

The Supreme Court of the State of Louisiana

IN RE: JOHN EDWARD WHALEN, JR.

No.2020-B-00869

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

September 29, 2020

Disbarment imposed. See per curiam.

BJJ

JLW

JDH

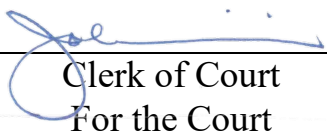
JTG

JHB

Crichton, J., dissents and assigns reasons.

Crain, J., dissents for reasons assigned by Justice Crichton.

Supreme Court of Louisiana
September 29, 2020


Clerk of Court
For the Court

09/29/20

SUPREME COURT OF LOUISIANA

NO. 2020-B-0869

IN RE: JOHN EDWARD WHALEN, JR.

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, John Edward Whalen, Jr., an attorney licensed to practice law in Louisiana, but currently ineligible to practice.¹

UNDERLYING FACTS

Laura M. Keith, a former resident of New Orleans who now lives in Italy, retained respondent to handle the succession of her mother. Ms. Keith was the only heir of the estate. Under the terms of a contract and engagement letter executed by respondent and Ms. Keith on October 28, 2011, respondent agreed to prepare the necessary pleadings to execute the last will and testament of Ms. Keith’s mother and place Ms. Keith into ownership of the estate’s property and assets. Respondent was to liquidate these assets and then wire transfer the funds to Ms. Keith after deducting applicable fees. In addition, the contract provided that Ms. Keith would pay respondent a \$10,000 “initial retainer fee,” to be billed at an hourly rate of \$250. The contract stated that the \$10,000 represented respondent’s “estimate” of forty hours of billable time to conclude the succession matter through to judgment of possession. The contract further provided that, in the event the matter could not be

¹ On June 29, 2018, respondent was declared ineligible to practice law for failing to comply with the mandatory continuing legal education requirements. He is also ineligible for failing to pay bar dues and the disciplinary assessment.

concluded within the estimated timeframe, Ms. Keith would be responsible for paying respondent's hourly rate in accordance with his submission of an itemized billing statement detailing the services he rendered on her behalf. The contract specifically provided that all costs and expenses, in addition to respondent's compensation, would be included on the itemized statement. Ms. Keith paid respondent \$1,000 in cash as an advance for costs associated with the representation.

In April 2012, respondent transferred \$403,000 to Ms. Keith's bank, but he did not include a breakdown explaining how the sum was calculated. Respondent then transferred funds in October 2013 (\$125,000) and October 2014 (\$130,000), again with no explanation as to calculation of these amounts.

Following the last transfer, Ms. Keith had difficulty contacting respondent and grew concerned that she received no accounting for either the transfers or for the estate as a whole. Ms. Keith asked respondent for a final accounting, and after several ignored requests, he promised to provide her with the accounting by December 31, 2014.

In August 2016, Ms. Keith filed a complaint against respondent with the ODC. In his response to the complaint, respondent admitted that he had not provided Ms. Keith with the final accounting, as he had promised to do in 2014, and indicated that he hoped to conclude the accounting within thirty days.

In February 2017, Ms. Keith e-mailed the ODC about her request for the final accounting. Shortly thereafter, the ODC sent correspondence to respondent asking him to comply with Ms. Keith's request within fifteen days. In March 2017, respondent submitted a purported final accounting.

After receiving the final accounting, Ms. Keith sent a letter to the ODC asserting that respondent had retained a fee of \$280,745 for his services, which sum she contended was unreasonable. She noted that the accounting did not include a breakdown of the hours for which respondent had charged but only summarily

provided that a certain remaining sum of the estate was billed for attorney's fees. In her letter, Ms. Keith detailed all of the discrepancies and problems with the accounting, and she reiterated her concern about respondent's failure to adequately communicate with her throughout the representation.

The ODC forwarded Ms. Keith's supplemental correspondence to respondent. When he failed to reply to this correspondence, as requested, the ODC subpoenaed respondent to appear for a sworn statement and to bring with him a copy of his trust account records for the period of time that he represented Ms. Keith.

During his sworn statement, taken in September 2017, respondent acknowledged that he did not know how much he actually earned in attorney's fees for working on Ms. Keith's matter. Respondent testified that in 2015, he moved out of his law office and all of his files were placed in storage. When he had to complete Ms. Keith's accounting in 2017, he could not locate the files that contained many of her billing records. As to how he reached the \$280,475 amount he billed as attorney's fees, respondent explained that he "went through what I had, what documentation I could find. I went through what expenses, what transfers were made to Mrs. Keith, what expenses that I found, what third party transfers were made according to her instructions *and whatever I could not account for ... it was showed as attorney's fees.*" [Emphasis added.] Respondent has not returned any of the attorney's fees to Ms. Keith and has made no effort to communicate with her or to discuss with her the amount of fees disputed.

During his sworn statement, respondent also admitted that he did not hold Ms. Keith's funds advanced for expenses in his client trust account, as required by the Rules of Professional Conduct.

DISCIPLINARY PROCEEDINGS

In March 2019, the ODC filed formal charges against respondent, alleging that his conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), and 1.5 (fee arrangements).²

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, the hearing committee determined that the factual allegations in the formal charges were proven by clear and convincing evidence. Based on these facts, the committee determined that respondent violated the Rules of Professional Conduct as charged.

The committee found that respondent violated duties owed to his client. By his own admission, he acted knowingly, if not intentionally. His misconduct caused actual harm to his client and continues to cause such harm, as he has yet to render a full accounting to his client or justify the fee charged. After reviewing the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined that the baseline sanction in this matter ranges from suspension to disbarment.

² Specifically, the ODC cited respondent's violation of Rule 1.5 in terms of his failure to deposit advanced fees, costs, and expenses in a client trust account, failure to refund an unearned fee, and failure to render an accounting.

The committee found the following aggravating factors are supported by the record: a dishonest or selfish motive, vulnerability of the victim, substantial experience in the practice of law (admitted 1993), and indifference to making restitution. The committee found no mitigating factors present.

Considering these findings, as well as the court's decision in *Louisiana State Bar Ass'n v. Hinrichs*, 486 So. 2d 116 (La. 1986), the committee recommended respondent be suspended from the practice of law for three years and be ordered to make restitution. The committee further recommended that respondent be assessed with the costs and expenses of this proceeding.

Neither respondent nor the ODC filed an objection to the hearing committee's report. Having received no objections, the disciplinary board submitted the committee's report directly to the court for consideration pursuant to Supreme Court Rule XIX, § 11(G). On December 10, 2019, we remanded the matter to the board for further review.

Disciplinary Board Recommendation

After review, the disciplinary board acknowledged that the factual allegations of the formal charges have been deemed admitted and proven. The board determined that the hearing committee correctly applied the Rules of Professional Conduct and that respondent violated the rules as charged.

The board found that respondent violated duties owed to his client, and acted knowingly, if not intentionally. Respondent's failure to communicate with his client, failure to diligently perform the services he agreed to perform, failure to provide an accounting, and failure to return unearned fees has caused significant, actual damage to his client. The board determined that the applicable baseline sanction in this matter is disbarment.

In aggravation, the board found the following factors apply: a dishonest or selfish motive, multiple offenses, vulnerability of the victim, substantial experience in the practice of law, and indifference to making restitution. The board found the following mitigating factors are present: absence of a prior disciplinary record and personal or emotional problems.

Based on these findings, and considering the prior jurisprudence of the court in conversion cases, the board determined that a downward deviation from the baseline sanction is not warranted. Accordingly, the board recommended respondent be disbarred. The board further recommended that respondent be required to pay restitution to Ms. Keith and that he be assessed with the costs and expenses of this proceeding.

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 of this deemed admitted matter reflects that respondent received \$280,475 on behalf of his client in connection with the succession of her mother. Respondent has never provided an accounting for these funds despite numerous

requests from his client. Rather, due to his inability to account for the funds, respondent has simply declared them to be his attorney's fees without any further explanation. Respondent also caused a significant delay in the resolution of the succession matter, failed to communicate with his client, and failed to place an advance deposit into his client trust account. This conduct violates the Rules of Professional Conduct as charged.

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 violated duties owed to his client. He acted knowingly, if not intentionally, and caused actual harm to his client. The applicable baseline sanction in this matter is disbarment. The aggravating and mitigating factors found by the disciplinary board are supported by the record.

In his sworn statement given to the ODC, respondent testified that he is no longer in possession of his client's funds. Essentially, respondent has acknowledged that he converted his client's funds to his own use. In *Louisiana State Bar Ass'n v. Hinrichs*, 486 So. 2d 116 (La. 1986), we set forth guidelines for imposing discipline in a conversion case:

In a typical case of disbarment for violation of DR 9-102 [now Rule 1.15], one or more of the following elements are usually present: the lawyer acts in bad faith and intends a result inconsistent with his client's interest; the lawyer commits forgery or other fraudulent acts in

connection with the violation; the magnitude or the duration of the deprivation is extensive; the magnitude of the damage or risk of damage, expense and inconvenience caused the client is great; the lawyer either fails to make full restitution or does so tardily after extended pressure of disciplinary or legal proceedings.

A three year suspension from practice typically results in cases involving similar but less aggravated factors. In such cases the lawyer is guilty of at least a high degree of negligence in causing his client's funds to be withdrawn or retained in violation of the disciplinary rule. He usually does not commit other fraudulent acts in connection therewith. The attorney usually benefits from the infraction but, in contrast with disbarment cases, the client may not be greatly harmed or exposed to great risk of harm. The attorney fully reimburses or pays his client the funds due without the necessity of extensive disciplinary or legal proceedings.

A suspension from practice of eighteen months or two years will typically result where the facts are appropriate for a three-year suspension, except that there are significant mitigating circumstances; or where the facts are appropriate for a one-year suspension, except that there are significant aggravating circumstances.

A suspension from practice of one year or less will typically result where the negligence in withdrawing or retaining client funds is not gross or of a high degree. No other fraudulent acts are committed in connection with the violation of the disciplinary rule. There is no serious harm or threat of harm to the client. Full restitution is made promptly, usually before any legal proceeding or disciplinary complaint is made.

Based upon these guidelines, we find that respondent's conduct warrants disbarment. Respondent clearly acted in bad faith in preparing Ms. Keith's accounting, as he knew that it was not supported by any documentation whatsoever. The magnitude and duration of the deprivation have been extensive. Respondent should have provided Ms. Keith with an accounting with each disbursement of funds made in 2012, 2013, and 2014, and a final accounting should have been provided at the conclusion of the representation; however, only one accounting was provided in 2017, and only after repeated requests by Ms. Keith and a complaint to the ODC. When she received the accounting, there was no breakdown of respondent's

professional time reflected therein and instead only a line item for \$280,745 in attorney's fees. While respondent admitted in his 2017 sworn statement that he did not know how much of this fee he had earned – which suggests he had not earned all of it – to date respondent has not reimbursed any of the fee to Ms. Keith. Indeed, as previously stated, respondent has acknowledged that he no longer has Ms. Keith's funds in his possession.

Based on this reasoning, we will adopt the board's recommendation and disbar respondent. We will also order respondent to provide a detailed accounting to Ms. Keith and make full restitution of the funds she is owed.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, it is ordered that John Edward Whalen, Jr., Louisiana Bar Roll number 22182, be and he hereby is 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. It is further ordered that respondent provide an accounting to Laura M. Keith and make full restitution, 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.