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

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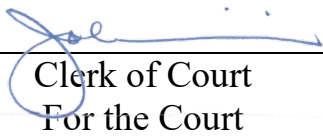
June 03, 2020

Permanent disbarment imposed. See per curiam.

JHB  
BJJ  
JLW  
JDH  
SJC  
JTG  
WJC

Crichton, J., additionally concurs and assigns reasons.

Supreme Court of Louisiana  
June 03, 2020

  
Clerk of Court  
For the Court

06/03/20

SUPREME COURT OF LOUISIANA

NO. 2020-B-0118

IN RE: KIRBY DALE KELLY

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Kirby Dale Kelly, an attorney licensed to practice law in Louisiana but currently on interim suspension for threat of harm to the public. *In re: Kelly*, 18-2113 (La. 1/14/19), 260 So. 3d 1207.

**FORMAL CHARGES**

*Count I – The Healthcare Express Matter*

Third-party medical provider Healthcare Express treated several of respondent’s personal injury clients. Respondent provided Healthcare Express with letters of guarantee promising to pay its bills from his clients’ settlements. Despite repeated demands from Healthcare Express dating back to 2017, respondent failed to pay \$74,040 in outstanding medical bills from funds withheld for that purpose from the settlements of 54 of his clients.

On March 13, 2018, Healthcare Express filed a disciplinary complaint against respondent. In response, respondent claimed any conversion of funds resulted from his asserted inability to supervise subordinate attorneys and his non-lawyer staff.

The ODC alleged that respondent’s conduct violated Rules 1.15 (safekeeping property of clients or third persons), 5.1 (responsibilities of partners, managers, and

supervisory lawyers), and 5.3 (failure to properly supervise a non-lawyer assistant) of the Rules of Professional Conduct.

### *Count II – The Montgomery Matter*

In 2017, Germaine Montgomery hired respondent to handle her personal injury claim. Thereafter, respondent failed to communicate with Ms. Montgomery about the status of her claim, which is now beyond the one-year anniversary date of the accident.

On September 10, 2018, Ms. Montgomery filed a disciplinary complaint against respondent. Despite being served with notice of the complaint via certified mail, respondent failed to respond.

The ODC alleged that respondent's conduct violated Rules 8.1(c) (failure to cooperate with the ODC in its investigation), 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct.

### *Count III – The Marshall Matter*

Following a 2015 traffic accident, Bobby Marshall hired respondent to handle his personal injury claim. The liability insurer tendered settlement in December 2015, and respondent disbursed the proceeds on December 2, 2015. Respondent withheld \$5,223.68 from the settlement to pay Willis-Knighton Hospital and provided Mr. Marshall with a copy of the check payable to Willis-Knighton, which represented that payment to the hospital had been made. Nevertheless, respondent failed to pay Willis-Knighton, and the hospital turned over Mr. Marshall's debt to a credit bureau for collection. Respondent also withheld \$398.25 from Mr. Marshall's settlement to pay William Norwood but failed to pay Mr. Norwood.

On October 20, 2018, Mr. Marshall filed a disciplinary complaint against respondent. Despite being served with notice of the complaint via certified mail, respondent failed to respond.

The ODC alleged that respondent's conduct violated Rules 1.15, 8.1(c), 8.4(a), and 8.4(c) of the Rules of Professional Conduct.

*Count IV – The Shreveport Doctors Rehabilitation Center Matter*

Shreveport Doctors Rehabilitation Center ("SDRC") treated respondent's client, Essie Parker, receiving a letter of guarantee from respondent. Following treatment, Ms. Parker informed SDRC that her case settled and funds were disbursed in January 2018. Ms. Parker provided SDRC with a copy of a \$1,909.60 check drawn on respondent's trust account, dated September 29, 2017, and made payable to SDRC. Nevertheless, SDRC never received the check.

On October 29, 2018, SDRC filed a disciplinary complaint against respondent. Despite being personally served with notice of the complaint, respondent failed to respond.

The ODC alleged that respondent's conduct violated Rules 1.15, 8.1(c), 8.4(a), and 8.4(c) of the Rules of Professional Conduct.

*Count V – The Head Matter*

Following an August 10, 2017 automobile accident, Yolanda Head hired respondent to handle her personal injury claim. The liability insurer tendered settlement in April 2018, and respondent disbursed the proceeds on September 12, 2018. Eastgate Chiropractic reduced Ms. Head's bill from \$6,271 to \$4,500, and respondent's office provided Ms. Head with a copy of a \$4,500 check payable to Eastgate Chiropractic. Nevertheless, respondent failed to remit the payment to the

medical provider. As such, on December 11, 2018, Eastgate Chiropractic demanded Ms. Head pay it \$6,271. Ms. Head attempted to contact respondent, to no avail.

Thereafter, Ms. Head filed a disciplinary complaint against respondent. Despite being served with notice of the complaint via certified mail, respondent failed to respond.

The ODC alleged that respondent's conduct violated Rules 1.15, 8.1(c), 8.4(a), and 8.4(c) of the Rules of Professional Conduct.

### **DISCIPLINARY PROCEEDINGS**

In February 2019, the ODC filed formal charges against respondent as set forth above. Respondent failed to answer the formal charges. Accordingly, the factual allegations contained therein were deemed admitted and proven by clear and convincing evidence pursuant to Supreme Court Rule XIX, § 11(E)(3). No formal hearing was held, but the parties were given an opportunity to file with the hearing committee written arguments and documentary evidence on the issue of sanctions. Respondent filed nothing for the hearing committee's consideration.

#### *Hearing Committee Report*

After considering the ODC's deemed admitted submission, which included a December 12, 2018 audit report of respondent's trust account for the period between August 2015 and October 2016, the hearing committee determined that the factual allegations set forth in the formal charges were deemed admitted and proven by clear and convincing evidence. The committee then made factual findings consistent with the deemed admitted factual allegations. Additionally, the committee noted that the ODC's audit of respondent's trust account concluded the following:

The trust account... balance at the end of the audit period is \$87,187.41. Review of the information provided reflects approximately \$320,000.00... in unpaid

obligations to clients and third parties which are associated with deposits that should have been made to the trust account during the audit period. The trust account... balance as of October 31, 2016 is over \$230,000.00 short to honor the obligations identified. Furthermore, the lack of documentation provided to the ODC hindered identification of potential additional client or third-party obligations[,] and the claim from Healthcare Express identifies \$46,778.80 is due in addition to what was identified with the information provided by [respondent].

Based on the ODC's audit, the committee found that respondent's actions have harmed Healthcare Express, the clients identified in the audit report, and countless other clients and third parties. In light of the above findings, the committee determined respondent violated the Rules of Professional Conduct as alleged in the formal charges.

The committee determined that respondent knowingly and intentionally violated duties owed to his clients and third-party medical providers. His conduct injured his clients, the public, the legal system, and the legal profession. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined that the baseline sanction is disbarment.

The committee found the following aggravating factors present: 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, vulnerability of the victims, substantial experience in the practice of law (admitted 1993), and indifference to making restitution. According to the committee, the only factor in mitigation is the absence of a prior disciplinary record.

In determining an appropriate sanction, the committee considered respondent's conduct in light of the permanent disbarment guidelines set forth in Supreme Court Rule, Appendix D. Citing Guideline 1 (repeated or multiple

instances of intentional conversion of client funds with substantial harm), the committee recommended respondent be permanently disbarred.

Neither respondent nor the ODC filed an objection to the hearing committee's recommendation. Therefore, pursuant to Supreme Court Rule XIX, § 11(G), the disciplinary board submitted the committee's report to the court for review.<sup>1</sup>

## 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.

In cases in which the lawyer does not answer the formal charges, the factual allegations of those charges are deemed admitted. Supreme Court Rule XIX, § 11(E)(3). Thus, the ODC bears no additional burden to prove the factual allegations contained in the formal charges after those charges have been deemed admitted. However, the language of § 11(E)(3) does not encompass legal conclusions that flow from the factual allegations. If the legal conclusion the ODC seeks to prove (i.e., a violation of a specific rule) is not readily apparent from the deemed admitted facts, additional evidence may need to be submitted in order to prove the legal conclusions that flow from the admitted factual allegations. *In re: Donnan*, 01-3058 (La. 1/10/03), 838 So. 2d 715.

The record in this deemed admitted matter supports a finding that respondent engaged in serious attorney misconduct, including converting client and third-party

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<sup>1</sup> As amended effective May 15, 2019, Supreme Court Rule XIX, § 11(G) provides that “[i]f the parties do not file objections to the hearing committee report, the board shall promptly submit the hearing committee’s report to the court.”

funds, failing to supervise subordinate attorneys and non-lawyer staff, and failing to cooperate with the ODC in its investigations. As such, he has violated the Rules of Professional Conduct as alleged in the formal charges, with one exception. In the Montgomery matter, we find neither respondent's failure to communicate with Ms. Montgomery nor his failure to cooperate with the ODC amounts to a violation of Rule 8.4(c) as charged by the ODC.

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 knowingly and intentionally violated duties owed to his clients, the public, the legal system, and the legal profession, causing significant harm to his clients and third parties. We agree with the hearing committee that the applicable baseline sanction is disbarment.

In its report, the committee concluded that respondent's offenses are so egregious that he should be permanently prohibited from applying for readmission to the bar. We agree. Respondent has failed to pay numerous clients' medical bills from settlement funds despite providing the medical providers with letters of guarantee. The ODC's audit of respondent's trust account indicates that he converted as much as \$230,000 from clients and third parties. Such conduct falls under Guideline 1 of the permanent disbarment guidelines set forth in Supreme Court Rule XIX, Appendix D.



Under these circumstances, we will adopt the committee's recommendation and permanently disbar respondent. Although the committee did not make a recommendation regarding restitution, we will also order respondent to make restitution, with legal interest, to the victims of his misconduct.

### **DECREE**

Upon review of the findings and recommendation of the hearing committee, and considering the record, it is ordered that Kirby Dale Kelly, Louisiana Bar Roll number 22479, be and he hereby is permanently disbarred. His name shall be stricken from the roll of attorneys and his license to practice law in the State of Louisiana shall be revoked. Pursuant to Supreme Court Rule XIX, § 24(A), it is further ordered that respondent be permanently prohibited from being readmitted to the practice of law in this state. It is further ordered that respondent make restitution to his clients and third parties, with legal interest. 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.