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

IN THE MATTER OF	§	
KENNETH M. PLAISANCE,	§	**CAUSE NO.** 69894
STATE BAR CARD NO. 24045166	§	

PETITION FOR RECIPROCAL DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), brings this action against Respondent, Kenneth M. Plaisance, (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 Petition for Reciprocal Discipline at Kenneth M. Plaisance, 2202 Touro Street, New Orleans, Louisiana 70119-1547.

3. Attached hereto and made a part hereof for all intents and purposes as if the same were copied verbatim herein, is a true and correct copy of a set of documents filed with the Supreme Court of Louisiana in the Plaisance matter consisting of an Order Per Curium dated February 6, 2024, styled Supreme Court of Louisiana, No 2023-B-1460, *In Re: Kenneth M. Plaisance, Attorney Disciplinary Proceeding*; Formal Charges filed December 13, 2021, styled Louisiana Disciplinary Board, *In Re: Kenneth M. Plaisance, (Bar Roll No. 19738)*, Docket No.

21-DB-066; Answer to the Office of Disciplinary Counsel's Formal Charge of Misconduct in Violation of the Rules of Professional Conduct filed January 4, 2022, styled Louisiana Attorney Disciplinary Board, *In Re: Kenneth M. Plaisance, Bar Roll No. 19738*, Docket No. 2021 DB 066; Report of Hearing Committee #9 filed December 9, 2022, styled Louisiana Disciplinary Board, *In Re: Kenneth M. Plaisance,* Docket No. 21-DB-066; and Recommendation to the Louisiana Supreme Court filed November 3, 2023, styled Louisiana Disciplinary Board, *In Re: Kenneth M. Plaisance,* Docket No. 21-DB-066. (Exhibit 1).

4. The Report of the Hearing Committee # 9 filed December 9, 2022, states in pertinent part as follows:

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.

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 confusion 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 place 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. Firth 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.

CONCLUSIONS and RECOMMENDATIONS

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.

The 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.

5. On or about February 6, 2024, an Order Per Curium entered by the Supreme Court of Louisiana styled Supreme Court of Louisiana, No. 2023-B-1460, *In Re: Kenneth M. Plaisance,*

Attorney Disciplinary Proceeding, states in pertinent part as follows:

> This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Kenneth M. Plaisance, an attorney licensed to practice law in Louisiana.[1]
>
> **DECREE**
>
> Upon review of the findings and recommendation of the hearing committee and the disciplinary board, and considering the record, it is ordered that Kenneth M. Plaisance, Louisiana Bar Roll number 19738, be and he hereby is suspended from the practice of law for a period of two years and one day, with one year deferred. 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.

6. Copies of the set of documents filed with the Supreme Court of Louisiana in the Plaisance matter consisting of an Order Per Curium dated February 6, 2024, styled Supreme Court of Louisiana, No 2023-B-1460, *In Re: Kenneth M. Plaisance, Attorney Disciplinary Proceeding*; Formal Charges filed December 13, 2021, styled Louisiana Disciplinary Board, *In Re: Kenneth M. Plaisance, (Bar Roll No. 19738)*, Docket No. 21-DB-066; Answer to the Office of Disciplinary Counsel's Formal Charge of Misconduct in Violation of the Rules of Professional Conduct filed January 4, 2022, styled Louisiana Attorney Disciplinary Board, *In Re: Kenneth M. Plaisance, Bar Roll No. 19738*, Docket No. 2021 DB 066; Report of Hearing Committee #9 filed December 9, 2022, styled Louisiana Disciplinary Board, *In Re: Kenneth M. Plaisance,* Docket No. 21-DB-066; and Recommendation to the Louisiana Supreme Court filed November 3, 2023, styled Louisiana Disciplinary Board, *In Re: Kenneth M. Plaisance,* Docket No. 21-DB-066 are attached hereto as Petitioner's Exhibit 1 made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce a certified copy of Exhibit 1 at the time of hearing

1 Respondent is also licensed to practice law in Texas.

of this cause.

7. Petitioner prays that, pursuant to Rule 9.02, Texas Rules of Disciplinary Procedure, this Board issue notice to Respondent, containing a copy of this Petition with exhibits, 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 that this Board enter a judgment imposing discipline identical with that imposed by the Supreme Court of Louisiana and that Petitioner have such other and further relief to which it may be entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Amanda M. Kates
Assistant Disciplinary Counsel
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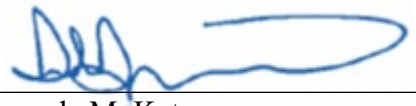
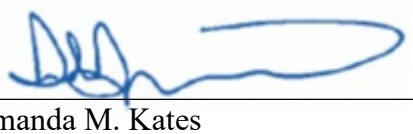


Amanda M. Kates
Bar Card No. 24075987
ATTORNEYS FOR PETITIONER

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 Petition for Reciprocal Discipline and the Order to Show Cause on Kenneth M. Plaisance, by personal service to:

Kenneth M. Plaisance
2202 Touro Street
New Orleans, Louisiana 70119-1547



Amanda M. Kates

The Supreme Court of the State of Louisiana

IN RE: KENNETH M. PLAISANCE

No. 2023-B-01460

RE: Disciplinary Counsel - Applicant Other; Findings and Recommendations rmal Charges);

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ruary 06, 2024

S ension imposed. See per curiam.

JBM

JLW

SJC

JTG

WJC

Hug J., dissents and would impose a lesser sanction.
Griff J., dissents and would reject the proposed discipline as too harsh.

Supreme urt of Louisiana
February 2024
Katie Marjanovic
Chief puty Clerk of Court
r the Court

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

Edwin C. Gonzales, Jr.
Deputy Clerk of Court

EXHIBIT
1

SUPREME COURT OF LOUISIANA

NO. 2023-B-1460

February 6, 2024

IN RE: KENNETH M. PLAISANCE

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Kenneth M. Plaisance, an attorney licensed to practice law in Louisiana.[1]

UNDERLYING FACTS

By way of background, on June 14, 2017, Larry Taylor was the driver of a vehicle that rear-ended an eighteen-wheeler making an illegal U-turn in New Orleans. Lawan Roussel, the minor child of Mr. Taylor and Melvia Hodges, was a front seat passenger in Mr. Taylor's vehicle at the time of the accident. Both Mr. Taylor and Lawan were injured. The police ticketed Mr. Taylor for following too closely, but the circumstances of the accident raised issues of comparative negligence. Progressive Insurance Company insured both Mr. Taylor's vehicle and the eighteen-wheeler.

On June 15, 2017, respondent agreed to represent both Mr. Taylor and Lawan on a contingency fee basis. However, he failed to disclose the existence of the concurrent conflict of interest by representing them both when Mr. Taylor may have some fault in causing the accident.[2] On July 27, 2017, respondent granted Mr.

[1] Respondent is also licensed to practice law in Texas.

[2] Respondent had Mr. Taylor and Ms. Hodges sign a waiver of the conflict of interest but explained to them that the conflict of interest stemmed from Progressive insuring both Mr. Taylor's vehicle

Taylor and Progressive a full release of all claims on behalf of Lawan in exchange for the $15,000 policy limit of Mr. Taylor's auto insurance policy.

On October 18, 2017, respondent filed a personal injury lawsuit in Orleans Parish Civil District Court against Progressive as the insurer of the eighteen-wheeler. Mr. Taylor and Lawan were co-plaintiffs in the lawsuit, and respondent failed to include any claims by Lawan alleging comparative negligence by Mr. Taylor. Progressive later removed the case to federal court in New Orleans, and the case was dismissed without prejudice at respondent's request.

In the latter part of 2017, respondent decided to try to enlist the help of a law firm that handles eighteen-wheeler cases. To this end, respondent asked the Leger & Shaw law firm in New Orleans to enroll as co-counsel on all claims. On December 16, 2017, the Leger firm advised respondent of the conflict of interest concerns with his dual representation of Mr. Taylor and Lawan, and it declined respondent's request to act as co-counsel.

Respondent then asked the Texas law firm of Derryberry, Zipps, and Wade, PLC, to enroll as co-counsel on behalf of Mr. Taylor and Lawan. After agreeing to represent Lawan, the Derryberry firm advised respondent of his concurrent conflict of interest in the dual representation and asked that he withdraw from Mr. Taylor's defense. Ultimately, respondent failed to withdraw from representing Mr. Taylor.

The Derryberry firm associated the New Orleans law firm of Gainsburgh, Benjamin, David, Meunier, and Warshauer, LLC as local counsel and met with Ms. Hodges on Lawan's behalf to advise her of respondent's conflict of interest. Thereafter, Ms. Hodges terminated respondent's representation of Lawan and executed a contingency fee agreement with the Derryberry firm and the Gainsburgh firm.

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and the eighteen-wheeler. He never explained the conflict of interest due to Mr. Taylor's possible comparative negligence.

On June 14, 2018, the Gainsburgh firm filed a lawsuit on behalf of Ms. Hodges and Lawan in the United States District Court for the Eastern District of Louisiana. With respondent's assistance, Mr. Taylor filed his own lawsuit in the United States District Court for the Eastern District of Louisiana. Soon thereafter, respondent enrolled as Mr. Taylor's counsel. Those two federal cases were then consolidated. On October 16, 2018, respondent filed a motion to intervene in the consolidated cases, requesting attorney's fees for his past representation of Lawan. The filing of the motion to intervene was ultimately rejected due to a deficiency respondent failed to correct.

In May 2019, the parties settled the claim following a mediation. Thereafter, Lawan's attorneys petitioned the Orleans Parish Civil District Court for authority to enter into the settlement on Lawan's behalf, which petition was ultimately granted.

On August 15, 2019, respondent emailed the Derryberry firm to warn it not to disburse the settlement funds until his fee claim was resolved. Because of uncertainty regarding the validity of respondent's fee claim, on September 4, 2019, Lawan's attorneys filed into the record of the consolidated federal cases a pleading entitled "Motion to Determine Conflict-Free Status and Entitlement to Attorneys' Fees." Respondent did not oppose the motion or appear at the related hearing. On October 7, 2019, the presiding judge confirmed that respondent had a conflict of interest and, thus, was ineligible to receive a fee from his conflicted representation of Lawan. Specifically, the judge ruled that, because respondent received a fee from Mr. Taylor's portion of the settlement, he could not share in the fees from Lawan's portion of the settlement. Respondent appealed the ruling to the United States Fifth Circuit Court of Appeals, which appeal was dismissed due to lack of jurisdiction in the latter part of March 2020.

DISCIPLINARY PROCEEDINGS

In December 2021, the ODC filed formal charges against respondent, alleging that his conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.4 (failure to communicate with a client), 1.7(a) (conflict of interest: concurrent clients), 3.3 (candor toward the tribunal),[3] 8.4(d) (engaging in conduct prejudicial to the administration of justice). Respondent answered the formal charges, essentially denying that he engaged in any misconduct. Accordingly, the matter proceeded to a formal hearing on the merits.

Formal Hearing

On April 11, 2022, one month prior to the scheduled hearing, respondent filed a motion to continue the hearing, arguing that discovery was incomplete and that he was still attempting to retain an attorney to represent him. The ODC opposed the motion, and the hearing committee chair denied the motion on April 18, 2022. On April 25, 2022, respondent filed a motion for summary judgment, which the ODC opposed based upon Supreme Court Rule XIX, § 15(B), which prohibits such motions "prior to the completion of the evidentiary record." The committee chair denied the motion on April 27, 2022.

On May 9, 2022, attorney Luke Fontana purportedly enrolled as respondent's counsel and filed a motion to continue, which again argued that discovery was incomplete. That same day, the committee chair denied the motion. On May 11, 2022, the day of the hearing, another motion to continue was fax-filed on respondent's behalf, purportedly by Mr. Fontana. Attached to the motion was a doctor's note indicating that respondent was unable to attend the hearing "due to

[3] The Rule 3.3 allegation may have been a typographical error in the formal charges as the formal charges define Rule 3.3 as "seeking to collect attorneys' fees in pursuit of a conflicted representation," and the ODC's pre-hearing memorandum references Rule 3.1 (meritorious claims and contentions) instead of Rule 3.3.

health concerns." Neither respondent nor Mr. Fontana appeared at the hearing. After attempts to reach Mr. Fontana failed, the committee chair denied the motion.

The hearing on the merits proceeded with only Deputy Disciplinary Counsel Robert Kennedy in attendance to represent the ODC. The ODC introduced documentary evidence and called attorney Michael Ecuyer of the Gainsburgh firm to testify before the committee.

Following the hearing, both respondent and the ODC provided conflicting information regarding whether Mr. Fontana had actually been retained to represent respondent. According to the ODC's investigator, Mr. Fontana denied representing respondent. According to respondent, he paid Mr. Fontana's paralegal to retain Mr. Fontana. Under these circumstances, the committee reopened the hearing to receive evidence and testimony regarding this conflicting information.

The second hearing took place on September 23, 2022. The ODC was represented by Deputy Disciplinary Counsel Christopher Kiesel. Respondent failed to appear, and no one appeared on his behalf. The ODC introduced documentary evidence and called Mr. Fontana to testify before the committee.

RESPONDENT'S OCTOBER 5, 2020 SWORN STATEMENT TESTIMONY

Respondent testified that he had not yet attempted to obtain counsel to represent him even though he requested a continuance to do so. Regarding the conflict of interest, respondent testified that he was aware of it because he had Mr. Taylor and Ms. Hodges sign waivers. He indicated that his research regarding whether the conflict of interest was unwaivable was indeterminate. He also testified that he did not obtain an ethics opinion regarding the conflict of interest from the Louisiana State Bar Association as suggested by the Leger firm. Nevertheless, at the suggestion of two other attorneys, he had the case that was removed to federal court dismissed because of a possible conflict of interest. Respondent believes that

the Derryberry and Gainsburgh firms kept bring up the conflict of interest issue so they could cut him out of a share of the attorney's fees.

MICHAEL ECUYER'S TESTIMONY

Mr. Ecuyer, an attorney at the Gainsburgh firm, testified that he filed a disciplinary complaint against respondent regarding his conflicted representation of Mr. Taylor and Lawan. He indicated that he and other attorneys repeatedly told respondent that he could not represent both Mr. Taylor and Lawan. Respondent stated that he had Mr. Taylor and Ms. Hodges sign waivers of the conflict of interest, and Mr. Ecuyer told him the conflict of interest was not waivable. In Mr. Ecuyer's opinion, respondent was unable to understand the difference between a waivable and an unwaivable conflict.

After the settlement, respondent insisted he was due a fee for his representation of Lawan. Therefore, Mr. Ecuyer and Lawan's other attorneys filed a motion asking the federal court to determine if respondent was conflict-free and, thus, entitled to a fee for his representation of Lawan. Until the fee dispute was resolved, the settlement funds were held in trust, which delayed the disbursement of Lawan's portion of the settlement for eight or nine months.

LUKE FONTANA'S TESTIMONY

Mr. Fontana testified that he has never spoken with respondent and was not retained to represent him. He also testified that he had never seen and did not sign the motions for continuance purportedly filed by him in this matter. He had no knowledge of whether his paralegal had ever spoken to respondent and never spoke to his paralegal about respondent. Mr. Fontana further testified that he had no knowledge of the $1,000 payment respondent purportedly made to his paralegal,

never authorized his paralegal to collect $1,000 from respondent, and never received the $1,000 from either respondent or his paralegal.

Mr. Fontana also testified that, at one point, he discovered that his driver's license was missing and that his name had been falsely used in a manner indicating he had appeared before a notary public. Additionally, he discovered unauthorized intrusions into his computer and bedroom, which he concluded were likely perpetrated by his paralegal.[4] Finally, Mr. Fontana indicated that, at some point, he never heard from the paralegal again.

Hearing Committee Report

After considering the testimony and evidence presented at the two hearings, the hearing committee made factual findings consistent with the factual allegations set forth in the formal charges and in the underlying facts section above. Additionally, the committee found the following:

- Respondent disregarded the requirement of a conflict-free representation of Mr. Taylor and Lawan, jeopardizing their constitutional Sixth Amendment rights;
- Respondent jeopardized their recovery of damages for their injuries;
- Respondent caused additional work by and placed additional burdens upon legal counsel in at least two law firms who were required to prevent his violation of the Rules of Professional Conduct;
- Respondent unnecessarily increased the workload of both the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals;

[4] In a sealed portion of the transcript, the ODC reported that Mr. Fontana's paralegal had an extensive criminal history in several states.

- Respondent contributed to the erosion of trust in the integrity of the bar and the judicial system;
- Respondent delayed, for approximately eight or nine months, the payment of damages in the form of settlement funds to three plaintiffs and their families due to his persistent litigation;
- Respondent caused added expenses, including costs and attorney's fees, for all parties due to his motion to intervene in the federal court settlement and his frivolous appeal to the United States Fifth Circuit Court of Appeals;
- Because of the increased attorney's fees, respondent reduced the parties' recoveries;
- Even if respondent believed he was represented at the May 11, 2022 disciplinary hearing, he has since learned he was not; yet he still has not provided any mitigating evidence or an explanation for his absence at the September 23, 2022 hearing;
- The medical note provided to the committee was presented by fraudulent means either by respondent or by Mr. Fontana's paralegal; respondent has provided no subsequent information regarding his absence, the fraudulent filing, or his position as to the formal charges; and
- Despite the September 23, 2022 hearing, the committee is unable to reach a conclusion as to whether respondent's absence at the May 11, 2022 hearing was due to his own attempted fraud or because he was a victim of Mr. Fontana's paralegal.

Based upon these facts, the committee determined respondent violated the Rules of Professional Conduct as charged. The committee then determined respondent knowingly and intentionally violated duties owed to his clients, the legal system, and the legal profession, which caused actual harm.

The committee found the following aggravating factors are present: a dishonest or selfish motive, a pattern of misconduct, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, and refusal to acknowledge the wrongful nature of the conduct. In mitigation, the committee found the absence of a prior disciplinary record and only moderate harm caused by his misconduct.

After further considering the court's prior case law addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for two years and one day, with one year deferred.

Respondent filed an objection to the hearing committee's repor

Disciplinary Board Recommendation

After review, the disciplinary board determined that the hearing committee's factual findings were not manifestly erroneous and adopted same. Additionally, the board found the following:

- During the ODC's investigation, respondent was scheduled to provide his sworn statement on September 10, 2020. Respondent requested the sworn statement be postponed so he could obtain counsel. During his rescheduled sworn statement on October 5, 2020, which was almost one year after he received notice of the disciplinary complaint, respondent admitted that he had made no effort to retain an attorney to represent him;
- Also during his sworn statement, respondent admitted that he knew Mr. Taylor may have some fault in the accident; however, respondent never disclosed to his clients that an unwaivable conflict of interest would exist in representing both Mr. Taylor and Lawan;

- When asked during his sworn statement why he had the civil lawsuit that was removed to federal court dismissed, respondent indicated that it was because there may have been conflicts of interest;
- On May 10, 2022, one day before the formal hearing in this matter, the board contacted respondent, but he refused to speak with the board, claiming advice of counsel even though he had not spoken to his purported counsel (Mr. Fontana) at the time of or even after this false representation; and
- On August 26, 2022, the ODC served respondent with a subpoena duces tecum for the production of documents related to Mr. Fontana's alleged representation. Respondent did not produce any documents by or after the September 15, 2022 deadline, nor did he provide an explanation for his failure to comply with the subpoena duces tecum or for his absence from the September 23, 2022 hearing.

Based upon these facts, the board determined respondent violated Rules 1.4, 1.7(a), and 8.4(d) of the Rules of Professional Conduct as alleged in the formal charges and as found by the committee. The board, however, determined that the committee erred in finding a violation of Rule 3.3, finding that the citing of this alleged rule violation in the formal charges appeared to be a typographical error. Instead, the board determined that the ODC intended to cite Rule 3.1 (meritorious claims and contentions) because he sought to intervene in the federal litigation so he could improperly receive attorney's fees for his conflicted representation of Lawan.

The board then determined respondent knowingly and intentionally violated duties owed to his clients, the legal system, and the legal profession, which caused actual harm. Based upon the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined the baseline sanction is suspension.

The board found the following aggravating factors are present: a prior disciplinary record (a 2002 diversion for settling a case without the client's consent),

a dishonest or selfish motive, a pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law (admitted 1989). The board found no mitigating factors present.

After further considering the court's prior case law addressing similar misconduct, the board recommended respondent be suspended from the practice of law for two years and one day, with one year deferred.

Neither respondent nor the ODC filed an objection to the board's report and recommendation.

DISCUSSION

Bar disciplinary matters fall within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. *In re: Banks*, 09-1212 (La. 10/2/09), 18 So. 3d 57.

The record of this matter supports a finding that respondent failed to adequately communicate with his clients, engaged in a conflict of interest, attempted to collect an impermissible fee, and engaged in conduct prejudicial to the administration of justice. Based upon these facts, respondent violated Rules 1.4, 1.7(a), 3.1, and 8.4(d) of the Rules of Professional Conduct.

Having found evidence of professional misconduct, we now turn to a determination of the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis*, 513 So. 2d 1173

(La. 1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington*, 459 So. 2d 520 (La. 1984).

Respondent caused actual harm by knowingly and intentionally violating duties owed to his clients, the legal system, and the legal profession. We agree with the disciplinary board that the baseline sanction is suspension. We also agree with the board's assessment of aggravating and mitigating factors.

Turning to the issue of an appropriate sanction, we find guidance from *In re: Bellaire*, 22-1084 (La. 9/27/22), 347 So. 3d 143, and *In re: Lapeyrouse*, 22-0571 (La. 10/21/22), 352 So. 3d 59. In *Bellaire*, an attorney represented the buyer and the seller with respect to a property transfer without obtaining a waiver of the conflict of interest, which resulted in actual harm to the buyer when the sale fell through. The attorney then failed to cooperate with the ODC's investigation of the matter. For this negligent and knowing misconduct, we suspended the attorney from the practice of law for six months, with all but ninety days deferred. In *Lapeyrouse*, an attorney engaged in a conflict of interest by providing legal advice to both his client and his client's estranged wife in connection with their divorce and by disclosing confidential information to his client's estranged wife. The attorney then filed a defamation lawsuit against his client and another witness based upon the information they provided to the ODC regarding his conflict of interest. For this knowing misconduct, we suspended the attorney from the practice of law for one year, with six months deferred.

Arguably, respondent's misconduct is more egregious than the misconduct found in *Bellaire* and *Lapeyrouse*. Respondent never adequately explained the conflict of interest to the clients and inappropriately obtained a waiver of an unwaivable conflict. He also attempted to obtain a fee he was barred from receiving

because of the conflict and filed frivolous pleadings, all of which delayed the parties' receipt of their settlement funds for months. Respondent's delaying tactics spilled over into the disciplinary proceedings, and he failed to appear at both disciplinary hearings without explanation.

Under these circumstances, a sanction requiring a formal application for reinstatement is warranted. Accordingly, we will adopt the board's recommendation and suspend respondent from the practice of law for two years and one day, with one year deferred.

DECREE

Upon review of the findings and recommendation of the hearing committee and the disciplinary board, and considering the record, it is ordered that Kenneth M. Plaisance, Louisiana Bar Roll number 19738, be and he hereby is suspended from the practice of law for a period of two years and one day, with one year deferred. 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 THE STATE OF LOUISIANA

FINDINGS AND RECOMMENDATIONS
OF THE
LOUISIANA ATTORNEY DISCIPLINARY BOARD

DUPLICATE

23 B 1460

IN RE: KENNETH M. PLAISANCE

(FORMAL CHARGES)

DELIVERED BY HAND
NOV 03 2023
SUPREME COURT OF LOUISIANA
BY

2023 NOV -6 PM 1:21
CLERK OF COURT
BY

CERTIFICATION

I certify that the record contained herein is the original and complete record of the Louisiana Attorney Disciplinary Board vs. **KENNETH M. PLAISANCE;** DOCKET NO.: **21-DB-066.** This **3rd** day of **November, 2023.**

Mildred B. Williams

MILDRED B. WILLIAMS
Docket Clerk
Louisiana Attorney Disciplinary Board

INPUT BY: _____

LOUISIANA ATTORNEY DISCIPLINARY BOARD

FILED
DISCIPLINARY BOARD
Date: 12-13-21
Clerk: [illegible]

IN RE: KENNETH M. PLAISANCE
(Bar Roll No. 19738)

DOCKET NO.: 21 DB 066

FORMAL CHARGES

NOW comes the OFFICE OF DISCIPLINARY COUNSEL, pursuant to La. Supreme Court Rule XIX and alleges that you have engaged in the following misconduct in violation of the Rules of Professional Conduct, to-wit:

Respondent, Kenneth M. Plaisance, is a Louisiana-licensed attorney admitted in 1989. He is also licensed in the state of Texas.

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.[1] The respondent's lawsuit failed to include any claims by Lawan alleging the comparative negligence of Taylor.

[1] This suit was later dismissed without prejudice and re-filed under a different case number: No. 18-cv-05889.

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.[2] 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

[2] 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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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).

WHEREFORE, Disciplinary Counsel states that, pursuant to Rule XIX, § 11B(3), a hearing committee chair approved the filing of formal charges on December 17, 2020, that the above alleged conduct, or any part thereof, if proven, merits the imposition of sanctions in accordance with La. S. Ct. Rule XIX.

Respectfully submitted,

Robert S. Kennedy

Robert S. Kennedy
BAR ROLL NO. 07463
DEPUTY DISCIPLINARY COUNSEL
4000 S. Sherwood Forest Blvd., Ste.607
Baton Rouge, LA 70816
Phone: (225) 293-3900

Please serve the respondent at the following address:

Primary Registration address:

KENNETH M. PLAISANCE
2202 TOURO ST.
NEW ORLEANS, LA 70119

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LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: KENNETH M PLAISANCE
BAR ROLL NO.: 19738

DOCKET NO. 2021 DB 066

ANSWER TO THE OFFICE OF DISCIPLINARY COUNSEL'S FORMAL CHARGE OF MISCONDUCT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT .

NOW INTO TO COURT, comes RESPONDENT-- KENNETH MICHAEL PLAISANCE who now answers to the OFFICE OF DISCIPLINARY COUNSEL FORMAL CHARGE filed in the above captioned matter. Respondent states there were and are exigent and extenuating circumstances that called for zealous representation which respondent answered the call. But for the actions of respondent, Lawan Rousell would not have gotten any of the proceeds and no other attorney would have taken his case if the only evidence was an inaccurate police report (which was inadmissable) which inaccurately reported that Lawan's biological father (Larry Taylor Jr.) rear-ended the Eighteen Wheeler. The evidence at the beginning of the case indicated that Mr. Taylor was presumed 100% at fault for the accident.

Nevertheless, for good cause shown, Respondent represents the following, to-wit:

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1.

That the allegations contained in paragraph (1) of the OFFICE OF DISCIPLINARY COUNSEL formal charge are true. Except Respondent object that the State of Louisiana has no jurisdiction over Respondent's license to practice law in Texas. Respondent practices in Texas and many times Respondent was not at 2202 Touro Street because he was in Texas.

2.

That the allegation contained in paragraph (2) respondent disagrees with the statment "On June 15, 2017, consulted with and agreed to jointly represent two person injury claimants . . ." Respondent states that the case or claim was in the beginning stage and because of the inaccurate police report which would have made Mr. Taylor 100% at fault. Respondent disagreed with the statement that "at the time Lawan Rousell was the minor child of Melvia Hodges is/was incorrect. Melvia Hodges aka Melvia Taylor allowed Reverent Rousell to become Lawan Rousell's custodial parent and allowed a name change due to alleged abuse charges. Respondent disagrees with the statement in paragraph 2 " at the time of the accident, Taylor was driving a vehicle when he rear ended an eighteen-wheeler because the police report was inaccurate and a more thorough investigation had to be done. Respondent states that there was an eye witness that the police officer

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failed to put on the police report. The eye witness stated that driver of Eighteen Wheeler was 100% at fault for the accident. Respondent disagrees with the statement that "THC in his system" Respondent states that THC had nothing to do with Taylor's ability to operate a vehicle.

3.

That the allegation contained in paragraph (3) are inaccurate and information sufficient to justify a belief therein. Respondent disagrees with the statement " At the time he was retained, Respondent failed to disclose the existence of a concurrent conflict of interest. Again, due to the inaccurate police report Mr. Taylor would have been declared 100% at fault for the accident and thus, Lawan's claims or case was moot or of no moment. Nevertheless, on or about October 18, 2017, respondent met with Attorney Ferdinand Valteau and his wife so that Attorney Valteau could either represent Lawan or Larry. Attorney Ferdinand Valteau agreed and gave respondent a check for the filing fees. Then on or about October 18, 2017, respondent filed the original petition in state court. This action cured any conflict of interest issues and an un-waivable conflict of interest issues. The rest of the statements in Paragraph 3 are inaccurate and or of no moment.

The allegation contained in paragraph (IV) of the OFFICE OF DISCIPLINARY COUNSEL'S FORMAL CHARGE are denied for lack of information sufficient to justify belief therein. Respondent states that the allegation contained in paragraph (4) are inaccurate and is information insufficient to justify a belief therein. Respondent was attempting to give Lawan and Larry the best legal representation. Respondent does not litigate in federal court anymore, and Respondent was one of the last attorney that are allowed to file by manual paper filing (not electronically). Respondent did not have any experience in litigating 18 wheeler cases in federal court. Federal rules mandates that you must have a lead litigating attorney on cases in federal court. The statement "the respondent approached the Covington Firm of Leger and Shaw about enrolling as co-counsel on all claims is misplaced and incorrect. Respondent approach several law firms to become lead litigating attorney for 18 wheeler cases. Respondent researched each firm that had litigated 18 wheeler cases. Again, respondent had AttorneyValteau to represent Larry and Respondent represented the interest of Lawan Rousell. Each firm respondent approached had experience in litigating 18 wheeler cases. The allegation from the Texas Law Firm Derryberry, Zipps and Wade are misplaced. DZW would make these statement

only after they settled and respondent requested attorney fees. Derryberry; Zipps and Wades did not have a license to practice in Louisiana, and were practicing without a license in Louisiana. Derryberry Zipps and Wades could not legally advise respondent on Louisiana Law. Respondent informed them that Respondent had another attorney representing either plaintiffs. Respondent informed them that Respondent needed a firm who had experience in litigating 18 wheeler cases. Derryberry, Zipps, and Wades said they had experience in representing 18 wheeler cases, and litigated cases in Shreveport Louisiana, and that they can motion the court for a motion pro hac vice. The allegations that "Gainsburgh, Benjamin, David, Meunier, and Washauer met with the client to apprise her of the conflict issues are skewed and misplaced. Again, it was understood that Ms. Hodges was not the custodian parent. It was understood that Ms. Hodges gave her rights up and gave her parental right to Reverent Rousell, and change Lawan's last name to Rousell. Secondly, Respondent , out of the abundance of caution, had Ms. Hodges signed a waiver of conflict and had Attorney Valteau to represent Larry. So, any conflict of interest issues or concurrent conflict of interest, or un-waivable consent issues were addressed and cured.

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The allegation contained in paragraph (V) of the OFFICE OF DISCIPLINARY COUNSEL'S FORMAL CHARGE are incorrect and misplaced and are denied for lack of information sufficient to justify belief therein, except that there was a mediation in May of 2018; except that on June 14, 2018, Attorney Michael Ecuyer of Gainsburgh, Benjamin, David, Meunier, and Washauer filed suit in federal court on behalf of Lawan Rousell; and that the respondent asked for the original action to be reopen and that he be allowed to intervene to collect his attorneys fees; and except that in May 2019, the parties reached an amicable settlement. Respondent objects to any implication that he failed on filing any pleading in federal court. Respondent does not practice in federal court any more and was one of the only few attorneys left who was allowed to file pleading manually paper filing (non electronically). The federal court does not mail out notice anymore. Respondent did not get the electronic notices from the court. Respondent disagrees with the statement that "Attorneys for Lawan thereafter petitioned the Orleans Parish Civil District Court for authority to enter into a settlement of the minor's claim, which was later granted is misplaced, the attorneys mentioned above Gainsburgh, Benjamin, David, Meunier, and Washauer did not secure this judgment in State court. Ms. Hodges was told to get another

attorney to get and an order to establish custodial parent status.

6.

The allegations contained in paragraph (VI) of the OFFICE OF DISCIPLINARY COUNSEL'S FORMAL CHARGE are denied for lack of information sufficient to justify belief therein. The fact in this paragraph are denied except that Respondent does not practice in federal court and did not get electronic notice. Respondent filed pleading manual via paper pleading not electronic pleadings. Respondent stated that the court was unaware of Attorney Ferdinand Valteau as being the other counsel representing either Lawan or Larry.

7.

The allegations contained in paragraph 7 of the OFFICE OF DISCIPLINARY COUNSEL'S FORMAL CHARGE are denied for lack of information sufficient to justify belief therein except that Respondent filed an appeal but it was ruled untimely.

8.

The allegations contained in paragraph 8 of the OFFICE OF DISCIPLINARY COUNSEL'S FORMAL CHARGE are denied for lack of information sufficient to justify belief therein. Respondent states that each case is different and not a cookie cutter- cut and dry case as the Discipline Counsel

believes. Respondent did not knowingly and intentionally violate Rules 1.4 (failure to communicate the existence of an un-waivable conflict of interest in his representation) because Lawan and Larry met with Respondent and Attorney Ferdinard Valteau and established representation of both plaintiffs seperately to cure any un-waivable conflict of interest or concurrent conflict of interest. With respect to seeking to collect attorney's fees in pursuit of a conflicted representation, Respondent states that since he had cured and/or corrected the conflict of interest issues, Respondent should have been allowed to collect his attorney fees. It was only after Respondent requested his attorneys fees Gainsburgh, Benjamin, David, Meunier, and Washauer filed a complaint with the Disciplinary Counsel. If Respondent did not request his attorneys fees, Gainsburgh, Benjamin, David, Meunier, and Washauer would not have complaint. Respondent denies any conduct prejudicial to the administration of justice.

CONCLUSION

Non-waiveable consent frustrate the client's exercise of autonomy and clients choice. The drafters of waivers of conflict of interest have relied upon pure autonomy notions in giving clients an absolute right to waive conflict of interest regardless of the consequences to themselves. Moreover, clients may wish to retain a conflicted lawyer because they know and trust the attorney. *Karen*

Corvy "The Right To Counsel Of One's Choice, 58 Notre Dame L Rev 793 (801-02 (1983).

Here, Lawan, Larry and Melvia trusted Respondent's advise and representation(s). From the time of Respondent's representation, until litigation, There were no issues of liability after the eye witness stated that the tortfeasor was 100% at fault of the accident. Respondent had both biological parent sign a waiver of a conflict of interest. In addition, out of the abundance of caution, Ferdinand Valteau to represent Larry in the matter and Attorney Valteau paid for the filing fees in state court. Lawan and Larry met with Respondent and Attorney Ferdinand Valteau and agreed that Respondent will represent Lawan and Attorney Valteau will represent Larry. Because of the assistance of another attorney, there were no conflict of interest.

According to *FDIC v. U. S. Fire Ins. Co.*, 50 F 3d 1304 , 1313(5th Cir 1995), the U. S. Fifth Circuit held that the "depriving a party of the right to be represented by the attorney of his choice is a penalty that must not be imposed without careful consideration."

Here, in this particular instance, Respondent met all of the requirements of

Paragraph (b), there was no directly adverse representation, nor did Lawan assert a claim against another client representation by the lawyer in the same litigation, Lawan did not want to sue his father and emphatically argued against such an action, and each client gave an informed consent in writing. Thus, Respondent can and could represent Larry and his minor son-- Lawan. Moreover, to correct or cure any conflict of interest issues, Ferdinand Valteau and Respondent were separate attorneys and or law firm representing either LARRY OR LAWAN.

Respondent offer, file and introduce Exhibit 1into the record.(text message to High Profile litigating attorney Robert Jenkins discussing the possibility of being lead litigating attorney in federal court.) Exhibit 1 purports and indicates

Rule 1.7 of the Louisiana Rules of Professional Conflict provides

Conflict of Interest

(a) Except s provided in paragraph (b) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict adverse to another client: or

(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 client's will be materially limited by the lawyers' responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph :

(1) the lawyer reasonably believe's that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before the tribunal; and

(4) each affected client gives informed consent, confirmed in writings.

Paragraph (b) requires the lawyer to obtain the informed consent of the client confirming in writing.

that Ferdinand Valteau (Ferd) and Respondent's firm were represent the plaintiff seperately.

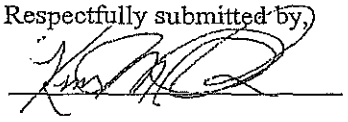
NON-WAIVEABLE CONFLICT OF INTEREST ARE WAIVABLE IN THE COURSE OF THE LITIGATION.

In *Zelda Enter. LLLP v. Guorismo*, 2017 U.S Court of Appeal 11th Circuit Lexis 447 (Oct 4, 2019), the court of appeals reminds us that even a non-waivable conflict of interest are waivable in the course of the litigation. The court noted the Rules of Professional Conduct which prohibits waivers of certain conflicts of interest among lawyers and their clients does not control the decision of whether a client subsequently waives the ability of the attorney. In sum the court seems to have caught on the the fact that attorneys/ litigants are trying to use tenuous connection with counsel to achieve litigation advantage by seeking disqualification of a party's lawyer of choice.

The courts are increasingly attuned to hyper-technical lawyering seeking to avoid the consequence of a parties earlier actions. Legal rights are great, but almost all of them can be waived.

WHEREFORE, RESPONDENT prays that: this Answer be deemed good and sufficient and, after all proceedings be had the Disciplinary Counsel dismiss the formal charge and the Louisiana Supreme Court rules in Respondent's favor

Respectfully submitted by,



Certificate of Service

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been mail postage prepaid, emailed, faxed or hand delivered to opposing counsel of record on the 4th of January, 2022

Respondent
Kenneth M. Plaisance
1148 Silber Road Ste 1123
Houston, Texas 77055
504-905 1888
kplaws88@gmail.com

Kenneth M. Plaisance

IN RE: KENNETH M. PLAISANCE
BAR ROLL NO.: 19738

DOCKET NO. 2021 DB 066

STATE OF LOUISIANA
PARISH OF ORLEANS

Before me, the undersigned, notary public, personally came and appeared:

KENNETH MICHAEL PLAISANCE

who after being duly sworn, did depose and say that:

1. Affiant states that he is the respondent in the above numbered and entitled case.
2. Affiant states that affiant offers, introduce and files affiant's telephone text document records into the record as Exhibit 1englobal .
3. Affiant states that Exhibit 1 is two copies of a text conversation from affiant's cell phone with Attorney Robert Jenkins dated December 14, 2017.
4. Affiant states that the text document indicate that the text message was on communicated on December 14, 2017,
5. Affiant states that the text document stated that **LARRY TAYLOR JR., et al** versus **TRAVIS JAMES, CDMT TRUCKING et al 2017-9436,** Lawan

Rousell's case) was in the beginning stages and that Mr. Jenkins' will be considered lead litigating attorney when the time arises.

6. Affiant states that Exhibit 1 shows and demonstrate that Ferdinand Valteau and Respondent were representing the plaintiffs Larry Taylor Jr. And Lawan Rousell respectively.

7. Affiant states that the phone text document is evidence that there were no concurrent conflict of interests, or an un-waivable conflict of interest in the case or claims because it was agreed at that time that Ferdinand Valteau would represent Larry Taylor Jr., and respondent would represent Lawan Rousell.

8. Affiant states that Ferdinand Valteau gave respondent a check to pay the filing fee.

This affidavit is true and correct to the best of affiant's knowledge, memory, and belief.

AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 4 DAY OF January, 2022

NOTARY PUBLIC

ASHLEIGH JOHNSON
Notary Public
Notary ID No. 172751
Jefferson Parish, Louisiana

Atty Robert Jenkins
+15048121999

Invite someone

IMPLY THAT FERD OR ME RETAINED YOU. We will keep you in mind to litigate.
2:46 PM

I never said that. 2:54 PM

I never inferred anything to ferd. You asked me that was it. I was only telling ferd. What a good case for you both. You jumped to a conclusion about me saying o was retained. I AM NOT ININ WORKING WITH YOU IF THIS IS HOW YOU RESPOND. THANKS 3:07 PM

Saturday, January 1, 2022

Happy New Year Rob ... want to talk to you about your case and if you have

Exh 1

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Atty Robert Jen...

Thursday, December 14, 2017

Dont do anything regarding the case i told you i had. WE ARE IN THE BEGINNING OF THE CASE. PLEASE DON'T IMPLY THAT FERD OR ME RETAINED YOU. We will keep you in mind to litigate.

2:46 PM

I never said that. 2:54 PM

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Saturday, January 1, 2022

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Enter me...

22

ORIGINAL

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.

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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).

160

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- 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).

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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

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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 Attorney's' 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).

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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.

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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.

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 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

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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, Ecuyer advised Respondent that it was an unwaivable conflict. Therefore, Ecuyer *fashioned and prepared* to file a motion to determine conflict-free status of Respondent Plaisance.

Ecuyer 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, Ecuyer 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 Ecuyer 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 US District Judge Triche Milazzo entered her ruling, the Respondent persistent 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.

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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;

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- 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:

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(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:

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-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.

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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.

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- 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

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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

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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

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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.

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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.

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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 5th day of January, 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

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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;

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LOUISIANA ATTORNEY DISCIPLINARY BOARD

2800 Veterans Memorial Blvd., Suite 310
Metairie, Louisiana 70002
Phone: (504) 834-1488 • Fax: (504) 834-1449 • 1-800-489-8411
Website: www.ladb.org

December 9, 2022

Mr. Kenneth M. Plaisance
Attorney at Law
1148 Silber Rd Apt 1123
Houston, TX 77055

Mr. Christopher Kiesler
Deputy Disciplinary Counsel
4000 S. Sherwood Forest Blvd
Suite 607
Baton Rouge, LA 70816

RE: REPORT OF HEARING COMMITTEE
KENNETH M. PLAISANCE
DOCKET NO. 21-DB-066

Dear Parties of Record:

Enclosed is the Hearing Committee's Recommendation filed with the Board on **December 9, 2022.**

Pursuant to Louisiana Supreme Court Rule XIX, §24(G), you have twenty (20) days from the mailing or electronic transmission of the hearing committee's report in which to file a notice of objection to the report. If an objection is filed by either party, the matter will be docketed for appellate review by the Disciplinary Board.

If no objections are filed, the matter will be filed with the Louisiana Supreme Court for review and final order.

In addition, attached is the statement of costs incurred in the referenced matter.

Kindest regards,

Donna P. Burgess

Donna P. Burgess
Sr. Docket Clerk

/db
Enclosure(s)
1 copy of Hearing Committee Report
1 copy of cost statement

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CERTIFICATE OF MAILING

IN RE: KENNETH M. PLAISANCE
DOCKET NO. 21-DB-066

I, Donna L. Roberts, the undersigned Administrator for the Louisiana Attorney Disciplinary Board, certify that a copy of the foregoing Hearing Committee Report and Initial Cost Statement has been mailed to the Respondent or his/her Attorney of Record, by E-mail and/or United States Mail and E-Filed to the Office of Disciplinary Counsel, this 9th **day December, 2022** at the following address:

Mr. Kenneth M. Plaisance
Attorney at Law
1148 Silber Rd Apt 1123
Houston, TX 77055

Mr. Christipher Kielser
Deputy Disciplinary Counsel
4000 S. Sherwood Forest Blvd
Suite 607
Baton Rouge, LA 70816

Donna L. Roberts
Board Administrator

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THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

2800 Veterans Memorial Blvd. Suite 310
Metairie, Louisiana 70002

COST STATEMENT
ORIGINAL

Name: Kenneth M Plaisance
1148 Silber Rd Apt 1123

Houston, TX 77055-

Statement Date: 12/09/22

Case / Complaint	Date	Description	Charge
0038024	11/05/20	Deposition Sworn statement of respondent 10/05/20 P.O.# 20957 V#:20948 VEN:Associated Reporters, Inc. Ck#:4566	$299.00
21-DB-066	12/13/21	Formal Charges Filed 12/13/2021 Formal Charges - Formal Charges	$10.00
21-DB-066	02/26/22	Other - (See Memo) Conference call 02/08/2022 V#:22573 VEN:Premiere Global Services Ck#:5650 CkD:3/15/2022	$0.15
21-DB-066	02/26/22	Other - (See Memo) Conference call 02/02/2022 V#:22573 VEN:Premiere Global Services Ck#:5650 CkD:3/15/2022	$9.10
21-DB-066	04/13/22	Other - (See Memo) Online search 04/28/2022 V#:22831 VEN:TransUnion Risk & Alternative Data Solutions	$0.40
21-DB-066	04/18/22	Witness Fee Witness fees for deposition 4/27/2022 V#:22741 VEN:Francis Valteau Ck#:5727 CkD:4/25/2022	$172.96
0038024	04/22/22	Investigation Staff investigator expense to attempt service of subpoena on witness at 237 W Main St New Iberia LA 4/20/2022	$92.00
0038024	04/22/22	Investigation Staff investigator expense to serve subpoena to witness at 237 W Main St New Iberia LA 4/20/2022	$96.31
21-DB-066	04/26/22	Other - (See Memo) Conference call 04/25/2022 V#:22854 VEN:Premiere Global Services Ck#:5791 CkD:5/13/2022	$0.75
21-DB-066	04/28/22	Other - (See Memo) Courier fees 4/25/2022 V#:22818 VEN:Federal Express Ck#:5778 CkD:5/13/2022	$20.81
21-DB-066	05/02/22	Other - (See Memo) Staff investigator expense to serve Subpoena to Franklin G Shaw at 512 E Boston St Covington LA 70433 4/29/2022	$57.21
21-DB-066	05/02/22	Other - (See Memo) Staff investigator expense to serve subpoena to Michael J Ecuyer at 1100 Poydras St New Orleans LA 70163 4/29/2022	$57.21
21-DB-066	05/02/22	Other - (See Memo) Staff investigator expense to attempt to serve subpoena to Ferdinand Valteau III at 237 Main St New Iberia LA 70560 5/2/2022	$164.60
21-DB-066	05/02/22	Other - (See Memo) Staff investigator expense to serve subpoena to Ferdinand Francis Valteau III at 107 Stockstill St New Iberia LA 70563 5/3/2022	$107.21
21-DB-066	05/05/22	Other - (See Memo) Courier charges 4/27/2022 V#:22819 VEN:Federal Express Ck#:5778 CkD:5/13/2022	$21.18

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THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

2800 Veterans Memorial Blvd. Suite 310
Metairie, Louisiana 70002

COST STATEMENT

Name: Kenneth M Plaisance
1148 Silber Rd Apt 1123

Houston, TX 77055-

Statement Date: 12/09/22

Case / Complaint	Date	Description	Charge
21-DB-066	05/05/22	Deposition Transcript Fee Minimum fee for Ferdinand Valtèau, III 4/27/2022 V#:22806 VEN:Associated Reporters, Inc. Ck#:5767 CkD:5/13/2022	$143.00
0038024	05/09/22	Deposition Deposition of witness Ferdinand Valteau III 5/5/2022 V#:22803 VEN:Associated Reporters, Inc. Ck#:5767 CkD:5/13/2022	$312.40
21-DB-066	05/26/22	Other - (See Memo) Conference call 05/02/2022 V#:22949 VEN:Premiere Global Services Ck#:5866 CkD:6/15/2022	$0.90
21-DB-066	06/24/22	Deposition Transcript Fee Sworn statement of respondent 5/11/2022 V#:23013 VEN:Associated Reporters, Inc. Ck#:5894 CkD:6/30/2022	$379.25
21-DB-066	08/26/22	Other - (See Memo) Conference call 08/10/2022 V#:23247 VEN:Premiere Global Services Ck#:6058 CkD:9/1/2022	$22.43
21-DB-066	08/26/22	Other - (See Memo) Conference call 08/17/2022 V#:23247 VEN:Premiere Global Services Ck#:6058 CkD:9/1/2022	$26.08
21-DB-066	09/23/22	Other - (See Memo) Staff attorney expense to attend hearing 9/23/2022 V#:23359 VEN:Christopher Kiesel Ck#:6125 CkD:9/29/2022	$86.13
21-DB-066	10/17/22	Hearing Transcript Fee Hearing 9/23/2022 V#:23473 VEN:Associated Reporters, Inc. Ck#:6202	$379.25
21-DB-066	12/09/22	Suspension Pending final judgment Pursuant to Rule XIX, Section 10.1(c)	$1,500.00
Thank You.		Balance:	**$3,958.33**

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CERTIFICATE OF MAILING

IN RE: KENNETH M. PLAISANCE
DOCKET NO. 21-DB-066

I, Donna L. Roberts, the undersigned Administrator for the Louisiana Attorney Disciplinary Board, certify that a copy of the foregoing Hearing Committee Report and Initial Cost Statement has been mailed to the Respondent or his/her Attorney of Record, by E-mail and/or United States Mail and E-Filed to the Office of Disciplinary Counsel, this **9th day December, 2022** at the following address:

Mr. Kenneth M. Plaisance
Attorney at Law
1148 Silber Rd Apt 1123
Houston, TX 77055

Mr. Christopher Kielser
Deputy Disciplinary Counsel
4000 S. Sherwood Forest Blvd
Suite 607
Baton Rouge, LA 70816

Donna L. Roberts
Board Administrator

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ORIGINAL

FILED by: [illegible]
Docket# 21-DB-066
Filed-On 11/3/2023

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: KENNETH M. PLAISANCE

DOCKET NUMBER: 21-DB-066

RECOMMENDATION TO THE LOUISIANA SUPREME COURT

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,[2] and 8.4(d).[3]

PROCEDURAL HISTORY

The formal charges were filed on December 13, 2021. Respondent filed an answer to the charges on January 4, 2022, in which he denied the allegations of misconduct in the formal charges. 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 judgment, which was denied by order signed April 27, 2022. On May 9, 2022, attorney Luke Fontana purportedly sought

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

[2] As discussed later in this Recommendation, the reference to Rule 3.3 (Candor Toward the Tribunal), as opposed to Rule 3.1 (Meritorious Claims and Contentions), in the formal charges appears to be inaccurate and may have been a typographical error.

[3] The attached Appendix contains the text of these Rules, as well as the text of Rule 3.1.

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to enroll as counsel for Respondent by filing a motion to continue, again stating that discovery was incomplete. The motion to continue was denied by order signed the same day. On May 11, 2022, another motion to continue purportedly was filed by Mr. Fontana, attaching a doctor's note which 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 to continue was denied, and the hearing proceeded before Hearing Committee No. 9 ("the Committee").[4] 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 re-opened 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 before the Committee. Deputy Disciplinary Counsel Christopher Kiesel appeared on behalf of ODC. Respondent failed to appear, nor did counsel appear on his behalf.

On December 9, 2022, the Committee issued its report in this matter, finding that Respondent had violated the Rules of Professional Conduct as charged. The Committee recommended that Respondent be suspended from the practice of law for two years and one day, with one year deferred. The Committee also recommended that Respondent be

[4] Members of the Committee included James B. Letten (Chair), Colin W. Reingold (Lawyer Member), and Robert P. Ventura (Public Member).

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assessed with all costs and expenses of the proceeding pursuant to Rule XIX, Section 10.1. ODC did not object to the report. On December 29, 2022, Respondent objected to the Committee's report and its finding that he had violated the identified rules. He also requested that the report "be overruled, denied and declared to [sic] harsh of a sanction." ODC's pre-argument brief was filed on March 21, 2023. Respondent's pre-argument brief and response to ODC's pre-argument brief was filed on April 3, 2023. Oral argument before Panel "C" of the Board on was held April 20, 2023.[5] Mr. Kiesel appeared on behalf of ODC. The Respondent did not appear.

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 [sic] ("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.

[5] Members of Panel "C" included Paula H. Clayton (Chair), Aldric C. ("Ric") Poirier, Jr. (Lawyer Member), and Susan P. DesOrmeaux (Public Member).

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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 [sic] 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

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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 un-waivable 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).

THE HEARING COMMITTEE'S REPORT

EVIDENCE/TESTIMONY INTRODUCED AT THE HEARINGS

In its December 9, 2022 report, the Committee noted that ODC Exhibits 1-22 were introduced into evidence at the May 11, 2022 hearing. Witnesses at the May 11th hearing were Michael Ecuyer, the complainant in this matter, and Janine Telio. The Committee described Mr. Ecuyer's testimony concerning the Respondent's participation in the underlying lawsuit at issue, particularly Respondent's conflict of interest in the lawsuit. Ms. Telio's testimony also was discussed in the Committee's report; her testimony related to ODC's unsuccessful efforts to locate Mr. Fontana prior to the May 11th hearing.

ODC Exhibits 23-31 were introduced at the subsequent September 23, 2022 hearing. Witnesses at this hearing included attorney Luke Fontana, Jr. and Allen Grimmis, an ODC investigator. In Mr. Fontana's testimony, he basically denied representing or filing pleadings on behalf of Respondent in this disciplinary matter, and his testimony was described in detail in the Committee's report. The Committee noted that Mr. Grimmis testified that, among other things, he had emailed a subpoena duces tecum to Respondent, but had not received records or a response from him. Hrg. Comm. Rpt., p. 16.

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THE COMMITTEE'S FINDINGS OF FACT

In its report, the Committee appears to find that the formal charges, as alleged, were proven by ODC. *Id.* at pp. 5, 10. As to the issue of whether Mr. Fontana represented Respondent in this matter, the Committee determined:

> The Committee collectively believes that although it is possible that Respondent believed he was represented [by Mr. Fontana] 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; [and]
>
> 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.*

Id. at p. 18.

RULES VIOLATED

The Committee also determined that ODC established that Respondent violated the Rules of Professional Conduct as charged. The Committee stated as follows:

> 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 un-waivable conflict of

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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 un-waivable 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

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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.

Id. at pp. 10-11.

As to the sanction, the Committee analyzed the Rule XIX, Section 10(C) factors and found that Respondent had violated duties owed to his client(s); the legal system, (including the federal and Louisiana state courts); other counsel involved in the litigation; and the legal profession. The Committee also determined that Respondent acted with knowledge and intent in that he had been expressly advised and made aware of the conflict. The Committee found that 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.

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Id. at p. 12.

Aggravating factors found by the Committee included Respondent's negligent or deliberate failure to engage at all in the disciplinary process; pattern of misconduct evidenced by Respondent's continued insistence on conflicted representation of the two parties to the lawsuit; refusal of Respondent to acknowledge the wrongful nature of the conflict -- and refusal to heed multiple admonitions, warnings and rulings; and a selfish, clearly financially driven motive for Respondent's pattern of maintaining the conflicted representations in question. Mitigating factors found by the Committee included absence of a prior disciplinary record and the fact that the harm caused, while real, is moderate.

In determining the appropriate sanction, the Committee noted that "[i]n 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 [the] process is a necessary component of any appropriate sanction in this matter. . . ." Hrg. Comm. Rpt., p. 19. The Committee explained that the Board and Court have imposed sanctions ranging from public reprimand to suspensions based upon concurrent conflicts of interest similar to the facts presented in this matter. After discussing the similar matters of *In re Vidrine*, 2011-1209 (La. 10/7/11); 72 So.2d 345, *In re Beevers*, 16-DB-014, Ruling of the Louisiana Attorney Disciplinary Board (1/22/18); *In re Cook*, 2018-1076 (12/5/2018), 319 So.3d 272; and *In re August*, 2010-1546 (10/15/10), 45 So.3d 1019, the Committee determined that a two-year and one-day suspension, with one year deferred, is the appropriate sanction in this matter and recommended same. The Committee also recommended that Respondent be assessed with all costs and expenses of these

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proceedings in accordance with Rule XIX, Section 10.1.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

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

A. The Manifest Error Inquiry

The Committee's findings of fact are not manifestly erroneous and are adopted by the Board. For further clarity, however, the Board also adopts the majority of the findings of fact proposed by ODC in its pre-argument brief.[6] These factual findings are listed below (citations largely omitted).

Respondent's Frustration of the Disciplinary Process

1. On September 10, 2020, during the ODC's investigation, Respondent's sworn statement was scheduled. Just prior to the start of that sworn statement, Respondent attempted to postpone it in order "[t]o obtain the services of an attorney." Despite receipt of the

[6] See pp. 2-10 of ODC's pre-argument brief.

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complaint nearly one year earlier, Respondent admitted during this October 5, 2020 sworn statement that he had made no effort to retain an attorney to represent him.

2. The formal charges were filed in this matter on December 13, 2021. On January 4, 2022, Respondent filed his answer to the formal charges. Respondent thereafter failed to submit his identification of persons having knowledge of relevant facts, as required by Louisiana Supreme Court Rule XIX, Section 15A. On February 2, 2022, a scheduling conference was held. Therein, the parties selected May 11-12, 2022 as the hearing dates. On April 11, 2022, Respondent filed a motion to continue the hearing, claiming that he needed more time to retain counsel and that discovery was "incomplete." ODC opposed that motion for two primary reasons. First, Respondent had made no serious effort to retain counsel in the two-and-a-half years since he was served with the complaint or in the four months since he was served with the formal charges. Second, Respondent already had ample time to take any legitimate depositions. By order dated April 18, 2022, Respondent's motion to continue was denied.

3. Respondent did not file a pre-hearing memorandum. On April 25, 2022, Respondent filed a motion for summary judgment. By order dated April 27, 2022, Respondent's motion for summary judgment was denied. *See* Rule XIX, Section 18(B).

4. On May 9, 2022, a second motion for continuance was filed on Respondent's behalf. That motion represented that Respondent had retained attorney Luke Fontana ("Mr. Fontana") and that a continuance was needed to "review discovery, take depositions, and determine if discovery is complete." By order dated May 9 2022, the second motion for continuance was denied. Contrary to the representations in that motion, Respondent had not retained Mr. Fontana, and Mr. Fontana did not file that motion. At the hearing in this matter, Mr.

Fontana testified that in his fifty-seven years of practice, he had never represented an attorney in a disciplinary proceeding.

5. On May 10, 2022, the Board contacted Respondent in advance of the hearing. Claiming "advice of counsel," Respondent refused to speak with the Board. Respondent had not spoken to purported counsel (Mr. Fontana) at the time he made, or even after, that false representation.

6. On May 11, 2022, just prior to the start of the hearing, a third motion for continuance was filed on Respondent's behalf. That motion again represented that it had been filed by Mr. Fontana, and that Respondent "was under the care of a medical doctor for health reasons" and had "been restricted for any work-related activities." Mr. Fontana did not file this motion. The alleged medical form attached to the motion was presented by fraudulent means, either by Respondent or Mr. Fontana's former paralegal, Chase Campbell. The third motion for continuance was denied.

7. Respondent failed to attend the hearing on May 11, 2022. During the hearing, ODC requested that the record be temporarily left open to allow Respondent to "make any evidentiary presentation he wished to make to supplement this record." By May 11, 2022 Minute Entry and Order, the Committee Chair granted ODC's request and ordered that "the record of this matter be held open for fifteen days, until May 26, 2022, to allow Respondent to make any appropriate filing or submission." The Board served that order on Respondent the same day. Respondent did not file or submit anything by that deadline.

8. In light of concerns regarding whether Mr. Fontana actually was retained to represent Respondent, by order dated August 10, 2022, the Committee Chair re-opened the hearing for the limited purpose of determining whether Mr. Fontana represented Respondent. On

August 26, 2022, ODC served a subpoena duces tecum on Respondent for the production of records regarding Mr. Fontana's alleged representation of Respondent. That production was due on September 15, 2022. Respondent did not produce any records to ODC by or after that deadline. Respondent also did not attend the re-opened hearing on September 23, 2022. Respondent did not provide any explanation for his failure to comply with ODC's subpoena or his absence from the re-opened hearing.

The Underlying Misconduct

9. On June 14, 2017, Larry Taylor, Jr. ("Mr. Taylor") and Lawan, the minor child of Mr. Taylor and Melvia Hodges ("Ms. Hodges"), suffered injuries as a result of an automobile accident with an eighteen-wheeler truck. Mr. Taylor was the driver, and Lawan was a passenger in the front seat of Mr. Taylor's vehicle. On June 15, 2017, Ms. Hodges signed a retainer agreement for Respondent to represent Ms. Hodges, individually and on behalf of Lawan. Mr. Taylor also retained Respondent to represent Mr. Taylor's interests related to the accident.

10. From the date of the accident, it was clear that there was an un-waivable conflict of interest in representing both Mr. Taylor and Lawan. Mr. Taylor had rear-ended the truck, and therefore, had some comparative fault and liability in the matter. The police report documenting the accident specifically placed fault on Mr. Taylor and noted that he had been issued a ticket for following too closely to the truck. Mr. Taylor's drug screen also tested positive for THC, indicating that marijuana was present in his system at the time of the accident. Respondent admitted during his sworn statement that he knew Mr. Taylor "may have some fault" in the accident. At no time did Respondent disclose to his clients that an un-waivable conflict of interest would exist in representing both Mr. Taylor and

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Lawan.

11. On July 27, 2017, Respondent (on behalf of Lawan) granted a full release of all claims against Mr. Taylor to Progressive Insurance Company ("Progressive"), Mr. Taylor's auto liability insurer, in exchange for payment of the $15,000 limit under Mr. Taylor's policy. Respondent thereafter disbursed those settlement funds as follows: $5,000 to Ms. Hodges (on behalf of Lawan), $5,000 to Mr. Taylor and $5,000 to Respondent as his attorney's fee.

12. On October 18, 2017, Respondent filed a civil suit in state court (Civil District Court, Parish of Orleans) on behalf of Mr. Taylor and Ms. Hodges, individually and on behalf of Lawan, against the truck driver and the truck driver's insurer. The lawsuit did not assert any claims by Lawan alleging the comparative negligence of Mr. Taylor. On December 1, 2017, the defendants removed the lawsuit to federal court. Respondent thereafter dismissed the lawsuit without prejudice. When asked why he dismissed the lawsuit, Respondent testified during his sworn statement, "I think because of the fact that there may have been conflicts of interest."

13. Shortly after the lawsuit had been removed to federal court, Respondent approached the Covington law firm of Leger & Shaw ("L&S firm") about assisting him in pursuit of that litigation. On December 26, 2017, the L&S firm advised Respondent that it would not do so and that Respondent "should consult with ethics counsel as soon as possible as to how [he] should proceed[.]"

14. In early 2018, Respondent next approached the Texas law firm of Derryberry Zips Wade, PLLC ("DZW firm") to gauge its interest in assisting in the litigation. On March 9, 2018, Respondent and Mr. Taylor executed a Consent to Associate Counsel permitting

Respondent to associate the DZW firm on Mr. Taylor's behalf.[7] On March 28, 2018, Respondent met with the DZW firm at its Texas office to further discuss the matter. During that and subsequent meetings, the DZW firm discussed with Respondent his un-waivable conflict of interest and the need to have separate counsel represent Mr. Taylor and Ms. Hodges (individually and on behalf of Lawan).

15. In May of 2018, the DZW firm associated the New Orleans law firm of Gainsburgh, Benjamin, David, Meunier & Washauer ("GB firm") to serve as local counsel in connection with the claims of Ms. Hodges and Lawan only. On June 12, 2018, Ms. Hodges, Lawan, and Respondent met with the GB and DZW firms. During that meeting, Respondent's un-waivable conflict of interest was again discussed. As Mr. Ecuyer (the complainant and one of the GB firm attorneys) explained during the hearing:

> [The GB firm] tried repeatedly and had discussions early on and throughout about the conflict of interest, that [Respondent] couldn't represent both parties . . . [T]here was a conflict and [it was] un-waivable.
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> [Ms. Hodges] and [Lawan] came to my office. [Respondent] came to the office . . . . But I explained to [Lawan] and his mother about the conflict, and . . . Respondent, when he was there, that there was a conflict of interest because dad could have some fault in this case and because of that fault, it was an un-waivable conflict and that there would need to be separate counsel for dad and for [Lawan] and mom, and that we were prepared to represent mom and [Lawan] in this claim. They consented. They signed a retainer . . . . With – and [Respondent] expressed an understanding that he could not represent both sides, . . . we spent a lot of time talking about that conflict.

May 11, 2022 Tr., pp. 47, 51-52.

[7] However, the consent document contained in the record (ODC Exhibit 1, BN 34) does not show that the DZW firm signed the document.

At this meeting, Ms. Hodges was presented with a retainer agreement that reflected that DZW, GB and Plaisance would all represent Ms. Hodges and Lawan. The retainer was signed by Ms. Hodges, individually and on behalf of Lawan, Plaisance, and GB attorney, Michael Ecuyer.

16. On June 14, 2018, the GB firm filed a new lawsuit on behalf of Ms. Hodges and Lawan in the Eastern District of Louisiana, entitled *Hodges v. James*, Case No. 2:18-cv-5889 (E.D. La.). Respondent was not listed as counsel on that complaint due to uncertainty as to whether he was admitted to practice before the Eastern District, and moreover, whether he was eligible to practice law. On that same date, Mr. Taylor -- assisted by Respondent -- also filed a new lawsuit in the Eastern District of Louisiana, titled *Taylor v. CDMT Trucking*, Case No. 2:18-cv-5903 (E.D. La.). Mr. Taylor's filing was submitted as a *pro se* filing. On June 22, 2018, Respondent filed an *ex parte* motion to enroll as counsel for Mr. Taylor in his case, which was granted by the federal court on June 26, 2018.

17. On July 16, 2018, the federal court issued an order consolidating both matters. At no time prior to the consolidation did Respondent terminate his representation of Ms. Hodges and Lawan. On August 29, 2018, attorney Chris Robinson filed an *ex parte* motion to substitute himself in place of Respondent as Mr. Taylor's attorney in the federal suit. This filing was the first notice received by the GB firm that Respondent had earlier enrolled as counsel for Mr. Taylor. This motion to substitute was granted on September 12, 2019. Mr. Ecuyer testified about his surprise in learning that Respondent had enrolled as Mr. Taylor's counsel in the consolidated litigation:

> This was after we had the discussion in our office explaining the conflict and that he could not represent both sides of the litigation. When we got a

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> copy of this [motion to enroll], we went back to Ms. Hodges and [Lawan] and Texas Counsel and said, 'Don't know' – 'He didn't call us. [Respondent] didn't call us. Didn't advise anything.' So we had [Ms. Hodges and Lawan] redo another contract, hiring just Texas counsel and us and took [Respondent] out of the representation in that retainer.

May 11, 2022 Tr., pp. 54-55.

18. On September 6, 2018, Ms. Hodges executed a new retainer agreement, individually and on behalf of Lawan, with only the DZW and GB firms.

19. On October 16, 2018, Respondent filed a "Motion/Petition to Intervene to Collect Attorneys Fee" in the consolidated action, claiming that he was entitled to collect an attorney's fee from any settlement of Ms. Hodges and Lawan's claims. The pleading was later stricken from the record as deficient by the clerk of court.

20. On May 7, 2019, a mediation was held, and the consolidated action was settled. Respondent collected an attorney's fee out of the settlement of Mr. Taylor's claims. Respondent again asserted that he had a right to collect an attorney's fee from the settlement of Ms. Hodges' and Lawan's claims. On June 17, 2019, the DZW firm sent Respondent a letter which stated, in pertinent part: "Importantly, we have previously discussed our concerns, on several occasions, of any potential fee sharing with you given what we believe are clear conflicts of interest that exist in connection with your claim to fees from the settlement of Plaintiffs'[.]"[8] On August 15, 2019, Respondent instructed the DZW firm not to disburse any of Ms. Hodges' and Lawan's settlement funds pending resolution of Respondent's fee claim.

21. As a result of Respondent's actions, counsel for Ms. Hodges and Lawan sought

[8] In June of 2019, Respondent produced to DZW two undated waivers of conflict of interest purportedly signed by Ms. Hodges and Mr. Taylor. As previously discussed, Respondent's conflict of interest could not be waived. Further, without any meaningful discussion of the conflict issues, Mr. Taylor and Ms. Hodges (individually and on behalf of Lawan) could not have given informed consent, even if Respondent's conflict had been waivable.

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confirmation from the federal court that Respondent could not share in attorney's fees derived from their settlement. On September 4, 2019, the DZW and GB firms filed a Motion to Determine Conflict-Free Status and Entitlement to Attorneys' Fees ("Conflict Motion") in the consolidated litigation. Respondent was served with a copy of, but did not file any opposition to, the Conflict Motion.

22. On October 7, 2019, the court issued an order which confirmed Respondent's conflict of interest:

> The police report at the time of the accident placed fault for the accident on Taylor, and he tested positive for THC following the collision. Accordingly, it was clear from the outset that there was a possibility that Taylor was at least partially liable for the injuries sustained by [Lawan] in the accident.
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> Here, it is clear that Plaisance's ability to secure damages for [Lawan] against those who caused his injuries was limited by his loyalty to Taylor, a possible cause of [Lawan's] injuries . . . .

The order ultimately concluded: "Because Plaisance received a fee from the settlement of Taylor's claims, he is not entitled to share in the fees from the settlement of [Ms. Hodges' and Lawan's] claims."

23. Despite his failure to oppose the Conflict Motion, Respondent appealed from the court's order to the United States Fifth Circuit Court of Appeals on December 18, 2019. On March 19, 2020, the appellate court dismissed Respondent's appeal due to lack of jurisdiction.

B. ***De Novo*** **Review**

The Committee correctly found that Respondent violated Rules 1.4, 1.7(a), and 8.4(d). The Board adopts these findings and the Committee's reasoning therefor. The Committee erred in finding a violation of Rule 3.3, as the citing of this alleged rule violation appears to be a typographical error in the formal charges. Instead, it appears that ODC intended to allege a

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violation of Rule 3.1. Each alleged rule violation is discussed below:

Rule 1.4: Rule 1.4(b) states that "the lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and means by which they are to be pursued." By failing to adequately inform Ms. Hodges (individually and on behalf of Lawan) and Mr. Taylor of his un-waivable conflict of interest, Respondent failed to give them sufficient information to participate intelligently in decisions concerning their representation/choice of counsel in the state and federal court litigation. As Respondent testified in his sworn statement, he did not explain the issues associated with his conflict in any detail to his clients:

> I didn't get too much into it terms of cross examinations because Larry's a laborer. I mean, he doesn't have a legal mind. . . . I didn't get into too much because both of them [Mr. Taylor and Ms. Hodges] are laborers or lay persons. I didn't get too much into the details of the cross examination and those things. I just said, "We might have a possible conflict of interest."

ODC Exhibit 3, BN 167-69.

Respondent's failure to give Mr. Taylor and Ms. Hodges sufficient information concerning his conflict of interest violated this Rule.

Rule 1.7(a): Rule 1.7(a) provides that 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
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> (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.

Here, Respondent's representation of Mr. Taylor was directly adverse to his representation of Lawan and Ms. Hodges (who filed suit individually and on behalf of Lawan) in violation of Rule 1.7(a)(1). Mr. Taylor was driving the vehicle during the accident in which his son and front

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seat passenger, Lawan, was injured. Mr. Taylor rear-ended a truck, and therefore, had some comparative fault and liability in the accident. The police report documenting the accident specifically placed fault on Mr. Taylor and noted that he had been ticketed for following too closely to the truck. Mr. Taylor's drug screen also tested positive for THC, indicating that marijuana was present in his system at the time of the accident. Mr. Taylor's fault was sure to become an issue in the consolidated federal court litigation; in fact, Progressive Northern Insurance Company lists in its answer in the *Hodges* suit as its Fifth Defense that the accident was caused by the negligence of "Larry Taylor, and/or other third parties over whom [Progressive] had no control." ODC Exhibit 19, BN 317.

Further, there also existed a significant risk that the representation of Mr. Taylor would be limited by Respondent's responsibilities to Ms. Hodges and Lawan. Moreover, his representation of Ms. Hodges and Lawan would be limited by Respondent's representation of Mr. Taylor. This circumstance violates Rule 1.7(a)(2).

Rules 3.3 and 3.1: In *Louisiana State Bar Ass'n v. Keys*, 88-2441 (La. 9/7/90), 567 So.2d 588, 591, citing *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2d 117 (1968), the Court held that due process requires that an attorney be given notice of the misconduct for which the disciplinary authority seeks to sanction him. A Rule 3.3 violation is alleged in the formal charges. This rule addresses candor toward a tribunal, and provides, in pertinent part, that a lawyer shall not knowingly make a false statement of fact or law to a tribunal. However, the facts of the formal charges do not allege conduct involving a knowingly false statement made to a court, as is necessary for a Rule 3.3 violation. Accordingly, it appears that the allegation of the Rule 3.3 violation was a typographical error.

Instead, the facts allege that Respondent sought "to collect attorney's fees in pursuit of a

conflicted representation," and describe how he filed impermissible (*i.e.*, frivolous) pleadings to recover an attorney's fee despite the existence of an un-waivable conflict. More specifically, Respondent sought to intervene in the federal litigation and improperly receive attorney's fees for his representation regarding "Lawan Rousell's case or claims."[9] He also appealed to the Fifth Circuit Court of Appeals the district court's ruling which confirmed his conflict of interest and prevented him from receiving attorney's fees from Ms. Hodges or Lawan.

The substance of the formal charges gave Respondent adequate notice of the asserted sanctionable misconduct, which constitutes a violation of Rule 3.1, not 3.3. Rule 3.1 states, in pertinent part, that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

By frivolously pursing attorney's fees in the court system, to which he clearly was not legally entitled, Respondent violated Rule 3.1. The Board finds a violation of this Rule, although not specifically charged. *See In re Aucoin*, 2021-0847 (La. 12/7/21), 328 So.3d 409, 415 n. 2 (where the substance of the formal charges gave respondent adequate notice of the asserted sanctionable misconduct, the Board was correct in finding a violation of a rule not specially charged by the ODC).

Rule 8.4(d): Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. As noted by the Committee, Respondent's protracted insistence on representing the interests of both the father and the minor child following the auto accident prejudiced the administration of justice in that he disregarded the requirement of conflict-free representation of at least two clients and jeopardized their recovery of

[9] As noted above, Respondent's motion/petition to intervene was later stricken by clerk of court due to its deficiencies.

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damages for injuries; caused additional work for legal counsel and the federal courts because of the conflict issue; caused the delay in the payment of damages in the form of settlement funds to Lawan and Ms. Hodges for approximately seven months; and caused added expenses to the litigants, especially due to his motion to intervene in the federal court settlement and his subsequent frivolous appeal to the Fifth Circuit Court of Appeals. Respondent has additionally violated this Rule.

II. The Appropriate Sanction

A. The Rule XIX, Section 10(C) Factors

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

(1) Whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

(2) Whether the lawyer acted intentionally, knowingly, or negligently;

(3) The amount of the actual or potential injury caused by the lawyer's misconduct; and

(4) The existence of any aggravating or mitigating factors.

Here, Respondent has violated duties owed to his clients, the legal system, and the profession. His conduct was knowing and intentional. The Committee correctly found that Respondent's misconduct caused actual harm. Aggravating factors include prior disciplinary offense (2002 diversion for negotiating a settlement without client consent); dishonest or selfish motive; pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; refusal to acknowledge wrongful nature of conduct; and substantial experience in the practice of law (admitted in 1989). No mitigating factors are present.

B. **ABA Standards and Case Law**

Under the ABA's *Standards for Imposing Law Sanctions*, suspension is the baseline sanction in this matter. Standard 4.32 provides that suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. In the instant matter, Respondent failed to fully disclose or acknowledge to his clients the possible effect his conflict of interest could have had on them. Actual harm occurred in that his failure to acknowledge the conflict led to further litigation and costs for his clients and to a substantial delay in Ms. Hodges and her son receiving their settlement funds.

Sanctions ranging from a public reprimand to a significant suspension have been imposed for similar misconduct. For example, in *In re Vidrine*, the Court upheld the Board's imposition of a public reprimand upon Mr. Vidrine for engaging in a concurrent conflict of interest and for making false representations to a tribunal. 2011-1209 (La. 10/7/11), 72 So.3d 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 who 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. Aggravating factors included 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 a 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

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mother. At the direction of two of the siblings, Mr. Cook prepared a petition and judgment 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 Bellaire*, the respondent engaged in a conflict of interest when he represented both a buyer and seller in a real estate transaction without obtaining a conflict waiver. He also failed to cooperate with ODC's investigation. He was found to have violated Rules 1.7(a), 1.9(a), 8.1(b), and 8.1(c). 2022-1084 (La. 9/27/22), 347 So.3d 14. He acted negligently in engaging in the conflict of interest and knowingly in failing to cooperate with ODC. He also caused actual harm to his client and the disciplinary system. Three aggravating factors were present: pattern of misconduct, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law (admitted in 2002). Four mitigating factors were also present: absence of a prior disciplinary record, absence of dishonest or selfish motive, personal problems, and character or reputation. Given that some of Mr. Bellaire's conduct was knowing, combined with the aggravating factors present, the Court determined that an actual period of suspension was warranted. Mr. Bellaire was suspended from the practice of law for six months, with all but ninety days deferred.

In *In re Lapeyrouse*, the respondent engaged in a conflict of interest by providing legal

advice to both his client and his client's estranged wife in connection with their divorce and by disclosing confidential information to his client's estranged wife. He later filed a defamation petition against his client and another witness based on the information they provided to ODC regarding his conflict of interest. 2022-0571 (La. 10/21/22), 352 So.3d 59. Mr. Lapeyrouse's misconduct violated Rules 1.6, 1.7(a)(2), 3.1, 8.4(a), and 8.4(d), as well as Louisiana Supreme Court Rule XIX, Sections 9(a) and 12A. He acted knowingly and caused actual and potential harm. There were four aggravating factors present: dishonest or selfish motive, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law. One mitigating factor was present: absence of a prior disciplinary record. Mr. Lapeyrouse was suspended from the practice of law for a period of one year, with six months deferred.

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 negligently in failing to timely file the wrongful death lawsuit; thereafter, she acted knowingly, if not intentionally. Her conduct caused actual and potential 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.

In the matter at hand, Respondent's misconduct was knowing and intentional. In an effort to collect a fee, he repeatedly ignored the advice of the other counsel with whom he

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consulted in the *Hodges/Rousell/Taylor* litigation concerning his un-waivable conflict of interest. He also filed a frivolous appeal in the Fifth Circuit Court of Appeals following the district court's confirmation that he had a conflict of interest. His mental intent is similar to that seen in *Lapeyrouse* (knowing) and *August* (knowing, if not intentional), and as seen in those matters, his misconduct also caused actual harm. Seven aggravating factors and no mitigating factors are present in the instant matter. The sanction relating to his misconduct involving his conflict of interest falls in between *Lapeyrouse* and *August*. Moreover, the Committee was rightfully disturbed by Respondent's "persistent non-participation in this process." Hrg. Comm. Rpt., pp. 18-19. Such egregious conduct is addressed by the aggravating factor of bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. Clearly, ODC and the Committee went to great lengths to ensure that Respondent had the formal opportunity to address the unusual filings in this matter, submit any evidence he wanted considered, and participate in the hearings, but he failed to do so.

Given the totality of the misconduct, the significant aggravating factors, ABA Standard 4.32, and the case law cited above, the Committee's recommended sanction of a two-year and one-day suspension, with one year deferred, appears to be reasonable and is adopted by the Board. Such a suspension will require Respondent to petition for reinstatement under Rule XIX, Section 24, should he wish to re-enter the practice of law. He will only be reinstated upon order of the Court, after meeting the requirements of Section 24(E) (or showing good or sufficient reason why he should nevertheless be reinstated) and demonstrating his fitness to practice law. The Board also adopts the Committee's recommendation that Respondent be assessed with all costs and expenses of these proceedings in accordance with Rule XIX,

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Section 10.1.

CONCLUSION

The Board adopts the Committee's findings of fact, with the clarifications noted above, and its findings that Respondent violated Rules 1.4, 1.7(a), and 8.4(d). The Board also finds that Respondent violated Rule 3.1. The Board further adopts the Committee's recommended sanction of a two-year and one-day suspension, with one year deferred. Finally, the Board adopts the Committee's recommendation that Respondent be assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

RECOMMENDATION

Given the above, the Board recommends that Respondent be suspended from the practice of law for two years and one day, with one year of the suspension deferred. The Board also recommends that Respondent be assessed with all costs and expenses and these proceedings in accordance with Rule XIX, Section 10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

R. Alan Breithaupt
Todd S. Clemons
Albert R. Dennis III
Susan P. DesOrmeaux
Aldric C. Poirier, Jr.
M. Todd Richard
Lori A. Waters

By: DocuSigned by: Paula Clayton 28E75ECB36...
Paula H. Clayton
FOR THE ADJUDICATIVE COMMITTEE

James B. Letten – Recused.

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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 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

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.

CERTIFICATE OF MAILING

In re: Kenneth M. Plaisance
Docket No(s). 21-DB-066

I hereby certify that a copy of the Recommendation of the Louisiana Attorney Disciplinary Board has this day been mailed and emailed to the Respondent(s) and/or the Counsel for the Respondent(s) by United States Mail and E-Filed to the Office of Disciplinary Counsel this 3rd day of **November, 2023** at the following address:

Mr. Kenneth M. Plaisance
Attorney at Law
2202 Touro Street
New Orleans, LA 70119

Mr. Christopher D. Kiesel
Deputy Disciplinary Counsel
4000 South Sherwood Forest Blvd.
Suite 607
Baton Rouge, LA 70816

DONNA L. ROBERTS
BOARD ADMINISTRATOR

264

LOUISIANA ATTORNEY DISCIPLINARY BOARD

2800 Veterans Memorial Boulevard, Suite 310
Metairie, Louisiana 70002
Phone: (504) 834-1488 • Fax: (504) 834-1449 • 1-800-489-8411

November 3, 2023

Ms. Veronica O. Koclanes
Clerk of Court
Louisiana Supreme Court
400 Royal Street
Suite 4200
New Orleans, LA 70130-8102

23 B 1460

In Re: KENNETH M. PLAISANCE
DOCKET NO(S).: 21-DB-066
(FORMAL CHARGES)

Dear Ms. Koclanes:

We are transmitting herewith the records in the above referenced case pursuant to Supreme Court Rule XIX. Enclosed please find the following:

1.	One	(1)	Original of Record –1 Vol.
2.	One	(1)	Duplicate Original of Record – 1 Vol.
3.	Two	(2)	Copies of Formal Charges, Answer, Hearing Committee Report & Recommendation to the Supreme Court
4.	Two	(2)	Original Exhibit – ODC
5.	Two	(2)	Transcript

SUPREME COURT OF LOUISIANA
2023 NOV -6 PM 1:21
CLERK OF COURT

Very truly yours,
Mildred B. Williams
Mildred B. Williams
Docket Clerk

/mbw
Enclosures

INTERNAL PROCEDURAL RULES

BOARD OF DISCIPLINARY APPEALS

Current through June 21, 2018

Contents

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Current through June 21, 2018

I. 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 [17.01] 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 [2.22], 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 [2.22], 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.

II. 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 himor 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.

III. 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.

IV. 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 [2.20] consistent with this requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21 [2.20].

(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 [2.20].

(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 [2.23], 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 postsubmission 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

(6[1]) 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.

[1] So in original.

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 [2.26]. 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.

V. 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 [2.22].

(b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23 [2.22], 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.

VI. 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.

VII. 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.

VIII. 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.

IX. 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.

X. 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.