

Supreme Court of Louisiana

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NEWS RELEASE #029

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 30th day of June, 2021 are as follows:

PER CURIAM:

2021-B-00191

IN RE: KEVIN C. SCHOENBERGER

SUSPENSION IMPOSED. SEE PER CURIAM.

Crichton, J., concurs in part, dissents in part and assigns reasons.

06/30/2021

SUPREME COURT OF LOUISIANA

No. 2021-B-0191

IN RE: KEVIN C. SCHOENBERGER

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Kevin C. Schoenberger, an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

The salient facts of these proceedings are largely undisputed. In early 2016, the ODC received notice of an overdraft that occurred in respondent’s trust account on February 25, 2016. Respondent indicated that the shortage was due to his failure to consider an outstanding client disbursement which cleared the trust account before a \$4,000.00 disbursement to his operating account was processed. To correct the error, respondent deposited a check issued from his operating account into his trust account the next day, but both the disbursed and deposited items were returned unpaid due to insufficient funds.

The ODC’s forensic auditor conducted an analysis of the trust account for the period between September 2015 and February 2016, and she identified several discrepancies which revealed a shortage of funds held in trust. A total of \$59,423.12 in net client proceeds, third-party liabilities, and IOLTA interest were identified as collected but not paid.¹ The analysis further revealed that in four client matters, the

¹ On February 29, 2016, respondent’s trust account balance was \$143.69, which is \$59,279.43 short of the outstanding client proceeds, third-party liabilities, and IOLTA interest.

sequence number on the checks did not agree with other checks issued at that time, and the checks were apparently backdated.²

During its investigation, the ODC sent correspondence respondent asking for information about why the checks had apparently been backdated. Respondent replied through correspondence, stating that he “backdated [the] checks to make his matters appear orderly with third-party vendors.”

DISCIPLINARY PROCEEDINGS

Formal Charges

After conclusion of its investigation, the ODC filed formal charges against respondent. The charges alleged respondent violated Rule 1.15 of the Rules of Professional Conduct by allowing the balance of his trust account to drop below the amount he was holding for clients and third parties and by failing to make prompt

² Specifically, the audit revealed the following facts:

On September 28, 2015, respondent deposited the sum of \$8,222.00 on behalf of his client, Ollie Dixon. The associated settlement statement shows that “Louisiana Primary Care Consultants” was owed \$2,222.00 from the settlement. Respondent issued a check in this amount to the third-party provider with a date of November 23, 2015. The check was not processed until May 22, 2017.

On November 12, 2015, respondent deposited the sum of \$36,000.00 on behalf of his client, Walter Jenkins. The associated settlement statement shows that “Healthcare Center” was owed \$10,401.00 from the settlement. Respondent issued a check in this amount to the third-party provider with a date of February 6, 2016. The check was not processed until April 17, 2017.

On September 25, 2015, respondent deposited the sum of \$15,000.00 was deposited on behalf of his client, Willie Smith. The associated settlement statement shows that “Sedgwick Claims/ATT&T subro” was owed \$7,500.00 from the settlement. Respondent issued a check in this amount to this third-party provider with a date of October 1, 2015. The check was not processed until May 23, 2016.

On January 15, 2016, respondent deposited \$9,300.00 on behalf of his client, Zachary Henderson. The associated settlement statement shows that “Westbank Health Care Center” was owed \$4,812.00 from the settlement. Respondent issued a check in this amount to this third-party provider on April 12, 2016. The check was not processed until February 10, 2017.

disbursements to third parties.³ The ODC further alleged respondent's backdating of the checks violated Rule 8.4(c).⁴

Respondent answered the formal charges. He admitted that his trust account was over drafted but denied committing conversion of funds. He further denied the allegation that his handling of third-party funds violated Rule 1.15. Finally, respondent admitted he backdated various checks, but denied that he did so in an effort to deceive the ODC.

Hearing Committee Report

The matter proceeded to a formal hearing before the hearing committee. The ODC introduced documentary evidence and called its forensic auditor as a witness. Respondent introduced documentary evidence, testified on his own behalf, and was

³ The formal charges cited Rule 1.15 generally without specifying any of its subparts. In its pre-hearing brief, however, the ODC specified that respondent violated Rules 1.15(a) and (d), which provide, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

* * *

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

⁴ Rule 8.4(c) provides:

It is professional misconduct for a lawyer to:

* * *

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

cross-examined by the ODC. With regard to the backdating of the checks, respondent testified that he backdated the checks because he “wanted to have it paid on dates that if anybody looked at my files later on, or even their files later on, if they subpoenaed the records, it would show that I timely paid.”

After considering the testimony and evidence presented at the hearing, the hearing committee made a factual finding that respondent violated Rule 1.15(a), although it found the overdraft of the trust account was inadvertent. The committee determined respondent’s accounting practices were “sloppy,” but found the evidence showed that he paid all clients and third parties the entirety of the funds due to them.

The committee declined to find respondent’s failure to make prompt payment to third parties violated Rule 1.15(d). In doing so, the committee noted none of the third parties to whom respondent owed money had perfected liens or privileges or a final judgment addressing disposition of those funds, and there was no written agreement by the client or by respondent on behalf of the client guaranteeing payment out of those funds. As such, the committee concluded respondent had no obligation to pay those parties directly from his trust account.

Finally, the committee determined respondent’s backdating of the checks did not violate Rule 8.4(c). The committee determined respondent’s decision to backdate the checks “was not meant to deceive ODC or for any other malicious purpose.” Rather, the committee concluded he “backdated checks in the four matters to keep his records orderly.”

In determining a sanction, the committee found the baseline sanction for the Rule 1.15(a) violation was a suspension. It identified the following mitigating factors: absence of a prior disciplinary record, personal or emotional problems, timely good faith effort to rectify the consequences of the misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, character or reputation, “acceptance of full responsibility of his

actions,” and remorse. The only aggravating factor recognized by the committee was respondent’s substantial experience in the practice of law, as he was admitted to the bar in 1972.

Considering all these factors, the committee recommended respondent be suspended from the practice of law for one year. It further recommended this suspension be fully deferred and respondent be placed on supervised probation for a period of two years, subject to conditions that respondent attend trust account training and submit to quarterly audits of his trust account.

The ODC filed an objection to the committee’s report, asserting that the committee erred in finding that respondent did not violate Rules 1.15(d) and 8.4(c).

Recommendation of the Disciplinary Board

The disciplinary board determined that the hearing committee’s factual findings regarding respondent’s mismanagement of his trust account were not manifestly erroneous. By placing and holding client and third party funds in his operating account, the board found respondent improperly commingled these funds with his own funds and also converted the funds, thus violating Rule 1.15(a).

The board further determined the ODC failed to prove by clear and convincing evidence that respondent’s failure to promptly pay third parties was a violation of Rule 1.15(d). The board acknowledged Rule 1.15(d) was “not a model of clarity.” However, the board found reasonable minds could conclude the obligation of prompt payment was limited to instances where the third parties had one of the three types of interests enumerated in the rule. Because it was undisputed the third parties had no such interests in this case, the board found no error in the hearing committee’s determination that respondent did not violate Rule 1.15(d).

Turning to Rule 8.4(c), the board placed emphasis on the hearing committee’s finding that respondent was credible when he testified the backdating of checks in

four matters was not meant to deceive the ODC or for any other malicious purpose. The board found this determination was not manifestly erroneous and therefore adopted the committee's finding that respondent did not violate Rule 8.4(c).

The board found the baseline sanction for respondent's violation of Rule 1.15(a) was suspension. It identified the following aggravating factors present: a pattern of misconduct and substantial experience in the practice of law. In mitigation, it found absence of a prior disciplinary record, personal or emotional problems, timely good faith effort to rectify the consequences of the misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, character or reputation, and remorse.

Considering these factors, the board recommended that respondent be suspended from the practice of law for one year, fully deferred, with a concurrent two-year period of supervised probation subject to the same conditions recommended by the committee.

The ODC filed an objection to the disciplinary board's recommendation. Accordingly, we docketed the case pursuant to Supreme Court Rule XIX, § 11(G)(1)(b) and received briefs and oral argument from the parties.

DISCUSSION

The allegations of respondent fall into two broad categories: (1) trust account mismanagement in violation of Rule 1.15; and (2) deceitful actions in connection with the backdating of the checks, in violation of Rule 8.4(c). We will address these issues in turn.

Trust Account Mismanagement

Rule 1.15(a) provides, "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate

from the lawyer's own property." Our jurisprudence has long recognized that "[a] lawyer may not deposit his own funds in the trust account. . . ." *Louisiana State Bar Ass'n v. Hinrichs*, 486 So. 2d 116, 121 (La. 1986).

The record in this case reveals the balance of respondent's trust account dropped below the amount he was holding in trust for payment of his clients and third parties. Instead, he placed certain client and third party funds in his operating account rather than in his trust account. In doing so, respondent clearly commingled these funds with his own funds and effectively converted them to his own use.

While we acknowledge and accept the committee's finding that respondent's actions were negligent rather than intentional, it is well settled that "[t]he attorney's mistake, good faith or lack of conscious wrongdoing may mitigate the offense, but does not negate the infraction." *Hinrichs*, 486 So. 2d at 122. Therefore, we find the ODC proved a violation of Rule 1.15(a) by clear and convincing evidence.

Although the ODC also alleged respondent violated Rule 1.15(d) by failing to promptly pay third parties, both the hearing committee and disciplinary board found the ODC failed to establish a violation of this section by clear and convincing evidence. Based on the specific facts presented and considering the lack of any significant harm to clients or third parties, we see no error in the findings of the hearing committee and disciplinary board. Accordingly, we find no violation of Rule 1.15(d).

Backdating of Checks

Rule 8.4(c) provides it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." The question presented for our resolution is whether respondent's backdating of certain third-party checks was done with the intent of deceiving the ODC during its investigation.

The record reveals the ODC's auditor conducted an analysis of respondent's trust account for the period of time between September 2015 and February 2016. In April 2017, following the completion of this audit, the ODC sent correspondence to respondent explaining that a review of documents he submitted showed that multiple third-party liabilities identified as withheld from client settlements were not identified as paid during the audit period. The ODC asked respondent to submit a supplemental response addressing these concerns along with copies of the cancelled checks deposited during the audit period. In response to the request, respondent submitted four cancelled checks identified as payments to third-party providers. These checks were dated as to appear to have been issued shortly after the respective settlements.⁵ Notably, however, the sequence numbers of these checks were not consistent with other checks written during the same time period, and the checks were not processed until several months after their issuance date.

Respondent does not dispute that he backdated the checks, but has consistently maintained he did so in good faith, in order to "make his matters appear orderly with third-party vendors." The hearing committee accepted respondent's version of events and made a factual finding that respondent's actions were "not meant to deceive ODC or for any other malicious purpose." As a result, it declined to find a violation of Rule 8.4(c).

In brief and argument to this court, the ODC contends the hearing committee's finding is clearly wrong and submits respondent acted with an improper intent in backdating the checks. According to the ODC, respondent's intent is clearly revealed by his own testimony, in which he stated that he backdated the checks because he "wanted to have it paid on dates that if anybody looked at my files later

⁵ Additionally, three checks were dated to suggest that they were issued during the 2015-2016 audit period. The fourth check was outside of the audit period, but within two months of the corresponding settlement.

on, or even their files later on, if they subpoenaed the records, it would show that I timely paid.”

Bar disciplinary matters come within the original jurisdiction of this court pursuant to La. Const. art. V, § 5(B). Consequently, we are empowered to act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proved by clear and convincing evidence. *In re: Quaid*, 1994-1316 (La. 11/30/94), 646 So. 2d 343, 348; *Louisiana State Bar Ass’n v. Boutall*, 597 So. 2d 444, 445 (La. 1992). In performing our review, we have recognized the hearing committee’s credibility findings are entitled to some degree of deference. *See In re: Bolton*, 2002-0257 (La. 6/21/02), 820 So. 2d 548, 553 (explaining that the hearing committee members act as “the eyes and ears of this court.”). Nonetheless, our decisions have made it abundantly clear that in the exercise of our constitutionally-granted jurisdiction, we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board. *See In re: Scheurich*, 2003-3264 (La. 4/30/04), 871 So. 2d 1104, 1107.

Although respondent contends he backdated the checks to “make his matters appear orderly with third-party vendors,” the ODC’s auditor testified that there was no accounting reason to backdate checks. Indeed, rather than making the payments more orderly, the backdating of the checks only served to interject confusion in the matter and created the potential the checks might be dishonored as stale.

Moreover, respondent candidly admitted that “if they subpoenaed the records, it would show that I timely paid.” This testimony indicates respondent was concerned with any potential investigation of his records and dated the checks to make it appear he had made the payments shortly after the settlements had been finalized.

Candor and honesty are a lawyer’s stock in trade. *In re: Bernstein*, 2007-1049 (La. 10/16/07), 966 So. 2d 537, 544. While we recognize respondent provided the

checks to the ODC voluntarily and did not attempt to hide the dates on which the backdated checks in question cleared, his decision to backdate the checks reveals an intent to mislead the ODC. The hearing committee was clearly wrong in finding to the contrary. Accordingly, we find the ODC has established a violation of Rule 8.4(c) by clear and convincing evidence.

Sanction

Disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *In re: Hingel*, 2020-0992 (La. 11/10/20), 303 So. 3d 1029, 1032. 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. *In re: Smothers*, 2020-0244 (La. 6/22/20), 297 So. 3d 743, 747. The purpose of lawyer disciplinary proceedings is not so much to punish the attorney as it is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice. *Louisiana State Bar Ass'n v. Powell*, 439 So. 2d 415, 417 (La. 1983).

Respondent's failure to comply with Rule 1.15(a) and his mismanagement of the trust account created a clear potential for serious harm. However, we acknowledge that his shortcoming was the product of negligence rather than intent and no clients or third parties suffered any actual harm as a result of his actions. We have typically imposed fully-deferred suspensions of one year and a day coupled with supervised probation in cases involving negligent trust account mismanagement when there was little or no actual harm. *See, e.g., In re: Alex*, 2016-1020 (La. 11/15/16), 205 So. 3d 895; *In re: Spears*, 2011-1135 (La. 9/02/11), 72 So. 3d 819; *In re: Cicardo*, 2004-0828 (La. 7/02/04), 877 So. 2d 980.

Turning to the Rule 8.4(c) violation, we find the record supports the conclusion there was no legitimate accounting purpose for respondent's backdating of the checks. Rather, his own testimony indicated that if his records were subpoenaed, the backdated checks "would show that I timely paid." Respondent's attempt to sanitize his records in the face of a potential disciplinary investigation reveals a clear lack of honesty and candor.

We have recognized that knowingly deceitful and dishonest actions by a lawyer can impede the fundamental responsibility of this court to assure the protection of the public and to safeguard the administration of justice. *See, e.g., In re: Stamps*, 2003-2985 (La. 4/14/04), 874 So. 2d 113, 124.

Standard 6.12 of the *ABA Standards for Imposing Lawyer Sanctions* states, "[s]uspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." In this case, respondent submitted that he knowingly backdated checks to the ODC during its investigation. When confronted with the discrepancy in the dates, respondent insisted the backdating was done to keep his records orderly, a contention which we do not find to be plausible. His actions caused a potential for harm, both to the recipients of the backdated checks as well as the disciplinary system. The baseline sanction for this misconduct is a suspension.

In aggravation, we recognize a pattern of misconduct and substantial experience in the practice of law. As mitigation, we find an absence of a prior disciplinary record, personal or emotional problems, a cooperative attitude toward the proceedings, good character and reputation, and remorse.

Considering the facts and circumstances of this case in their entirety, we find the appropriate sanction for respondent's misconduct is a suspension from the practice of law for a period of one year and one day. We will defer all but sixty days of this suspension and place respondent on supervised probation for a period of two years subject to the conditions identified by the hearing committee.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, briefs, and oral argument, it is ordered that Kevin C. Schoenberger, Louisiana Bar Roll number 11813, be suspended from the practice of law for one year and one day. It is further ordered that all but sixty days of the suspension shall be deferred. Following the active portion of the suspension, respondent shall be placed on supervised probation for two years, subject to the following conditions: (1) he attend and successfully complete the first available session of the Trust Accounting School sponsored by the Louisiana State Bar Association; and (2) he submit to quarterly audits of his trust account during his two-year probationary period. The probationary period shall commence from the date respondent, the ODC, and the probation monitor execute a formal probation plan. Any failure of respondent to comply with the conditions of probation, or any misconduct during the probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. 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.

06/30/2021

SUPREME COURT OF LOUISIANA

No. 2021-B-00191

IN RE: KEVIN C. SCHOENBERGER

ATTORNEY DISCIPLINARY PROCEEDING

CRICHTON, J., concurs in part, dissents in part, and assigns reasons.

I agree with the per curiam that respondent has violated the Rules of Professional Conduct, solely as set forth therein. However, I disagree with the sanction imposed, as I find it too harsh under the particular facts and circumstances of this case. This case presents numerous mitigating factors, including absence of a prior disciplinary record, personal or emotional problems, timely good faith effort to rectify the consequences of the misconduct, character or reputation, and remorse. I particularly note that respondent made a full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, factors which I consider to weigh in favor of less harsh discipline. *See, e.g., In re: Trieu*, 19-1680 (La. 3/9/20), 290 So. 3d 658 (Crichton, J., dissenting as to the sanction as “too harsh under the particular circumstances of this case” where the respondent made a “full and free disclosure” and displayed a “cooperative attitude toward proceedings”); *In re: Butler*, 18-1812 (La. 5/8/18), 283 So. 3d 455 (Crichton, J., dissenting from the sanction imposed as too harsh, finding significant mitigating factors the majority failed to adequately consider). Consequently, I dissent from the majority’s sanction.

With respect to the charged violation of Rule 1.15(d), I agree with the per curiam that there was no error in the findings of the hearing committee and disciplinary board and find no violation here. I write separately to note that Louisiana Rule of Professional Conduct 1.15(d) differs from ABA Model Rule 1.15(d). In my view, the Bar and the Court should examine the language of Rule 1.15(d) to

determine whether the language difference in the two rules results in unintended consequences for lawyers, clients, and third parties.