of 2014. Information further confirmed that the Respondent had filed multiple disputed claims and other pleadings in the Office of Workers' Compensation district offices during his period of ineligibility, and continued to practice before OWC judges, despite his ineligibility. It was further established that in ODC complaint number 0033965, ODC received correspondence from JPMorgan Chase Bank in November 2015, regarding an overdraft in Respondent's trust account. ODC's review of the Respondent's trust accounts records found evidence of commingling of personal funds in the Respondent's client trust account, as well as several procedural errors associated with the Respondent's handling of his trust account; specifically, the Respondent failed to maintain the safety of the client funds deposited into his trust account and did not transfer attorney's fees as earned.

Respondent admitted to having violated the following of the Louisiana Rules of Professional Conduct:

- 1.15(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property; and
- 5.5 A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

5. A copy of Petitioner's Exhibit 1 and Exhibit 2 are attached hereto and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits 1 and 2 at the time of the hearing in this case.

6. Petitioner prays that, pursuant to Rule 9.02, Texas Rules of Disciplinary Procedure, this Board issue notice to Respondent, containing a copy of this First Amended Petition with exhibit, and an order directing Respondent to show cause within thirty (30) days from the date of the mailing of the notice, why the imposition of the identical discipline in this state would be unwarranted. Petitioner further prays that, upon trial of this matter, this Board enter a judgment imposing discipline identical with that imposed by the Supreme Court of the State of Louisiana and that Petitioner have such other and further relief to which it may be entitled.

Respectfully submitted,

Linda A. Acevedo
Chief Disciplinary Counsel

Amanda M. Kates
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
Telephone: 512.427.1350
Telecopier: 512.427.4167
Email: akates@texasbar.com

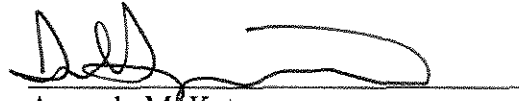


Amanda M. Kates
Bar Card No. 24075987
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that upon receipt of the Order to Show Cause from the Board of Disciplinary Appeals, I will serve a copy of this First Amended Petition for Reciprocal Discipline and the Order to Show Cause on Richard E. Smith by personal service.

Richard E. Smith
212 E. 5th Street
Russellville, Kentucky 42276


Amanda M. Kates

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Effective February 19, 2015 and amended September 20, 2016

Contents

SECTION 1: GENERAL PROVISIONS	1
Rule 1.01 Definitions.....	1
Rule 1.02 General Powers	1
Rule 1.03 Additional Rules in Disciplinary Matters.....	1
Rule 1.04 Appointment of Panels.....	1
Rule 1.05 Filing of Pleadings, Motions, and Other Papers.....	1
Rule 1.06 Service of Petition.....	2
Rule 1.07 Hearing Setting and Notice	3
Rule 1.08 Time to Answer.....	3
Rule 1.09 Pretrial Procedure.....	3
Rule 1.10 Decisions.....	4
Rule 1.11 Board of Disciplinary Appeals Opinions	4
Rule 1.12 BODA Work Product and Drafts	5
Rule 1.13 Record Retention.....	5
Rule 1.14 Costs of Reproduction of Records	5
Rule 1.15 Publication of These Rules.....	5
SECTION 2: ETHICAL CONSIDERATIONS	5
Rule 2.01 Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases.....	5
Rule 2.02 Confidentiality	5
Rule 2.03 Disqualification and Recusal of BODA Members	5
SECTION 3: CLASSIFICATION APPEALS	6
Rule 3.01 Notice of Right to Appeal	6
Rule 3.02 Record on Appeal.....	6
SECTION 4: APPEALS FROM EVIDENTIARY PANEL HEARINGS.....	6
Rule 4.01 Perfecting Appeal.....	6
Rule 4.02 Record on Appeal.....	7
Rule 4.03 Time to File Record	9
Rule 4.04 Copies of the Record.....	10
Rule 4.05 Requisites of Briefs.....	10

Rule 4.06 Oral Argument	11
Rule 4.07 Decision and Judgment	11
Rule 4.08 Appointment of Statewide Grievance Committee	12
Rule 4.09 Involuntary Dismissal	12
SECTION 5: PETITIONS TO REVOKE PROBATION	12
Rule 5.01 Initiation and Service	12
Rule 5.02 Hearing.....	12
SECTION 6: COMPULSORY DISCIPLINE	12
Rule 6.01 Initiation of Proceeding.....	12
Rule 6.02 Interlocutory Suspension.....	12
SECTION 7: RECIPROCAL DISCIPLINE	13
Rule 7.01 Initiation of Proceeding.....	13
Rule 7.02 Order to Show Cause.....	13
Rule 7.03 Attorney’s Response	13
SECTION 8: DISTRICT DISABILITY COMMITTEE HEARINGS	13
Rule 8.01 Appointment of District Disability Committee	13
Rule 8.02 Petition and Answer	14
Rule 8.03 Discovery	14
Rule 8.04 Ability to Compel Attendance.....	15
Rule 8.05 Respondent’s Right to Counsel	15
Rule 8.06 Hearing.....	15
Rule 8.07 Notice of Decision.....	15
Rule 8.08 Confidentiality.....	15
SECTION 9: DISABILITY REINSTATEMENTS	15
Rule 9.01 Petition for Reinstatement.....	15
Rule 9.02 Discovery	15
Rule 9.03 Physical or Mental Examinations.....	16
Rule 9.04 Judgment	16
SECTION 10: APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS.....	16
Rule 10.01 Appeals to the Supreme Court.....	16

SECTION 1: GENERAL PROVISIONS

Rule 1.01 Definitions

- (a) “BODA” is the Board of Disciplinary Appeals.
- (b) “Chair” is the member elected by BODA to serve as chair or, in the Chair’s absence, the member elected by BODA to serve as vice-chair.
- (c) “Classification” is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a “complaint” or an “inquiry.”
- (d) “BODA Clerk” is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.
- (e) “CDC” is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.
- (f) “Commission” is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.
- (g) “Executive Director” is the executive director of BODA.
- (h) “Panel” is any three-member grouping of BODA under TRDP 7.05.
- (i) “Party” is a Complainant, a Respondent, or the Commission.
- (j) “TDRPC” is the Texas Disciplinary Rules of Professional Conduct.
- (k) “TRAP” is the Texas Rules of Appellate Procedure.
- (l) “TRCP” is the Texas Rules of Civil Procedure.
- (m) “TRDP” is the Texas Rules of Disciplinary Procedure.
- (n) “TRE” is the Texas Rules of Evidence.

Rule 1.02 General Powers

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining

disciplinary proceedings. But TRDP 15.01 applies to the enforcement of a judgment of BODA.

Rule 1.03 Additional Rules in Disciplinary Matters

Except as varied by these rules and to the extent applicable, the TRCP, TRAP, and TRE apply to all disciplinary matters before BODA, except for appeals from classification decisions, which are governed by TRDP 2.10 and by Section 3 of these rules.

Rule 1.04 Appointment of Panels

- (a) BODA may consider any matter or motion by panel, except as specified in (b). The Chair may delegate to the Executive Director the duty to appoint a panel for any BODA action. Decisions are made by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing in these rules gives a party the right to be heard by BODA sitting en banc.
- (b) Any disciplinary matter naming a BODA member as Respondent must be considered by BODA sitting en banc. A disciplinary matter naming a BODA staff member as Respondent need not be heard en banc.

Rule 1.05 Filing of Pleadings, Motions, and Other Papers

- (a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.
 - (1) **Email Address.** The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.
 - (2) **Timely Filing.** Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day

that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.

- (3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.
- (4) **Exceptions.**
 - (i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.
 - (ii) The following documents must not be filed electronically:
 - a) documents that are filed under seal or subject to a pending motion to seal; and
 - b) documents to which access is otherwise restricted by court order.
 - (iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.
- (5) **Format.** An electronically filed document must:
 - (i) be in text-searchable portable document format (PDF);
 - (ii) be directly converted to PDF

rather than scanned, if possible;
and

(iii) not be locked.

- (b) A paper will not be deemed filed if it is sent to an individual BODA member or to another address other than the address designated by BODA under Rule 1.05(a)(2).
- (c) **Signing.** Each brief, motion, or other paper filed must be signed by at least one attorney for the party or by the party pro se and must give the State Bar of Texas card number, mailing address, telephone number, email address, and fax number, if any, of each attorney whose name is signed or of the party (if applicable). A document is considered signed if the document includes:
 - (1) an “/s/” and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or
 - (2) an electronic image or scanned image of the signature.
- (d) **Paper Copies.** Unless required by BODA, a party need not file a paper copy of an electronically filed document.
- (e) **Service.** Copies of all documents filed by any party other than the record filed by the evidentiary panel clerk or the court reporter must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

Rule 1.06 Service of Petition

In any disciplinary proceeding before BODA initiated by service of a petition on the Respondent, the petition must be served by personal service; by certified mail with return receipt requested; or, if permitted by BODA, in any other manner that is authorized by the TRCP and reasonably calculated under all the circumstances to apprise the Respondent of the proceeding and to give him or her reasonable time to appear and answer. To establish

service by certified mail, the return receipt must contain the Respondent's signature.

Rule 1.07 Hearing Setting and Notice

- (a) **Original Petitions.** In any kind of case initiated by the CDC's filing a petition or motion with BODA, the CDC may contact the BODA Clerk for the next regularly available hearing date before filing the original petition. If a hearing is set before the petition is filed, the petition must state the date, time, and place of the hearing. Except in the case of a petition to revoke probation under TRDP 2.23, the hearing date must be at least 30 days from the date that the petition is served on the Respondent.
- (b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23, the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.
- (c) **Setting Notices.** BODA must notify the parties of any hearing date that is not noticed in an original petition or motion.
- (d) **Announcement Docket.** Attorneys and parties appearing before BODA must confirm their presence and present any questions regarding procedure to the BODA Clerk in the courtroom immediately prior to the time docket call is scheduled to begin. Each party with a matter on the docket must appear at the docket call to give an announcement of readiness, to give a time estimate for the hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

Rule 1.08 Time to Answer

The Respondent may file an answer at any time, except where expressly provided otherwise by these rules or the TRDP, or when an answer date has been set by prior order of BODA. BODA may, but is not required to, consider an answer filed the day of the hearing.

Rule 1.09 Pretrial Procedure

- (a) **Motions.**
 - (1) **Generally.** To request an order or other relief, a party must file a motion supported by sufficient cause with proof of service on all other parties. The motion must state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other documents must be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. Unless otherwise required by these rules or the TRDP, the form of a motion must comply with the TRCP or the TRAP.
 - (2) **For Extension of Time.** All motions for extension of time in any matter before BODA must be in writing, comply with (a)(1), and specify the following:
 - (i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;
 - (ii) if an appeal has been perfected, the date when the appeal was perfected;
 - (iii) the original deadline for filing the item in question;
 - (iv) the length of time requested for the extension;
 - (v) the number of extensions of time that have been granted

previously regarding the item in question; and

- (vi) the facts relied on to reasonably explain the need for an extension.

- (b) **Pretrial Scheduling Conference.** Any party may request a pretrial scheduling conference, or BODA on its own motion may require a pretrial scheduling conference.
- (c) **Trial Briefs.** In any disciplinary proceeding before BODA, except with leave, all trial briefs and memoranda must be filed with the BODA Clerk no later than ten days before the day of the hearing.
- (d) **Hearing Exhibits, Witness Lists, and Exhibits Tendered for Argument.** A party may file a witness list, exhibit, or any other document to be used at a hearing or oral argument before the hearing or argument. A party must bring to the hearing an original and 12 copies of any document that was not filed at least one business day before the hearing. The original and copies must be:
 - (1) marked;
 - (2) indexed with the title or description of the item offered as an exhibit; and
 - (3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

All documents must be marked and provided to the opposing party before the hearing or argument begins.

Rule 1.10 Decisions

- (a) **Notice of Decisions.** The BODA Clerk must give notice of all decisions and opinions to the parties or their attorneys of record.
- (b) **Publication of Decisions.** BODA must report judgments or orders of public discipline:
 - (1) as required by the TRDP; and

- (2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.

- (c) **Abstracts of Classification Appeals.** BODA may, in its discretion, prepare an abstract of a classification appeal for a public reporting service.

Rule 1.11 Board of Disciplinary Appeals Opinions

- (a) BODA may render judgment in any disciplinary matter with or without written opinion. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and must be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be written. The names of the participating members must be noted on all written opinions of BODA.
- (b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.
- (c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this rule and may be issued without a written opinion.

Rule 1.12 BODA Work Product and Drafts

A document or record of any nature—regardless of its form, characteristics, or means of transmission—that is created or produced in connection with or related to BODA’s adjudicative decision-making process is not subject to disclosure or discovery. This includes documents prepared by any BODA member, BODA staff, or any other person acting on behalf of or at the direction of BODA.

Rule 1.13 Record Retention

Records of appeals from classification decisions must be retained by the BODA Clerk for a period of at least three years from the date of disposition. Records of other disciplinary matters must be retained for a period of at least five years from the date of final judgment, or for at least one year after the date a suspension or disbarment ends, whichever is later. For purposes of this rule, a record is any document, paper, letter, map, book, tape, photograph, film, recording, or other material filed with BODA, regardless of its form, characteristics, or means of transmission.

Rule 1.14 Costs of Reproduction of Records

The BODA Clerk may charge a reasonable amount for the reproduction of nonconfidential records filed with BODA. The fee must be paid in advance to the BODA Clerk.

Rule 1.15 Publication of These Rules

These rules will be published as part of the TDRPC and TRDP.

SECTION 2: ETHICAL CONSIDERATIONS

Rule 2.01 Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases

- (a) A current member of BODA must not represent a party or testify voluntarily in a disciplinary action or proceeding. Any BODA member who is subpoenaed or otherwise compelled to appear at a disciplinary action or proceeding, including at a deposition, must promptly notify the BODA Chair.

- (b) A current BODA member must not serve as an expert witness on the TDRPC.
- (c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

Rule 2.02 Confidentiality

- (a) BODA deliberations are confidential, must not be disclosed by BODA members or staff, and are not subject to disclosure or discovery.
- (b) Classification appeals, appeals from evidentiary judgments of private reprimand, appeals from an evidentiary judgment dismissing a case, interlocutory appeals or any interim proceedings from an ongoing evidentiary case, and disability cases are confidential under the TRDP. BODA must maintain all records associated with these cases as confidential, subject to disclosure only as provided in the TRDP and these rules.
- (c) If a member of BODA is subpoenaed or otherwise compelled by law to testify in any proceeding, the member must not disclose a matter that was discussed in conference in connection with a disciplinary case unless the member is required to do so by a court of competent jurisdiction.

Rule 2.03 Disqualification and Recusal of BODA Members

- (a) BODA members are subject to disqualification and recusal as provided in TRCP 18b.
- (b) BODA members may, in addition to recusals under (a), voluntarily recuse themselves from any discussion and voting for any reason. The reasons that a BODA member is recused from a case are not subject to discovery.
- (c) These rules do not disqualify a lawyer who is a member of, or associated with, the law firm of a BODA member from serving on

a grievance committee or representing a party in a disciplinary proceeding or legal malpractice case. But a BODA member must recuse him- or herself from any matter in which a lawyer who is a member of, or associated with, the BODA member's firm is a party or represents a party.

SECTION 3: CLASSIFICATION APPEALS

Rule 3.01 Notice of Right to Appeal

- (a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.
- (b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

Rule 3.02 Record on Appeal

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

SECTION 4: APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01 Perfecting Appeal

- (a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 consistent with this

requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21.

- (b) **Notification of the Evidentiary Judgment.** The clerk of the evidentiary panel must notify the parties of the judgment as set out in TRDP 2.21.

- (1) The evidentiary panel clerk must notify the Commission and the Respondent in writing of the judgment. The notice must contain a clear statement that any appeal of the judgment must be filed with BODA within 30 days of the date that the judgment was signed. The notice must include a copy of the judgment rendered.

- (2) The evidentiary panel clerk must notify the Complainant that a judgment has been rendered and provide a copy of the judgment, unless the evidentiary panel dismissed the case or imposed a private reprimand. In the case of a dismissal or private reprimand, the evidentiary panel clerk must notify the Complainant of the decision and that the contents of the judgment are confidential. Under TRDP 2.16, no additional information regarding the contents of a judgment of dismissal or private reprimand may be disclosed to the Complainant.

- (c) **Filing Notice of Appeal.** An appeal is perfected when a written notice of appeal is filed with BODA. If a notice of appeal and any other accompanying documents are mistakenly filed with the evidentiary panel clerk, the notice is deemed to have been filed the same day with BODA, and the evidentiary panel clerk must immediately send the BODA Clerk a copy of the notice and any accompanying documents.

- (d) **Time to File.** In accordance with TRDP 2.24, the notice of appeal must be filed within 30 days after the date the judgment

is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.

- (e) **Extension of Time.** A motion for an extension of time to file the notice of appeal must be filed no later than 15 days after the last day allowed for filing the notice of appeal. The motion must comply with Rule 1.09.

Rule 4.02 Record on Appeal

- (a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.
- (b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record on appeal by written stipulation filed with the clerk of the evidentiary panel.
- (c) **Responsibility for Filing Record.**
 - (1) Clerk's Record.
 - (i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.
 - (ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each

party, any post submission pleadings and briefs, and the notice of appeal.

- (iii) If the clerk of the evidentiary panel is unable for any reason to prepare and transmit the clerk's record by the due date, he or she must promptly notify BODA and the parties, explain why the clerk's record cannot be timely filed, and give the date by which he or she expects the clerk's record to be filed.

(2) Reporter's Record.

- (i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:
 - a) a notice of appeal has been filed;
 - b) a party has requested that all or part of the reporter's record be prepared; and
 - c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.
- (ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

(d) Preparation of Clerk's Record.

- (1) To prepare the clerk's record, the evidentiary panel clerk must:
 - (i) gather the documents

- designated by the parties' written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);
 - (ii) start each document on a new page;
 - (iii) include the date of filing on each document;
 - (iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;
 - (v) number the pages of the clerk's record in the manner required by (d)(2);
 - (vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and
 - (vii) certify the clerk's record.
- (2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.
- (3) The table of contents must:
- (i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;
 - (ii) be double-spaced;
 - (iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;
 - (iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and
 - (v) if the record consists of multiple volumes, indicate the page on which each volume begins.
- (e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:
- (1) file each computer file in text-searchable Portable Document Format (PDF);
 - (2) create electronic bookmarks to mark the first page of each document in the clerk's record;
 - (3) limit the size of each computer file to 100 MB or less, if possible; and
 - (4) directly convert, rather than scan, the record to PDF, if possible.
- (f) **Preparation of the Reporter's Record.**
- (1) The appellant, at or before the time prescribed for perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.
 - (2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual

for Texas Reporters' Records.

- (3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.
- (4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise appear.
- (5) A court reporter or recorder must not lock any document that is part of the record.
- (6) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.
- (g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.
- (h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.
- (i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the

attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

Rule 4.03 Time to File Record

- (a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.
- (b) **If No Record Filed.**
 - (1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.
 - (2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:
 - (i) the appellant failed to request a

- reporter's record; or
- (ii) the appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record, and the appellant is not entitled to proceed without payment of costs.
- (c) **Extension of Time to File the Reporter's Record.** When an extension of time is requested for filing the reporter's record, the facts relied on to reasonably explain the need for an extension must be supported by an affidavit of the court reporter. The affidavit must include the court reporter's estimate of the earliest date when the reporter's record will be available for filing.
- (d) **Supplemental Record.** If anything material to either party is omitted from the clerk's record or reporter's record, BODA may, on written motion of a party or on its own motion, direct a supplemental record to be certified and transmitted by the clerk for the evidentiary panel or the court reporter for the evidentiary panel.

Rule 4.04 Copies of the Record

The record may not be withdrawn from the custody of the BODA Clerk. Any party may obtain a copy of the record or any designated part thereof by making a written request to the BODA Clerk and paying any charges for reproduction in advance.

Rule 4.05 Requisites of Briefs

- (a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.
- (b) **Appellee's Filing Date.** Appellee's brief must be filed within 30 days after the appellant's brief is filed.
- (c) **Contents.** Briefs must contain:
 - (1) a complete list of the names and addresses of all parties to the final decision and their counsel;

- (2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;
- (3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;
- (4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;
- (5) a statement, without argument, of the basis of BODA's jurisdiction;
- (6) a statement of the issues presented for review or points of error on which the appeal is predicated;
- (7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;
- (8) the argument and authorities;
- (9) conclusion and prayer for relief;
- (10) a certificate of service; and
- (11) an appendix of record excerpts pertinent to the issues presented for review.
- (d) **Length of Briefs; Contents Included and Excluded.** In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction, signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on

leave of BODA. A computer-generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

- (e) **Amendment or Supplementation.** BODA has discretion to grant leave to amend or supplement briefs.
- (f) **Failure of the Appellant to File a Brief.** If the appellant fails to timely file a brief, BODA may:
 - (1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's failure to timely file a brief;
 - (2) decline to dismiss the appeal and make further orders within its discretion as it considers proper; or
 - (3) if an appellee's brief is filed, regard that brief as correctly presenting the case and affirm the evidentiary panel's judgment on that brief without examining the record.

Rule 4.06 Oral Argument

- (a) **Request.** A party desiring oral argument must note the request on the front cover of the party's brief. A party's failure to timely request oral argument waives the party's right to argue. A party who has requested argument may later withdraw the request. But even if a party has waived oral argument, BODA may direct the party to appear and argue. If oral argument is granted, the clerk will notify the parties of the time and place for submission.
- (b) **Right to Oral Argument.** A party who has filed a brief and who has timely requested oral argument may argue the case to BODA unless BODA, after examining the briefs, decides that oral

argument is unnecessary for any of the following reasons:

- (1) the appeal is frivolous;
 - (2) the dispositive issue or issues have been authoritatively decided;
 - (3) the facts and legal arguments are adequately presented in the briefs and record; or
 - (4) the decisional process would not be significantly aided by oral argument.
- (c) **Time Allowed.** Each party will have 20 minutes to argue. BODA may, on the request of a party or on its own, extend or shorten the time allowed for oral argument. The appellant may reserve a portion of his or her allotted time for rebuttal.

Rule 4.07 Decision and Judgment

- (a) **Decision.** BODA may do any of the following:
 - (1) affirm in whole or in part the decision of the evidentiary panel;
 - (2) modify the panel's findings and affirm the findings as modified;
 - (3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or
 - (4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:
 - (i) the panel that entered the findings; or
 - (ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.
- (b) **Mandate.** In every appeal, the BODA Clerk must issue a mandate in accordance with BODA's judgment and send it to the evidentiary panel and to all the parties.

Rule 4.08 Appointment of Statewide Grievance Committee

If BODA remands a cause for further proceedings before a statewide grievance committee, the BODA Chair will appoint the statewide grievance committee in accordance with TRDP 2.27. The committee must consist of six members: four attorney members and two public members randomly selected from the current pool of grievance committee members. Two alternates, consisting of one attorney and one public member, must also be selected. BODA will appoint the initial chair who will serve until the members of the statewide grievance committee elect a chair of the committee at the first meeting. The BODA Clerk will notify the Respondent and the CDC that a committee has been appointed.

Rule 4.09 Involuntary Dismissal

Under the following circumstances and on any party's motion or on its own initiative after giving at least ten days' notice to all parties, BODA may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal:

- (a) for want of jurisdiction;
- (b) for want of prosecution; or
- (c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

SECTION 5: PETITIONS TO REVOKE PROBATION

Rule 5.01 Initiation and Service

- (a) Before filing a motion to revoke the probation of an attorney who has been sanctioned, the CDC must contact the BODA Clerk to confirm whether the next regularly available hearing date will comply with the 30-day requirement of TRDP. The Chair may designate a three-member panel to hear the motion, if necessary, to meet the 30-day requirement of TRDP 2.23.

- (b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23, the TRCP, and these rules. The CDC must notify BODA of the date that service is obtained on the Respondent.

Rule 5.02 Hearing

Within 30 days of service of the motion on the Respondent, BODA must docket and set the matter for a hearing and notify the parties of the time and place of the hearing. On a showing of good cause by a party or on its own motion, BODA may continue the case to a future hearing date as circumstances require.

SECTION 6: COMPULSORY DISCIPLINE

Rule 6.01 Initiation of Proceeding

Under TRDP 8.03, the CDC must file a petition for compulsory discipline with BODA and serve the Respondent in accordance with the TRDP and Rule 1.06 of these rules.

Rule 6.02 Interlocutory Suspension

- (a) **Interlocutory Suspension.** In any compulsory proceeding under TRDP Part VIII in which BODA determines that the Respondent has been convicted of an Intentional Crime and that the criminal conviction is on direct appeal, BODA must suspend the Respondent's license to practice law by interlocutory order. In any compulsory case in which BODA has imposed an interlocutory order of suspension, BODA retains jurisdiction to render final judgment after the direct appeal of the criminal conviction is final. For purposes of rendering final judgment in a compulsory discipline case, the direct appeal of the criminal conviction is final when the appellate court issues its mandate.
- (b) **Criminal Conviction Affirmed.** If the criminal conviction made the basis of a compulsory interlocutory suspension is affirmed and becomes final, the CDC must

file a motion for final judgment that complies with TRDP 8.05.

- (1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.
- (2) If the criminal sentence is not fully probated:
 - (i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or
 - (ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.
- (c) Criminal Conviction Reversed. If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

SECTION 7: RECIPROCAL DISCIPLINE

Rule 7.01 Initiation of Proceeding

To initiate an action for reciprocal discipline under TRDP Part IX, the CDC must file a petition with BODA and request an Order to Show Cause. The petition must request that the Respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction, including a certified copy of the order or judgment rendered against the Respondent.

Rule 7.02 Order to Show Cause

When a petition is filed, the Chair immediately issues a show cause order and a hearing notice and forwards them to the CDC, who must serve the order and notice on the Respondent. The CDC must notify BODA of the date that service is obtained.

Rule 7.03 Attorney's Response

If the Respondent does not file an answer within 30 days of being served with the order and notice but thereafter appears at the hearing, BODA may, at the discretion of the Chair, receive testimony from the Respondent relating to the merits of the petition.

SECTION 8: DISTRICT DISABILITY COMMITTEE HEARINGS

Rule 8.01 Appointment of District Disability Committee

- (a) If the evidentiary panel of the grievance committee finds under TRDP 2.17(P)(2), or the CDC reasonably believes under TRDP 2.14(C), that a Respondent is suffering from a disability, the rules in this section will apply to the de novo proceeding before the District Disability Committee held under TRDP Part XII.
- (b) Upon receiving an evidentiary panel's finding or the CDC's referral that an attorney is believed to be suffering from a disability, the BODA Chair must appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. BODA will reimburse District Disability Committee members for

reasonable expenses directly related to service on the District Disability Committee. The BODA Clerk must notify the CDC and the Respondent that a committee has been appointed and notify the Respondent where to locate the procedural rules governing disability proceedings.

- (c) A Respondent who has been notified that a disability referral will be or has been made to BODA may, at any time, waive in writing the appointment of the District Disability Committee or the hearing before the District Disability Committee and enter into an agreed judgment of indefinite disability suspension, provided that the Respondent is competent to waive the hearing. If the Respondent is not represented, the waiver must include a statement affirming that the Respondent has been advised of the right to appointed counsel and waives that right as well.
- (d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee must be filed with the BODA Clerk.
- (e) Should any member of the District Disability Committee become unable to serve, the BODA Chair must appoint a substitute member.

Rule 8.02 Petition and Answer

- (a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service must comply with Rule 1.06
- (b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.
- (c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the

chair of the District Disability Committee and send notice of the hearing to the parties.

Rule 8.03 Discovery

- (a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.
- (b) **Physical or Mental Examinations.** On written motion by the Commission or on its own motion, the District Disability Committee may order the Respondent to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. Nothing in this rule limits the Respondent's right to an examination by a professional of his or her choice in addition to any exam ordered by the District Disability Committee.
 - (1) **Motion.** The Respondent must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
 - (2) **Report.** The examining professional must file with the BODA Clerk a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the CDC and the Respondent.
- (c) **Objections.** A party must make any objection to a request for discovery within 15 days of receiving the motion by filing a written objection with the BODA Clerk. BODA may decide any objection or contest to a discovery motion.

Rule 8.04 Ability to Compel Attendance

The Respondent and the CDC may confront and cross-examine witnesses at the hearing. Compulsory process to compel the attendance of witnesses by subpoena, enforceable by an order of a district court of proper jurisdiction, is available to the Respondent and the CDC as provided in TRCP 176.

Rule 8.05 Respondent's Right to Counsel

- (a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for reasonable expenses directly related to representation of the Respondent.
- (b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

Rule 8.06 Hearing

The party seeking to establish the disability must prove by a preponderance of the evidence that the Respondent is suffering from a disability as defined in the TRDP. The chair of the District Disability Committee must admit all relevant evidence that is necessary for a fair and complete hearing. The TRE are advisory but not binding on the chair.

Rule 8.07 Notice of Decision

The District Disability Committee must certify its finding regarding disability to BODA, which will issue the final judgment in the matter.

Rule 8.08 Confidentiality

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District

Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

SECTION 9: DISABILITY REINSTATEMENTS

Rule 9.01 Petition for Reinstatement

- (a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.
- (b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.
- (c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

Rule 9.02 Discovery

The discovery period is 60 days from the date that the petition for reinstatement is filed. The BODA Clerk will set the petition for a hearing on the first date available after the close of the discovery period and must notify the parties of the time and place of the hearing. BODA may continue the hearing for good cause shown.

Rule 9.03 Physical or Mental Examinations

- (a) On written motion by the Commission or on its own, BODA may order the petitioner seeking reinstatement to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. The petitioner must be served with a copy of the motion and given at least seven days to respond. BODA may hold a hearing before ruling on the motion but is not required to do so.
- (b) The petitioner must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
- (c) The examining professional must file a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the parties.
- (d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.
- (e) Nothing in this rule limits the petitioner's right to an examination by a professional of his or her choice in addition to any exam ordered by BODA.

Rule 9.04 Judgment

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof as directed by BODA. The judgment may include other orders necessary to protect the public and the petitioner's potential clients.

SECTION 10: APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS

Rule 10.01 Appeals to the Supreme Court

- (a) A final decision by BODA, except a determination that a statement constitutes an inquiry or a complaint under TRDP 2.10, may be appealed to the Supreme Court of Texas. The clerk of the Supreme Court of Texas must docket an appeal from a decision by BODA in the same manner as a petition for review without fee.
- (b) The appealing party must file the notice of appeal directly with the clerk of the Supreme Court of Texas within 14 days of receiving notice of a final determination by BODA. The record must be filed within 60 days after BODA's determination. The appealing party's brief is due 30 days after the record is filed, and the responding party's brief is due 30 days thereafter. The BODA Clerk must send the parties a notice of BODA's final decision that includes the information in this paragraph.
- (c) An appeal to the Supreme Court is governed by TRDP 7.11 and the TRAP.

CONFIDENTIAL
DUPLICATE

17 B 1537

SUPREME COURT OF LOUISIANA

IN RE: CONFIDENTIAL PARTY

DOCKET NO. _____

JOINT PETITION FOR CONSENT DISCIPLINE
PURSUANT TO RULE XIX, § 20

NOW INTO THESE PROCEEDINGS comes the OFFICE OF THE DISCIPLINARY COUNSEL ("ODC"), through the undersigned First Assistant Disciplinary Counsel, and RICHARD E. SMITH ("the Respondent") (Bar Roll No. 27723), who jointly petition the Louisiana Supreme Court for consent discipline in the above-captioned proceeding on the following grounds:

I.

The Respondent, RICHARD E. SMITH, whose bar number is 27723, was born November 11, 1957, and admitted to the practice of law in Louisiana on October 5, 2001. The Respondent is currently eligible to practice law in the State of Louisiana.

II.

Formal charges are currently pending before the Louisiana Attorney Disciplinary Board in the matter bearing LADB Docket Number 17-DB-030.

III.

All relevant facts are set forth in the *Joint Stipulation of Facts* accompanying this petition and more fully reflected in the exhibits submitted herewith. However, for ease of consideration, a summary of facts follows.

ODC complaint number 0033708, ODC received information indicating that the Respondent has been declared ineligible to practice law, effective May of 2014. Information further confirmed that the Respondent had filed multiple disputed claims and other pleadings in the Office of Workers' Compensation district offices during his period of ineligibility, and continued to practice before OWC judges, despite his ineligibility.

SUPREME COURT OF LOUISIANA
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORD

Edwin C. Gonzalez, Jr.
Deputy Clerk of Court

INPUT BY: RE

Exhibit

1

In ODC complaint number 0033965, ODC received correspondence from JPMorgan Chase Bank in November 2015, regarding an overdraft in Respondent's trust account. ODC's review of the Respondent's trust accounts records found evidence of commingling of personal funds in the Respondent's client trust account, as well as several procedural errors associated with the Respondent's handling of his trust account; specifically, the Respondent failed to maintain the safety of the client funds deposited into his trust account and did not transfer attorney's fees as earned.

IV.

In exchange for the stated discipline being imposed, the Respondent admits to having violated Rules 1.15(a) and 5.5 of the Rules of Professional Conduct.

V.

Respondent has consented to the imposition of discipline freely and voluntarily. He has not been the subject of coercion or duress and he is fully aware of the implications of submitting to consent discipline.

VI.

Respondent has consented to the imposition of discipline because he knows that if formal charges were prosecuted he could not successfully defend against them.

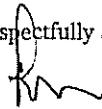
VII.

Pursuant to Rule XIX, § 20, Respondent and the Office of Disciplinary Counsel jointly propose the following sanction as appropriate discipline for the admitted misconduct in this matter: a year and a day suspension, with all but 60 days deferred, with two years' probation, along with other conditions set forth below.

WHEREFORE, Respondent RICHARD E. SMITH and the Office of Disciplinary Counsel hereby jointly pray that the Louisiana Supreme Court favorably consider and approve this *Joint Petition for Consent Discipline* and render a finding that the discipline appropriate to address this matter is a suspension from the practice of law for a year and a day suspension, with all but 60 days deferred, with two years' probation with the special conditions of: (1) Regular audits of the Respondent's IOTLA account during the period of

probation to be performed by a CPA of the Respondent's choosing, and subject to the approval of ODC, to be submitted quarterly to the Office of Disciplinary Counsel, with the cost and expense of the audits paid by the Respondent; 2) Timely compliance with the Respondent's annual MCLE requirements, and at least six hours of the Respondent's mandatory CLE requirements during the probationary period shall be obtained in law office practice/client trust account management; 3) During the entire time of the probation, the Respondent shall pay all bar dues and assessments levied by the disciplinary board and bar association when due without fail; 4) The Respondent acknowledges that subsequent disciplinary violations arising during the probationary period are to be treated in a summary fashion by the Office of the Disciplinary Counsel as probation violation matters; and, 5) The Respondent is responsible of payment all costs and expenses of the disciplinary proceeding.

Respectfully Submitted,



RICHARD E. SMITH
RESPONDENT
Bar Roll No. 27723
600 Jefferson St., Ste. 510
Lafayette, LA 70501



GREGORY L. TWEED
FIRST ASSISTANT DISCIPLINARY COUNSEL
Bar Roll No. 23960
4000 S. Sherwood Forest Blvd., Ste. 607
Baton Rouge, LA 70816
Telephone: (225) 293-3900

SUPREME COURT OF LOUISIANA

IN RE: CONFIDENTIAL PARTY

DOCKET NO. _____

JOINT STIPULATION OF FACTS

NOW INTO THESE PROCEEDINGS comes RICHARD E. SMITH, and the OFFICE OF DISCIPLINARY COUNSEL, through undersigned First Assistant Disciplinary Counsel, who stipulate the following facts in conjunction with the *Joint Petition for Consent Discipline*:

I.

The Respondent, RICHARD E. SMITH, whose bar number is 27723, was born November 11, 1957. The Respondent graduated from an out-of-state law school and was admitted to the practice of law in the State of Louisiana on October 5, 2001. The Respondent is currently eligible to practice law in the State of Louisiana.

II.

1. The Respondent was declared ineligible to practice law, effective May of 2014.
2. The Respondent filed multiple disputed claims and pleadings in the Office of Workers' Compensation district offices during his period of ineligibility, and continued to practice before OWC judges, despite his ineligibility.
3. The Respondent acknowledges he engaged in the practice of law while ineligible.
4. The Respondent states that on September 17, 2015, he received correspondence from the LSBA indicating he had been certified ineligible to practice law since September 9, 2015, because of his failure to pay the annual LSBA dues or the disciplinary board assessment fees for 2015-2016.
5. Upon receipt of this notice, the Respondent paid the dues and the penalty fee, and received correspondence from the LSBA on September 23, 2015, that his payment had been received on September 21, 2015.
6. The Respondent received correspondence on October 6, 2015, notifying him he had been declared eligible to practice law.

7. The Respondent claims he was not aware this notice did not cure his ineligibility due to his failure to comply with his annual MCLE requirements.
8. The Respondent's MCLE records confirm he was ineligible to practice during the period from May 31, 2013 through December 12, 2013, due to noncompliance with the MCLE requirements for 2012.
9. The Respondent's MCLE records confirm that the Respondent did not comply with the 2013 requirements and was again certified ineligible to practice on May 31, 2014, and was not reinstated until January 19, 2016, for compliance with the annual requirements for the years 2013 - 2015.
10. The Respondent acknowledges he engaged in the practice of law during the above period of ineligibility.
11. No client has been harmed because of the Respondent's practicing while ineligible.
12. ODC received correspondence from JPMorgan Chase Bank in November 2015, regarding an overdraft in Respondent's trust account, ending in 1603.
13. Respondent was formerly associated with the firm of Gaubert & Smith, LLC, and for the past several years, the firm maintained a trust account ending in 5907.
14. In late August 2015, the Respondent terminated his association with Gaubert & Smith, and in October of 2015, the Respondent opened the trust account ending in 1603.
15. About this overdraft, the Respondent states that on October 13, 2015, thinking he had deposited a client's workers' compensation checks into the wrong trust account, he wrote a check from his trust account ending in 1603 and deposited it into his trust account ending in 5907.
16. The Respondent was out of state during the overdraft, but upon learning of the overdraft, contacted his bank and requested a deposit of \$2,000.00 be made into his trust account ending in 1603 to eliminate the overdraft until he could determine the reason.
17. Once the Respondent determined where the error was made, he deposited an additional \$4,731.47 to correct the account.
18. The Respondent telephoned each client who received an NSF check and fully refunded them, including any fees they may have been charged.
19. ODC's Forensic Auditor, Angelina Marcellino, performed an audit of the Respondent's trust accounts records for the period covering June to November 2015.
20. Mrs. Marcellino found evidence of commingling of the Respondent's funds in the client trust account, and procedural errors associated with the Respondent's handling of his trust account.

21. The Respondent failed to maintain the safety of the client funds deposited into his trust account by issuing payment from the trust account prior to the deposit of the corresponding client funds.
22. The Respondent failed to transfer his attorney's fees as earned and left his funds in the trust account for months at a time.
23. There have been no complaints from the Respondent's clients or third parties related to his handling of his trust account.
24. The Respondent's mishandling of these funds is contrary to Rule 1.15(a) of the Rules of Professional Conduct, and prior jurisprudence of the Louisiana Supreme Court.
25. The Respondent acknowledges that his conduct violated Rules 1.15(a) and 5.5 of the Rules of Professional Conduct.
26. The Respondent's violation of Rules 1.15(a) and 5.5 violated duties owed to his clients and the profession.
27. The Respondent's violation of Rules 1.15(a) and 5.5 was knowing, rather than intentional.
28. The Respondent's violations of Rule 1.15(a) and 5.5 caused no actual harm, but the Respondent's practicing while ineligible and poor accounting practices created the potential for harm.
29. The aggravating factors are:
 - a. Substantial experience in the practice of law.
30. The mitigating factors applicable to the Respondent are:
 - a. Absence of a dishonest or selfish motive;
 - b. Personal or emotional problems (poor health);
 - c. Cooperative attitude toward proceedings;
 - d. Timely good faith effort to rectify misconduct; and
 - e. Remorse.

III.

Respondent stipulates to the above factual allegations. The Respondent admits to having violated Rules 1.15(a) and 5.5 of the Rules of Professional Conduct.

IV.

To bring about a final, appropriate resolution to these disciplinary proceedings, Respondent agrees with the Office of Disciplinary Counsel, and submits the accompanying *Joint Petition for Consent Discipline*, seeking imposition of a year and a day suspension, with all but 60 days deferred, with two years' probation, as set forth in the accompanying *Joint Petition for Consent Discipline*.

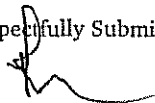
V.

The consent given by the Respondent has been freely and voluntarily given, without coercion or duress. Respondent is fully aware of the implications of submitting the attached petition for consent discipline.

VI.

Each signatory to this *Joint Stipulation of Facts* has fully and completely read each of the above numbered paragraphs in detail and stipulates that they are fully accurate and truthful in all respects.

Respectfully Submitted,



RICHARD E. SMITH
RESPONDENT
Bar Roll No. 27723
600 Jefferson St., Ste. 510
Lafayette, LA 70501



GREGORY L. TWEED
FIRST ASSISTANT DISCIPLINARY COUNSEL
Bar Roll No. 23960
4000 S. Sherwood Forest Blvd., Ste. 607
Baton Rouge, LA 70816
Telephone: (225) 293-3900

SUPREME COURT OF LOUISIANA

IN RE: CONFIDENTIAL PARTY

DOCKET NO. _____

JOINT MEMORANDUM IN SUPPORT OF CONSENT DISCIPLINE

MAY IT PLEASE THE COURT, this *Joint Memorandum in Support of Consent Discipline* is filed in these proceedings by the OFFICE OF THE DISCIPLINARY COUNSEL, through the undersigned First Assistant Disciplinary Counsel, and Respondent, RICHARD E. SMITH (Bar Roll No. 27723), to this Honorable Court as follows:

I.

After formal charges were filed, the Respondent expressed a desire to resolve this matter by consent discipline. Therefore, Respondent and the Office of Disciplinary Counsel tender the attached *Joint Petition for Consent Discipline* and *Joint Stipulation of Facts*, under Rule XIX, § 20 (as amended), of the Louisiana Supreme Court Rules.

II.

All relevant facts are set forth in the *Joint Stipulation of Facts* accompanying this petition, and more fully reflected in the exhibits submitted herewith. However, for ease of consideration, a summary of facts follows.

In ODC complaint number 0033708, ODC received information indicating that the Respondent has been declared ineligible to practice law, effective May of 2014. Information further confirmed that the Respondent had filed multiple disputed claims and pleadings in the Office of Workers' Compensation district offices during his period of ineligibility, and continued to practice before OWC judges, despite his ineligibility.

In ODC complaint number 0033965, ODC received correspondence from JPMorgan Chase Bank in November 2015, regarding an overdraft in Respondent's trust account. ODC's review of the Respondent's trust accounts records found evidence of commingling of personal funds in the Respondent's client trust account, as well as several procedural

errors associated with the Respondent's handling of his trust account; specifically, the Respondent failed to maintain the safety of the client funds deposited into his trust account and did not transfer attorney's fees as earned.

III.

The parties stipulate to the following aggravating and mitigating factors as set forth in ABA Standards 9.22 and 9.32 respectively:

AGGRAVATING:

- a. Substantial experience in the practice of law

MITIGATING:

- a. Absence of a dishonest or selfish motive;
- b. Personal or emotional problems (poor health);
- c. Cooperative attitude toward proceedings;
- d. Timely good faith effort to rectify misconduct; and
- e. Remorse.

IV.

ABA Standard 4.12 indicates that suspension is generally appropriate when a lawyer knows or should know that he or she is dealing improperly with client property and causes injury or potential injury to a client.

ABA Standard 7.2 indicates that suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

V.

The actions of the Respondent have not resulted in any actual harm, and no clients or third parties have complained to the ODC they have not received the money they were supposed to receive from the Respondent. However, the potential for harm resulting from the Respondent's handling of his trust account is great. The actions of the Respondent suggest, at a minimum, gross negligence in the way he handled his trust account. The actions of the Respondent can be analogized to the recent line of cases involving lawyers who fail to properly supervise employees who then embezzle funds from the trust account.

In one of the earlier cases in this area, this Court spoke to the lawyer's obligation to provide supervision in the matter of *LSBA vs. Keys, Jr.*, 561 So.2d 588 (La. 1990). There, the Respondent was retained to handle a succession and came into possession of succession funds which were appropriately deposited into an escrow or trust account solely for the benefit of the estate. The checkbook was kept in the Respondent's office. During the time the succession funds were being held in the Respondent's law office, his employee wrote checks on the succession account totaling approximately \$46,000.00 without Court approval and payable to his firm. The Respondent acknowledged the secretary's conduct was inappropriate but that she had done so without his knowledge. The Court directly addressed a lawyer's responsibility in a disciplinary context for the misconduct of an employee who handled clients' funds which should have been under the lawyer's control but who used the misappropriated funds improperly. The Court stated:

While respondent did not know of the misuse of the funds in the present case at a time when the consequences could have been avoided, his negligence in/ailing to establish adequate procedures for handling the client's funds resulted in the comingling of the client's funds with those of the attorney and the use of the client's funds for the attorney's personal purposes. Perhaps an attorney may blindly trust an employee with his own funds, but the attorney who undertakes to handle a client's funds has the duty to take reasonable steps to safeguard the funds. Here, the respondent's duty under D.R. 9-102 to safeguard the funds of a client included the duty of reasonable supervision of the non-lawyer employee who actually handled the funds. Respondent failed to instruct his employee on the concept of escrow accounts and failed to check periodically the handling of the funds held in escrow. Respondent's supervisory failures over a long period of time created a fertile environment for his employee's misuse of the funds.

The Court determined discipline was appropriate. Mr. Keys was suspended from the practice of law for thirty days. In this matter, the Respondent failed to establish adequate procedures for handling client funds, which resulted in the comingling of client funds with those of the Respondent. The core issue in both the *Keys* case and this matter is failing to have proper procedures in place for handling client funds.

In the nearly thirty years which have passed since *Keys*, the disciplinary jurisprudence has evolved. Amongst those evolutionary changes has been a willingness by this Court to defer imposing actual suspensions while placing an individual on probation with terms and conditions reasonably tied to the misconduct establishing the sanction. The

parties believe that a period of suspension, partially deferred, coupled with targeted terms and conditions of probation would have a strong deterrent effect for this Respondent going forward (and for other attorneys who learn of this decision). The conditions of probation will include an educational component to ensure that the Respondent fully recognizes and appreciates not only his ethical obligations, but also the proper means of maintaining and supervising his trust account, and finally provides an appropriate mechanism of revocation should the Respondent be unable or unwilling to comply with the terms and conditions of his probation.

With this in mind, the parties suggest these cases involve facts similar to those, which have consistently resulted in imposing a fully deferred suspension, to wit:

In re: Darryl Breaux, 2013-1123 (La. 06/14/13), 117 So.3d 499, ODC commenced an investigation into allegations that the Respondent mishandled his client trust account by maintaining personal funds in the trust account and allowing it to become overdrawn. Parties stipulated to a violation of Rule 1.15(a) and the Court accepted a consent discipline of a suspension of six months, fully deferred, subject to one year of probation.

In re: Cindy Williams, 2012-0750 (La. 05/04/12), 88 So.3d 443, six months, fully deferred, with 2 years' probation (w/ conditions) for violation of Rule 1.15, with no evidence of conversion and no client harm.

In re: Antoine Laurent, 2002-2163 (La. 01/14/2003), 835 So.2d 430, the Court suspended a lawyer for six months, fully deferred, and placed him on two years' probation with conditions, for misuse of his trust account. Mr. Laurent had a small legal practice consisting primarily of uncontested domestic matters and criminal misdemeanors. Due to the nature of his practice, he did not have a substantial amount of funds in his client trust account at most times, often failing to satisfy the minimum account balance required by his financial institution. As a result, Mr. Laurent began keeping the legal fees he earned from completed personal injury cases in his client trust account so as to avoid payment of bank penalties and service charges. He routinely wrote checks on his client trust account to satisfy office expenses (i.e., monthly bills, staff salaries) and personal debts. He also

utilized the account to make monetary advances to clients and satisfy litigation expenses prior to the settlement of the respective clients' cases.

In handing down the sanction in *Laurent*, the Court stated,

Taken as a whole, the record suggests respondent's misconduct resulted from improper practice management skills rather than any intentional or selfish motive. While this finding in no way excuses respondent's action, it will serve to ameliorate the harshness of the sanction. Under these circumstances, a fully deferred suspension is appropriate.

In the consent discipline matter of *In re: Brown*, 2011-2247 (La. 11/14/2011), 74 So.3d 695, the Court approved the *Laurent* sanction for a solo practitioner who caused or allowed the balance in his trust account to become negative on multiple occasions, which resulted in one instance of negligent conversion of funds owed to a third party medical provider. The overdrafts in Mr. Brown's trust account were the result of bank service charges. Despite the insufficient balance in his trust account, the bank honored the check and no actual harm resulted from these events.

In the consent discipline matter of *In re: Cave*, 2010-0692 (La. 04/23/2010), 33 So.3d 883, the Court approved the *Laurent* sanction for a lawyer who commingled law firm funds in the trust account and routinely issued payments from the trust account to cover business-related expenses.

Regarding the Respondent's practicing while ineligible, this Court has addressed this issue with *In re: John D. Ray*, 13-1275 (La. 9/13/13), 123 So.2d 707. In *Ray*, the Respondent was ineligible from September 10, 2010 until June 3, 2011. However, the Respondent had a history of ineligibility dating to 1999. During a sworn statement taken by ODC, Mr. Ray acknowledge practicing while in eligible. Here, the Respondent was ineligible from May 31, 2013 to December 12, 2013, and again from May 31, 2014 through January 19, 2016. However, the Respondent also had periods of ineligibility dating to 2002. The Respondent has acknowledged his practicing while ineligible. This Court, in *Ray*, imposed a year and a day suspension, with all but 60 days deferred. In mitigation, the Court found that the Respondent lacked a prior disciplinary record, had no dishonest or selfish motive, personal problems, full disclosure with ODC, physical disability, good

character and remorse. Due to the factual similarities between Mr. Ray and the Respondent, it is felt that a similar sanction should be imposed in our case.

The parties respectfully request that the Court give this matter favorable consideration. The Respondent has accepted full and complete responsibility for the circumstances establishing the trust account mismanagement and his ineligibility, has fully cooperated with this investigative effort, has updated his accounting procedures, and has demonstrated genuine remorse. The sanction sought to be imposed here is appropriate discipline for the Respondent and serves well the goal of protecting the public. The parties respectfully request this *Joint Petition for Consent Discipline* be granted.

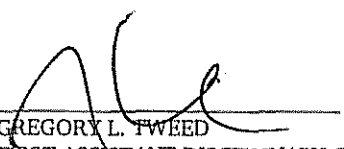
VII.

The Respondent and the Office of Disciplinary Counsel respectfully suggest that a year and a day suspension, with all but 60 days deferred, with two years' probation, along with other special conditions, as set forth in the accompanying *Joint Petition for Consent Discipline*, will serve the public, uphold the standards of the profession, deter others from engaging in misconduct, and impose appropriate discipline on the Respondent.

Respectfully Submitted,



RICHARD E. SMITH
RESPONDENT
Bar Roll No. 27723
600 Jefferson St., Ste. 510
Lafayette, LA 70501



GREGORY L. TWEED
FIRST ASSISTANT DISCIPLINARY COUNSEL
Bar Roll No. 23960
4000 S. Sherwood Forest Blvd., Ste. 607
Baton Rouge, LA 70816
Telephone: (225) 293-3900

SUPREME COURT OF LOUISIANA

IN RE: CONFIDENTIAL PARTY

DOCKET NO. _____

WAIVER OF OPPORTUNITY TO WITHDRAW

NOW INTO THESE DISCIPLINARY PROCEEDINGS comes the Respondent, RICHARD E. SMITH (Bar Roll No. 27723), who has submitted a *Petition for Consent Discipline* in the above numbered and entitled cause. As a specific, material consideration for the agreement, consent and concurrence by the Office of Disciplinary Counsel, the Respondent specifically and irrevocably waives any opportunity to withdraw consent prior to the final disposition of these consent proceedings.

RESPECTFULLY SUBMITTED:



RICHARD E. SMITH
RESPONDENT
Bar Roll No. 27723
600 Jefferson St., Ste. 510
Lafayette, LA 70501

SUPREME COURT OF LOUISIANA

IN RE: CONFIDENTIAL PARTY

DOCKET NO. _____

EXHIBIT LIST

- ODC - 1 Notice of Respondent's unauthorized practice of law while ineligible from Office of Worker's Compensation, dated September 30, 2015;
- ODC - 2 Respondent's response to ODC# 33708, dated December 4, 2015;
- ODC - 3 Certificate of Eligibility from the LSBA, dated April 21, 2016;
- ODC - 4 Correspondence, with attachments, from MCLE dated August 9, 2016, regarding Respondent's ineligibility periods;
- ODC - 5 Pleadings filed by the Respondent in November 2015, in the matter *Thibodeaux v. Synergy and LWCC*, OWC District 4, Docket No. 15-01077;
- ODC - 6 Notice from JP Morgan Chase Bank regarding Respondent's trust account overdraft, dated October 28, 2015;
- ODC - 7 Notice from JP Morgan Chase Bank regarding Respondent's trust account overdraft, dated October 29, 2015;
- ODC - 8 Transcript of Respondent sworn statement taken on October 4, 2016; and
- ODC - 9 Forensic Auditor Memo dated January 5, 2017.

The Supreme Court of the State of Louisiana

IN RE: RICHARD E. SMITH

NO. 2017-B-1537

IN RE: Disciplinary Counsel; Richard E. Smith; - Other(s); Applying
For Joint Petition for Consent Discipline Rule XIX, Sec. 20 Office of
Disciplinary Board, No. 17-DB-030;

October 16, 2017

Joint petition for consent discipline accepted. See per curiam.

MRC

BJJ

JLW

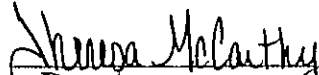
GGG

JDH

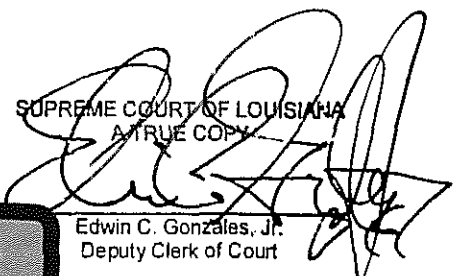
SJC

JTG

Supreme Court of Louisiana
October 16, 2017


Deputy

Clerk of Court
For the Court


SUPREME COURT OF LOUISIANA
A TRUE COPY

Edwin C. Gonzales, Jr.
Deputy Clerk of Court

Exhibit

2

SUPREME COURT OF LOUISIANA

NO. 2017-B-1537

IN RE: RICHARD E. SMITH

OCT 16 2017

MRC

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

The Office of Disciplinary Counsel ("ODC") commenced an investigation into allegations that respondent mishandled his client trust account and practiced law while ineligible to do so. Following the filing of formal charges, respondent and the ODC submitted a joint petition for consent discipline in which respondent admitted that his conduct violated Rules 1.15(a) and 5.5 of the Rules of Professional Conduct. Having reviewed the petition,

IT IS ORDERED that the Petition for Consent Discipline be accepted and that Richard E. Smith, Louisiana Bar Roll number 27723, be suspended from the practice of law for a period of one year and one day. It is further ordered that all but sixty days of this suspension shall be deferred. Following completion of the active portion of the suspension, respondent shall successfully complete a two-year period of unsupervised probation governed by the conditions set forth in the petition for consent discipline. The probationary period shall commence from the date respondent and the ODC execute a formal probation plan. Any failure of respondent to comply with the conditions of probation, or any misconduct during the probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate.

IT IS FURTHER ORDERED that all costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

SUPREME COURT OF LOUISIANA
A TRUE COPY

[Signature]
Edwin C. Gonzalez, Jr.
Deputy Clerk of Court