

# Supreme Court of Louisiana

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NEWS RELEASE #013

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 24th day of March, 2021 are as follows:

**PER CURIAM:**

2020-B-01139

IN RE: MARK G. SIMMONS

SUSPENSION IMPOSED. SEE PER CURIAM.

Weimer, C.J., dissents and assigns reasons.

03/24/21

SUPREME COURT OF LOUISIANA

NO. 2020-B-1139

IN RE: MARK G. SIMMONS

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Mark G. Simmons, an attorney licensed to practice law in Louisiana, but currently suspended from practice.

**PRIOR DISCIPLINARY HISTORY**

Before we address the current charges, we find it helpful to review respondent’s prior disciplinary history. Respondent was admitted to the practice of law in Louisiana in 1990.

On October 16, 2017, we suspended respondent from the practice of law for one year and one day, with all but sixty days deferred, followed by two years of supervised probation with conditions, for mismanaging his client trust account, neglecting a legal matter, failing to communicate with a client, and failing to cooperate with the ODC in two investigations. *In re: Simmons*, 17-1043 (La. 10/16/17), 226 So. 3d 1102 (“*Simmons I*”). No application for rehearing was filed in *Simmons I*, and thus respondent’s suspension became final and effective on October 30, 2017, fourteen days after the date of our judgment.

Respondent served the sixty-day period of actual suspension imposed in *Simmons I*. Thereafter, upon his compliance with the provisions of Supreme Court Rule XIX, § 23, respondent was reinstated to the practice of law on February 23,

2018. His two-year period of probation commenced on April 9, 2018. However, during the probationary period, respondent failed to comply with the condition requiring him to submit quarterly audits of his trust account to the ODC. The ODC then moved to revoke respondent's probation. After considering the matter, we revoked respondent's probation and made immediately executory the previously deferred portion of the one year and one day suspension imposed in *Simmons I*. *In re: Simmons*, 19-0908 (La. 6/26/19), 276 So. 3d 129 ("*Simmons II*"). Respondent has not sought reinstatement from this suspension. Thus, he remains suspended from the practice of law.

Against this backdrop, we now turn to a consideration of the misconduct at issue in the instant proceeding.

### **FORMAL CHARGES**

As set forth above, respondent was suspended from the practice of law between October 30, 2017 and February 23, 2018. During this time period, respondent represented clients as follows:

1. He represented Shellie Castille in a family court matter regarding a qualified domestic relations order. The matter was filed on November 6, 2017, and the judgment was signed on November 14, 2017. Respondent then communicated with the opposing party and a representative from Ms. Castille's employer in an effort to resolve issues related to the order.
2. On November 7, 2017 and January 19, 2018, respondent appeared in court with Lawrence Roberts, his client in a criminal matter. During both appearances, respondent requested and was granted a continuance.
3. On December 27, 2017, respondent filed a motion to dismiss with prejudice on behalf of Mable Hadley, his client in a civil matter.

4. On January 24, 2018, respondent appeared in court for the sentencing of Devin Morris, his client in a criminal matter.
5. On January 29, 2018, respondent appeared in court with Darius Slan, his client in a criminal matter.
6. On January 30, 2018, respondent appeared in court with Kevin Aguillard, his client in a criminal matter.

### **DISCIPLINARY PROCEEDINGS**

In August 2018, the ODC filed formal charges against respondent, alleging that his conduct violated Rules 5.5(a) (engaging in the unauthorized practice of law) and 8.4(a) (violation of the Rules of Professional Conduct) of the Rules of Professional Conduct. Respondent failed to answer the formal charges, and the factual allegations contained therein were deemed admitted and proven by clear and convincing evidence pursuant to Supreme Court Rule XIX, § 11(E)(3).

Respondent then filed a motion to recall the deemed admitted order and a request to be heard in mitigation. The hearing committee chair denied respondent's motion to recall for failure to demonstrate good cause but granted respondent's request for a hearing in mitigation. The committee held the hearing in mitigation on March 1, 2019. Respondent failed to appear at the hearing.<sup>1</sup>

#### *Hearing Committee Report*

The hearing committee found that respondent represented himself as a licensed attorney, made appearances in court holding himself out as a practicing attorney, and filed pleadings while his license to practice law was suspended. Based

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<sup>1</sup> The hearing committee noted in its report that the ODC had attempted to contact respondent both before and on the day of the hearing; nevertheless, he did not appear. The committee also noted that respondent failed to participate in any prehearing conference calls and failed to submit any prehearing pleadings.

on these facts, the committee determined respondent violated the Rules of Professional Conduct as alleged in the formal charges.

The committee determined respondent knowingly and intentionally violated duties owed to the public, the legal system, and the legal profession. Although the committee found respondent caused no actual harm to the clients he represented while suspended, it did find actual harm to the disciplinary system. The committee also noted that respondent showed a lack of respect to the legal profession by continuing to practice law while suspended and then refusing to participate in the mitigation hearing he requested. Relying on the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the baseline sanction is disbarment.

In light of respondent's failure to participate in the mitigation hearing, the committee determined that no mitigating factors are present. In aggravation, the committee found a prior disciplinary record, multiple offenses, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, and substantial experience in the practice of law.

Based on these findings, the committee recommended respondent be disbarred. Neither respondent nor the ODC filed an objection to the committee's report. However, in its pre-argument brief to the disciplinary board, the ODC argued that respondent should be permanently disbarred. Respondent did not file a pre-argument brief but did appear for oral argument before the board. Respondent also filed a post-argument brief for the board's consideration.

#### *Disciplinary Board Recommendation*

Before addressing the merits, the disciplinary board addressed the arguments respondent presented during oral argument. First, respondent argued that he did not receive proper notice of the formal charges and did not have an opportunity to respond to same. He indicated that he did not sign for the formal charges, nor did

anyone who was authorized to receive mail on his behalf. He further claimed that he did not receive notice of the mitigation hearing date.

Regarding the Castille and Hadley matters, respondent asserted that these matters were resolved prior to his suspension in *Simmons I* and that the opposing attorneys had been responsible for filing the judgments. When Ms. Castille called him with questions in December 2017, he told her he could not assist her until the end of the year. When she continued to call, respondent contacted the opposing attorney and Ms. Castille's retirement plan administrator to ask them to look into her questions. He did not think he was practicing law because Ms. Castille's legal matter had been resolved and he "was no longer representing" her. He further denied appearing in court with Mr. Roberts on November 7, 2017.

Regarding his practice of law beginning in January 2018, respondent claimed that an ODC staff member informed him he would be able to resume practicing after sixty days even though it could take a little longer to go through the process of reinstatement. Based on this staff member's statement, respondent believed he was eligible to practice law again in January 2018.

In conclusion, respondent argued that he has legitimate defenses to the formal charges, and he was not given the opportunity to present them. He also argued that the hearing committee's recommended sanction "is excessive and is contrary to what is fair and just according to the circumstances." As such, respondent requested that the board remand the matter for a full hearing and not impose permanent disbarment.

The board determined respondent was properly served with the formal charges at his primary registration address.<sup>2</sup> He then failed to answer the formal charges, which were subsequently deemed admitted. When respondent moved to

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<sup>2</sup> Mailing the formal charges by certified mail to the address respondent listed in his registration statement is adequate service, regardless of whether respondent actually received the mailing. *In re: Edwards*, 97-0624 (La. 6/13/97), 695 So. 2d 1325; Supreme Court Rule XIX, § 13(A).

recall the deemed admitted order, he failed to demonstrate good cause why the imposition of the order would be improper or would result in a miscarriage of justice. As such, the hearing committee chair denied the motion. Determining that respondent's failure to timely respond appears to be attributable to his own inaction, the board found no error in the committee chair's ruling. The board also determined that respondent was properly notified of the mitigation hearing date. Nevertheless, he failed to participate.

Turning to the merits, the board indicated it gave consideration to respondent's arguments at oral argument when determining its recommended sanction. The board also determined that the deemed admitted facts and evidence presented prove respondent violated Rules 5.5(a) and 8.4(a) of the Rules of Professional Conduct.

The board then determined respondent violated duties owed to his clients, the legal system, and the legal profession. Based on respondent's explanations at oral argument, the board determined respondent acted negligently in part and knowingly in part. Specifically, the board found respondent acted negligently when he improperly appeared in court between January 1, 2018 and February 23, 2018. The board found no evidence of actual harm to respondent's clients or the legal system. However, the potential for harm existed. Respondent's conduct also damaged the legal profession and the disciplinary system.

The board agreed with the committee that no mitigating factors are present. In aggravation, the board found a prior disciplinary record, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, and substantial experience in the practice of law.

Based on these findings, and considering the prior jurisprudence of the court concerning similar misconduct, a majority of the board recommended respondent be suspended from the practice of law for two years. One board member dissented and

would recommended disbarment, noting that respondent “was somewhat deceptive in his limited participation in the disciplinary process.”

The ODC filed an objection to the board’s recommendation. Accordingly, the case was docketed for oral argument pursuant to Supreme Court Rule XIX, § 11(G)(1)(b).

## **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 practiced law during a period of suspension. Respondent was suspended from the practice of law from October 30, 2017 until he complied with the applicable reinstatement requirements on February 23, 2018. Nevertheless, the record contains evidence, in the form of court records and docket reports, showing respondent filed pleadings and appeared in court with clients on several occasions during this time period. As such, respondent has violated the Rules of Professional Conduct as alleged in the formal charges.

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).

The record supports a finding that respondent knowingly engaged in the unauthorized practice of law. Respondent maintains that he believed he could resume the practice of law beginning in January 2018 because an unnamed ODC staff person told him so. Even if we accepted this contention, which we do not, respondent practiced law in November and December 2017, during which time he was clearly suspended pursuant to our judgment in *Simmons I*.

In practicing law while suspended, respondent violated duties owed to his clients, the public, the legal system, and the legal profession. His misconduct caused no actual harm but the potential for harm was great. The applicable baseline sanction is disbarment.

Aggravating factors include a prior disciplinary record, multiple offenses, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, vulnerability of the victims, and substantial experience in the practice of law. No mitigating factors are evident from the record.

In *In re: Thomas*, 07-1616 (La. 1/16/08), 973 So. 2d 686, we observed that the severity of the sanction for an attorney who practices law during a period of suspension or disbarment largely depends on the attorney’s mental state. Here, respondent acted knowingly, and as such, a period of suspension is appropriate.

Under the unique facts of this case, we find respondent's conduct warrants a three-year suspension from the practice of law, which we will make retroactive to the date of his suspension in *Simmons I*.

### **DECREE**

Upon review of the findings and recommendations of the hearing committee and the disciplinary board, and considering the record, briefs, and oral argument, it is ordered that Mark G. Simmons, Louisiana Bar Roll number 19995, be and he hereby is suspended from the practice of law for a period of three years, retroactive to October 16, 2017, the date of his suspension in *In re: Simmons*, 17-1043 (La. 10/16/17), 226 So. 3d 1102. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

**SUPREME COURT OF LOUISIANA**

**NO. 2020-B-01139**

**IN RE: MARK G. SIMMONS**

*ATTORNEY DISCIPLINARY PROCEEDING*

**WEIMER, C.J.**, dissenting.

I respectfully dissent from the sanction imposed in this matter. As the “Prior Disciplinary History” recounted at the outset of the per curiam makes clear, the unauthorized practice of law charge currently before the court is separate and distinct from the prior charges respondent faced and for which he was disciplined. The misconduct charged here is not of the same type and did not occur in the same time frame as the previous misconduct. As a result, I believe there is no basis for making the discipline in the present matter retroactive to the date of respondent’s previous suspension in the entirely unrelated matter.

I believe a suspension of two years, with all but one year deferred, is both justified and warranted as the more appropriate sanction under the facts.<sup>1</sup>

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<sup>1</sup> The misconduct related to the August 2018 charges occurred from November 2017 and January 2018, after the effective date of respondent’s suspension in **In re: Simmons**, 17-1043 (La. 10/16/17), 226 So.3d 1102 (**Simmons I**) and prior to his compliance with Supreme Court Rule XIX, § 23 (reinstatement following an active period of suspension of one year or less). After being granted a hearing in mitigation, at which respondent failed to appear, the hearing committee recommended disbarment. Following the disciplinary board proceedings, the board recommended a two-year suspension. The Office of Disciplinary Counsel (ODC) objected to this recommendation.

Meanwhile, on April 29, 2019 (after the hearing committee’s disbarment recommendation, but before the hearing by the disciplinary board), the ODC filed a motion to revoke respondent’s probation for his failure to submit quarterly audits of his trust account as required by his probation agreement in **Simmons I**. Following a hearing, at which respondent failed to appear, this court revoked respondent’s probation and made the previously-deferred portion of the **Simmons I** suspension executory. See In re: Simmons, 19-0908 (La. 6/26/19), 276 So.3d 129 (**Simmons II**.) As a result of the court’s judgment in **Simmons II**, respondent will be required to file a petition for reinstatement pursuant to Supreme Court Rule XIX, § 24.

As this chronology demonstrates, the unauthorized practice of law matter currently before the court is completely separate and distinct from the **Simmons I** and **Simmons II** matters. The misconduct is not of the same type and did not occur in the same time frame. Therefore, I do not believe there is any basis to make the discipline in the unauthorized practice of law matter retroactive to **Simmons II** or otherwise to give respondent “credit” for his prior suspension.