

The Supreme Court of the State of Louisiana

IN RE: DONALD JOSEPH MELANCON

No.2020-B-01177

IN RE: Disciplinary Counsel - Applicant Other; Findings and Recommendations
(Formal Charges);

January 20, 2021

Suspension imposed. See per curiam.

WJC

JLW

JDH

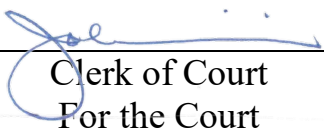
SJC

JTG

JBM

PDG

Supreme Court of Louisiana
January 20, 2021



Clerk of Court
For the Court

1/20/21

SUPREME COURT OF LOUISIANA

NO. 2020-B-1177

IN RE: DONALD JOSEPH MELANCON

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

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

FORMAL CHARGES

Client Trust Account Mismanagement

On November 16, 2015, a \$57 check was returned due to insufficient funds in respondent’s client trust account. On November 27, 2015, a \$600 check was returned due to insufficient funds in respondent’s trust account. On December 2, 2015, the same \$600 check was returned again due to insufficient funds in respondent’s trust account.

When the ODC received an overdraft notice from respondent’s bank, it conducted an audit of his trust account for the period from June 2015 through December 2015. The audit revealed that respondent engaged in commingling and conversion of client funds. The audit further showed that, on December 31, 2015, respondent’s trust account should have held at least \$5,448.94; instead, the balance on that day was \$64.67.

More specifically, in September 2015, respondent settled a case for \$30,000 on behalf of his client Gary Forrest. Respondent deposited the \$30,000 into his trust

account on September 18, 2015. Just prior to the deposit, the balance in his trust account was \$96.04. According to Mr. Forrest's settlement statement, he and respondent agreed to a fee of 28.5% (\$8,550). The settlement statement also indicated that respondent withheld \$5,283.90 to pay third-party medical providers, withheld \$2,500 for "Tina Case's Lien," and withheld \$100 for a petition filing fee. Respondent also gave Mr. Forrest a \$150 credit. From the \$30,000 deposit, respondent made the following distributions from his trust account:

1. \$200 to the Clerk of Court;
2. \$2,000 to respondent;
3. \$2,000 to respondent;
4. \$1,220 to Computer Repair Clinic;
5. \$2,000 to respondent;
6. \$500 to respondent;
7. \$250 to respondent;
8. \$5,275 to Edgardo Zeron;
9. \$1,000 to Tina Case;
10. \$5,341.10 to Mr. Forrest;
11. \$2,500 to Edgardo Zeron; and
12. \$4,476.10 to Josephine Forrest.¹

On November 16, 2015, all of the funds from Mr. Forrest's settlement had been depleted without the remaining \$1,500 being disbursed for Tina Case's lien and without the \$5,283.90 being disbursed to the third-party medical providers. Additionally, respondent disbursed \$1,220 to Computer Repair Clinic. According to the settlement statement, respondent was also supposed to disburse a total of

¹ Mr. Forrest's father was in the vehicle with Mr. Forrest at the time of the accident. According to respondent, he represented both Mr. Forrest and his father. Apparently, Mr. Forrest's father instructed respondent to pay his portion of the proceeds directly to his wife, Josephine Forrest.

\$13,866.10 (\$13,716.10 + \$150) to Mr. Forrest. On September 25, 2015, respondent disbursed \$5,341.10 to Mr. Marshall, and on October 7, 2015, respondent disbursed \$4,476.10 to Josephine Marshall. On December 21, 2015, after the settlement funds had been depleted, respondent disbursed an additional \$450 to Mr. Marshall for a total of \$10,267.20. As such, respondent converted client funds.

Respondent also engaged in commingling because he failed to promptly remove his attorney's fees from the trust account. He deposited Mr. Forrest's settlement into his trust account on September 18, 2015. He removed his attorney's fees as follows: \$2,000 on September 23, 2015; \$2,000 on October 1, 2015; a total of \$3,000 on November 5, 2015; and \$1,500 on November 12, 2015.

On January 10, 2017, respondent provided a sworn statement to the ODC. During the sworn statement, he struggled to explain the overdrafts, showing that he failed to properly reconcile his trust account.

Sharing Legal Fees and Solicitation

Respondent paid Edgardo Zeron, a runner, 50% of his attorney's fees for the referral of clients to his law firm. Respondent's bank statements and the audit of respondent's trust account show that he made several payments from the trust account to Mr. Zeron (a/k/a Zeron Legal Services or "Rene" Zeron). Specifically, during the audit period, respondent made the following payments to Mr. Zeron from his trust account: \$2,500 on June 6, 2015; \$5,275 on September 22, 2015; \$2,500 on September 29, 2015; \$320 on October 5, 2015; and \$3,750 on November 5, 2015.

During respondent's January 10, 2017 sworn statement, he indicated he entered into a contractual relationship with Mr. Zeron, wherein Mr. Zeron would provide various services to respondent's Spanish-speaking clients. Respondent described these services as translations and document collection. He also indicated that the payment method was task-based, and he paid Mr. Zeron from his attorney's

fees earned on a case by case basis. The terms of the contractual agreement provided that respondent would not pay Mr. Zeron more than 50% of the fee he collected.

During the audit period, respondent received a wire transfer into his trust account in the amount of \$7,500 from Maria Couceiro. Thereafter, he paid Mr. Zeron \$3,750 from his trust account. On November 16, 2015, respondent issued a \$7,000 refund to Ms. Couceiro, which resulted in the conversion of both client and third-party medical provider funds from Mr. Forrest's settlement.

Contingency Fee Agreement

Respondent's contingency fee agreement contains a clause requesting and/or obtaining authorization to endorse and negotiate an instrument given in settlement of the client's claim, prior to the client approving the settlement.

DISCIPLINARY PROCEEDINGS

In August 2018, the ODC filed formal charges against respondent, as set forth above, alleging that he violated the following provisions of the Rules of Professional Conduct: Rules 1.5 (fee arrangements), 1.8(k) (a lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents), 1.15 (safekeeping property of clients or third persons), 7.4 (direct contact with prospective clients), 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent answered the formal charges, denying any misconduct. The matter then proceeded to a formal hearing on the merits.

Hearing Committee Report

After considering the testimony and evidence presented at the hearing, the hearing committee found that the ODC proved by clear and convincing evidence that respondent mismanaged his trust account in violation of Rules 1.15(a) (a lawyer shall hold property of clients or third person that is in a lawyer's possession in connection with a representation separate from the lawyer's own property) and 1.15(b) (a lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on the account or obtaining a waiver of those charges, but only in an amount necessary for that purpose) of the Rules of Professional Conduct. The committee found, however, that the ODC failed to prove respondent violated the other rules as alleged in the formal charges.

More specifically regarding the trust account mismanagement, the committee determined respondent's testimony that he did not "completely understand" how and why he needed to reconcile his trust account "may have been the understatement of the hearing, if not the year." The committee further indicated that respondent's understanding of his ethical obligations related to his trust account was not merely incomplete but "practically non-existent." Respondent's father helped respondent set up his accounting books in 2005 and reconciled same until 2009, at which time he was only able to reconcile them occasionally; in 2011, respondent's father ceased overseeing respondent's accounting altogether. The committee found it "inconceivable" that respondent's trust account mismanagement was limited to the seven-month period audited by the ODC. Respondent did not challenge the ODC auditor's findings and conclusions; as such the committee adopted those findings, which fully support the allegations of trust account mismanagement made in the formal charges. According to the committee, there is no question that respondent's bookkeeping was "incredibly sloppy;" commingling unquestionably occurred, and conversion occurred at least constructively. However, respondent credibly testified

that all clients had been made whole, and the evidence was so confusing that, while it raised a suspicion of conversion, there was not clear and convincing evidence that any client or third-party provider was not paid.

The committee further determined the ODC did not prove respondent shared fees with a non-lawyer or used a non-lawyer to solicit business. Mr. Zeron testified that he referred several clients, mainly members of his family, to respondent, but he denied being compensated to do so. Mr. Zeron performed paralegal and translation/interpretation services for respondent's Spanish-speaking clients. Neither respondent nor Mr. Zeron kept time records of the work performed, and the only stipulation was that Mr. Zeron would not be paid more for such services than what respondent made in net legal fees in connection with a given case. Respondent testified that Mr. Zeron provided court-runner services but did not solicit clients on his behalf. However, respondent also admitted that payments to Mr. Zeron were improperly drawn on his trust account. These payments should have been drawn against respondent's earned fees deposited into his operating account. According to the committee, however, neither these payments nor any other substantial evidence supported the allegation that respondent paid Mr. Zeron a *quid pro quo* for client referrals.

Finally, the committee determined the ODC did not prove respondent's contingency fee contract contained a clause authorizing him to settle cases without his client's consent. Respondent testified that he copied the following clause from a form book:

Attorney has full and unlimited power to act in client's behalf, to obtain additional or substitute counsel, to endorse checks or drafts in client's name, and to retain fees and costs. Client agrees to permit attorney to handle all matters in the preparation and conduct of this case, to take no action against the advice of attorney, to refrain from contacting adverse parties or their attorneys, and to advise attorney immediately of any change of client's address or telephone number.

The committee found that this language does not give respondent the power to settle a client's case without the client's consent. While the grant of unlimited power in the contract is broad, the list of specific powers that follows does not include the power to settle a case without the client's consent. At worst, the language is ambiguous, and the ODC failed to show respondent had exercised such power in connection with any client's case.

Having found respondent violated the Rules of Professional Conduct as set forth above, the committee then determined that respondent's mismanagement of his trust account was grossly negligent, if not knowing in some instances, but was not intentional. Other than delayed payments, there was no clear and convincing evidence of harm to any clients. However, respondent did cause general harm to the public and the legal profession. Relying on the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the baseline sanction is suspension.

In aggravation, the committee found a pattern of misconduct and multiple offenses. In mitigation, the committee found the absence of a prior disciplinary record, the absence of a dishonest or selfish motive, timely good faith effort to make restitution, a cooperative attitude toward the proceedings, and remorse.

After further considering this court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for one year and one day, fully deferred, subject to two years of supervised probation with the following conditions:

1. During the probationary period, respondent shall submit to the ODC quarterly audits of his trust account to be performed by an ODC-approved CPA, with the costs and expenses of the audit to be paid by respondent;

2. During the probationary period, at least six hours of respondent's mandatory continuing legal education requirements shall be in the area of law practice management/client trust account management;
3. During the probationary period, respondent shall successfully complete the Louisiana State Bar Association's Ethics School and Trust Accounting School; and
4. Any failure of respondent to comply with the conditions of probation or any misconduct during the probationary period shall be grounds for making the deferred suspension executory or for imposing additional discipline, as appropriate.

The ODC filed an objection to the committee's report and recommendation. Specifically, the ODC objected to the committee's factual findings and conclusions of law and argued that the recommended sanction is too lenient.

Two months after the committee filed its report, the ODC filed a motion to supplement the record with evidence that respondent, contrary to his hearing testimony, did not pay the third-party medical providers in the Forrest matter. The disciplinary board granted the ODC's motion, and the following evidence was admitted into the record: (1) a July 22, 2019 invoice from Westbank Physician Rehabilitation indicating a \$2,899.90 balance owed relative to the Forrest matter; (2) a July 22, 2019 invoice from LA MRI, INC. indicating a \$2,780 balance owed relative to the Forrest matter; and (3) a July 22, 2019 invoice from Orthopedic Care Center of Louisiana indicating a \$644 balance owed relative to the Forrest matter.

Disciplinary Board Recommendation

After review, the disciplinary board adopted the hearing committee's factual findings. More specifically, the board concurred in the committee's finding that respondent misused his trust account and commingled and converted funds. The

board also agreed with the committee that the ODC failed to prove respondent shared professional fees with a non-attorney, paid a non-attorney for solicitation of business, or obtained a power of attorney or mandate from a client authorizing respondent to enter into a settlement agreement without the client's consent.

The board then turned to a consideration of the evidence the ODC presented after the committee filed its report. Noting the evidence would have helped the committee determine that respondent had not paid these third parties, which the committee was unable to do with the evidence presented at the hearing, the board nevertheless decided the evidence does not warrant a reopening of the hearing because the committee did not need the documents to find respondent converted the funds.

Based on these facts, the board agreed with the committee that respondent violated Rules 1.15(a) and 1.15(b) of the Rules of Professional Conduct. Additionally, the board found a violation of Rules 1.15(d) (failure to timely remit funds to a client or third person) and 1.15(f) (a lawyer shall subject all client trust accounts to a reconciliation process at least quarterly and shall maintain records of the reconciliation as mandated by this rule). In light of respondent's violation of these rules, the board further found that respondent violated Rule 8.4(a).

The board then determined respondent violated duties owed to his clients, the public, and the legal profession. His conduct was grossly negligent and, in some respects, knowing. The newly-submitted evidence suggests respondent's misconduct may have caused actual harm to his client and the three third-party medical providers due to the continued delay in respondent's payment of the providers' invoices relative to the client's medical treatment. His misconduct also created the potential for harm to his clients. The board agreed with the committee that the baseline sanction is suspension.

The board also agreed with the committee's determination of aggravating factors. However, in mitigation, the board found only the absence of a prior disciplinary record, a cooperative attitude toward the proceedings, and remorse.

After further considering this court's prior jurisprudence addressing similar misconduct, the board recommended respondent be suspended from the practice of law for one year and one day, with six months deferred, followed by two years of supervised probation with the following conditions:

1. During the probationary period, respondent shall submit to the ODC quarterly audits of his trust account to be performed by an ODC-approved CPA, with the costs and expenses of the audit to be paid by respondent;
2. During the probationary period, at least six hours of respondent's mandatory continuing legal education requirements shall be in the area of law practice management/client trust account management;
3. During the first year of the probationary period, respondent shall successfully complete the Louisiana State Bar Association's Ethics School and Trust Accounting School;
4. Within six months of the imposition of discipline, respondent shall provide evidence that all amounts retained from the Forrest settlement to pay third-party medical providers have been paid by him to those providers; and
5. Any failure of respondent to comply with the conditions of probation or any misconduct during the probationary period shall be grounds for making the deferred suspension executory or for imposing additional discipline, as appropriate.

Neither respondent nor the ODC filed an objection to the disciplinary board's 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. While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *See In re: Caulfield*, 96-1401 (La. 11/25/96), 683 So. 2d 714; *In re: Pardue*, 93-2865 (La. 3/11/94), 633 So. 2d 150.

The record in this matter supports a finding that respondent mismanaged his trust account, resulting in commingling and conversion. The record also supports a finding that respondent still owes third-party medical providers in the Forrest matter \$6,323.90. This misconduct amounts to a violation of the Rules of Professional Conduct as found by the disciplinary board.²

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).

² Based on the record and in light of the fact that the ODC did not object to the board's findings and recommendation, we agree that the ODC failed to prove by clear and convincing evidence a violation of Rules 1.5, 1.8(k), 7.4, and 8.4(c) of the Rules of Professional Conduct as originally alleged in the formal charges.

Both the hearing committee and the board determined that respondent's conduct was grossly negligent, if not knowing at times. We agree. Respondent negligently, if not knowingly, violated duties owed to his clients, the public, and the legal profession. His conduct caused actual harm to the third-party medical providers in the Forrest matter, who still have not been paid, and had the potential to cause even more harm to his clients. Like the committee and the board, we find the baseline sanction is suspension.

Aggravating factors present are a pattern of misconduct, multiple offenses, and substantial experience in the practice of law (admitted 2005). The record indicates the presence of the following mitigating factors: the absence of a prior disciplinary record, a cooperative attitude toward the proceedings, and remorse.

Turning to the issue of an appropriate sanction, we find guidance from *In re: Johnson*, 17-1011 (La. 9/6/17), 225 So. 3d 1057, wherein an attorney failed to timely remit funds owed to a client, failed to account for funds belonging to a client, allowed his trust account to become overdrawn, and took cash withdrawals from his trust account. We found that the attorney acted negligently, and he paid his client the full amount owed prior to the court's imposition of discipline. Under these circumstances, we suspended the attorney from the practice of law for one year and one day, fully deferred, subject to two years of supervised probation with conditions. The primary difference here is that respondent has not yet paid the third-party medical providers what they are owed. Therefore, we find an actual period of suspension, as recommended by the board, is warranted.

Accordingly, we will adopt the board's recommendation and suspend respondent from the practice of law for one year and one day, with six months deferred, subject to a two-year period of supervised probation with the conditions recommended by the board.

DECREE

Upon review of the findings and recommendations of the hearing committee and the disciplinary board, and considering the record, it is ordered that Donald Joseph Melancon, Louisiana Bar Roll number 29976, be and he hereby is suspended from the practice of law for a period of one year and one day, with six months of the suspension deferred. Following the active portion of the suspension, respondent shall be placed on supervised probation for a period of two years, subject to the conditions recommended by the disciplinary board. 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, shall be grounds for making the deferred portion of the suspension executory or for 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.