

The Supreme Court of the State of Louisiana

IN RE: KENNETH M. PLAISANCE

No. 2023-B-01460

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

February 06, 2024

Suspension imposed. See per curiam.

JBM

JLW

SJC

JTG

WJC

Hughes, J., dissents and would impose a lesser sanction.

Griffin, J., dissents and would reject the proposed discipline as too harsh.

Supreme Court of Louisiana

February 06, 2024



Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 2023-B-1460

IN RE: KENNETH M. PLAISANCE

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Kenneth M. Plaisance, an attorney licensed to practice law in Louisiana.¹

UNDERLYING FACTS

By way of background, on June 14, 2017, Larry Taylor was the driver of a vehicle that rear-ended an eighteen-wheeler making an illegal U-turn in New Orleans. Lawan Roussel, the minor child of Mr. Taylor and Melvia Hodges, was a front seat passenger in Mr. Taylor’s vehicle at the time of the accident. Both Mr. Taylor and Lawan were injured. The police ticketed Mr. Taylor for following too closely, but the circumstances of the accident raised issues of comparative negligence. Progressive Insurance Company insured both Mr. Taylor’s vehicle and the eighteen-wheeler.

On June 15, 2017, respondent agreed to represent both Mr. Taylor and Lawan on a contingency fee basis. However, he failed to disclose the existence of the concurrent conflict of interest by representing them both when Mr. Taylor may have some fault in causing the accident.² On July 27, 2017, respondent granted Mr.

¹ Respondent is also licensed to practice law in Texas.

² Respondent had Mr. Taylor and Ms. Hodges sign a waiver of the conflict of interest but explained to them that the conflict of interest stemmed from Progressive insuring both Mr. Taylor’s vehicle

Taylor and Progressive a full release of all claims on behalf of Lawan in exchange for the \$15,000 policy limit of Mr. Taylor's auto insurance policy.

On October 18, 2017, respondent filed a personal injury lawsuit in Orleans Parish Civil District Court against Progressive as the insurer of the eighteen-wheeler. Mr. Taylor and Lawan were co-plaintiffs in the lawsuit, and respondent failed to include any claims by Lawan alleging comparative negligence by Mr. Taylor. Progressive later removed the case to federal court in New Orleans, and the case was dismissed without prejudice at respondent's request.

In the latter part of 2017, respondent decided to try to enlist the help of a law firm that handles eighteen-wheeler cases. To this end, respondent asked the Leger & Shaw law firm in New Orleans to enroll as co-counsel on all claims. On December 16, 2017, the Leger firm advised respondent of the conflict of interest concerns with his dual representation of Mr. Taylor and Lawan, and it declined respondent's request to act as co-counsel.

Respondent then asked the Texas law firm of Derryberry, Zipps, and Wade, PLC, to enroll as co-counsel on behalf of Mr. Taylor and Lawan. After agreeing to represent Lawan, the Derryberry firm advised respondent of his concurrent conflict of interest in the dual representation and asked that he withdraw from Mr. Taylor's defense. Ultimately, respondent failed to withdraw from representing Mr. Taylor.

The Derryberry firm associated the New Orleans law firm of Gainsburgh, Benjamin, David, Meunier, and Warshauer, LLC as local counsel and met with Ms. Hodges on Lawan's behalf to advise her of respondent's conflict of interest. Thereafter, Ms. Hodges terminated respondent's representation of Lawan and executed a contingency fee agreement with the Derryberry firm and the Gainsburgh firm.

and the eighteen-wheeler. He never explained the conflict of interest due to Mr. Taylor's possible comparative negligence.

On June 14, 2018, the Gainsburgh firm filed a lawsuit on behalf of Ms. Hodges and Lawan in the United States District Court for the Eastern District of Louisiana. With respondent's assistance, Mr. Taylor filed his own lawsuit in the United States District Court for the Eastern District of Louisiana. Soon thereafter, respondent enrolled as Mr. Taylor's counsel. Those two federal cases were then consolidated. On October 16, 2018, respondent filed a motion to intervene in the consolidated cases, requesting attorney's fees for his past representation of Lawan. The filing of the motion to intervene was ultimately rejected due to a deficiency respondent failed to correct.

In May 2019, the parties settled the claim following a mediation. Thereafter, Lawan's attorneys petitioned the Orleans Parish Civil District Court for authority to enter into the settlement on Lawan's behalf, which petition was ultimately granted.

On August 15, 2019, respondent emailed the Derryberry firm to warn it not to disburse the settlement funds until his fee claim was resolved. Because of uncertainty regarding the validity of respondent's fee claim, on September 4, 2019, Lawan's attorneys filed into the record of the consolidated federal cases a pleading entitled "Motion to Determine Conflict-Free Status and Entitlement to Attorneys' Fees." Respondent did not oppose the motion or appear at the related hearing. On October 7, 2019, the presiding judge confirmed that respondent had a conflict of interest and, thus, was ineligible to receive a fee from his conflicted representation of Lawan. Specifically, the judge ruled that, because respondent received a fee from Mr. Taylor's portion of the settlement, he could not share in the fees from Lawan's portion of the settlement. Respondent appealed the ruling to the United States Fifth Circuit Court of Appeals, which appeal was dismissed due to lack of jurisdiction in the latter part of March 2020.

DISCIPLINARY PROCEEDINGS

In December 2021, the ODC filed formal charges against respondent, alleging that his conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.4 (failure to communicate with a client), 1.7(a) (conflict of interest: concurrent clients), 3.3 (candor toward the tribunal),³ 8.4(d) (engaging in conduct prejudicial to the administration of justice). Respondent answered the formal charges, essentially denying that he engaged in any misconduct. Accordingly, the matter proceeded to a formal hearing on the merits.

Formal Hearing

On April 11, 2022, one month prior to the scheduled hearing, respondent filed a motion to continue the hearing, arguing that discovery was incomplete and that he was still attempting to retain an attorney to represent him. The ODC opposed the motion, and the hearing committee chair denied the motion on April 18, 2022. On April 25, 2022, respondent filed a motion for summary judgment, which the ODC opposed based upon Supreme Court Rule XIX, § 15(B), which prohibits such motions “prior to the completion of the evidentiary record.” The committee chair denied the motion on April 27, 2022.

On May 9, 2022, attorney Luke Fontana purportedly enrolled as respondent’s counsel and filed a motion to continue, which again argued that discovery was incomplete. That same day, the committee chair denied the motion. On May 11, 2022, the day of the hearing, another motion to continue was fax-filed on respondent’s behalf, purportedly by Mr. Fontana. Attached to the motion was a doctor’s note indicating that respondent was unable to attend the hearing “due to

³ The Rule 3.3 allegation may have been a typographical error in the formal charges as the formal charges define Rule 3.3 as “seeking to collect attorneys’ fees in pursuit of a conflicted representation,” and the ODC’s pre-hearing memorandum references Rule 3.1 (meritorious claims and contentions) instead of Rule 3.3.

health concerns.” Neither respondent nor Mr. Fontana appeared at the hearing. After attempts to reach Mr. Fontana failed, the committee chair denied the motion.

The hearing on the merits proceeded with only Deputy Disciplinary Counsel Robert Kennedy in attendance to represent the ODC. The ODC introduced documentary evidence and called attorney Michael Ecuyer of the Gainsburgh firm to testify before the committee.

Following the hearing, both respondent and the ODC provided conflicting information regarding whether Mr. Fontana had actually been retained to represent respondent. According to the ODC’s investigator, Mr. Fontana denied representing respondent. According to respondent, he paid Mr. Fontana’s paralegal to retain Mr. Fontana. Under these circumstances, the committee reopened the hearing to receive evidence and testimony regarding this conflicting information.

The second hearing took place on September 23, 2022. The ODC was represented by Deputy Disciplinary Counsel Christopher Kiesel. Respondent failed to appear, and no one appeared on his behalf. The ODC introduced documentary evidence and called Mr. Fontana to testify before the committee.

RESPONDENT’S OCTOBER 5, 2020 SWORN STATEMENT TESTIMONY

Respondent testified that he had not yet attempted to obtain counsel to represent him even though he requested a continuance to do so. Regarding the conflict of interest, respondent testified that he was aware of it because he had Mr. Taylor and Ms. Hodges sign waivers. He indicated that his research regarding whether the conflict of interest was unwaivable was indeterminate. He also testified that he did not obtain an ethics opinion regarding the conflict of interest from the Louisiana State Bar Association as suggested by the Leger firm. Nevertheless, at the suggestion of two other attorneys, he had the case that was removed to federal court dismissed because of a possible conflict of interest. Respondent believes that

the Derryberry and Gainsburgh firms kept bring up the conflict of interest issue so they could cut him out of a share of the attorney's fees.

MICHAEL ECUYER'S TESTIMONY

Mr. Ecuier, an attorney at the Gainsburgh firm, testified that he filed a disciplinary complaint against respondent regarding his conflicted representation of Mr. Taylor and Lawan. He indicated that he and other attorneys repeatedly told respondent that he could not represent both Mr. Taylor and Lawan. Respondent stated that he had Mr. Taylor and Ms. Hodges sign waivers of the conflict of interest, and Mr. Ecuier told him the conflict of interest was not waivable. In Mr. Ecuier's opinion, respondent was unable to understand the difference between a waivable and an unwaivable conflict.

After the settlement, respondent insisted he was due a fee for his representation of Lawan. Therefore, Mr. Ecuier and Lawan's other attorneys filed a motion asking the federal court to determine if respondent was conflict-free and, thus, entitled to a fee for his representation of Lawan. Until the fee dispute was resolved, the settlement funds were held in trust, which delayed the disbursement of Lawan's portion of the settlement for eight or nine months.

LUKE FONTANA'S TESTIMONY

Mr. Fontana testified that he has never spoken with respondent and was not retained to represent him. He also testified that he had never seen and did not sign the motions for continuance purportedly filed by him in this matter. He had no knowledge of whether his paralegal had ever spoken to respondent and never spoke to his paralegal about respondent. Mr. Fontana further testified that he had no knowledge of the \$1,000 payment respondent purportedly made to his paralegal,

never authorized his paralegal to collect \$1,000 from respondent, and never received the \$1,000 from either respondent or his paralegal.

Mr. Fontana also testified that, at one point, he discovered that his driver's license was missing and that his name had been falsely used in a manner indicating he had appeared before a notary public. Additionally, he discovered unauthorized intrusions into his computer and bedroom, which he concluded were likely perpetrated by his paralegal.⁴ Finally, Mr. Fontana indicated that, at some point, he never heard from the paralegal again.

Hearing Committee Report

After considering the testimony and evidence presented at the two hearings, the hearing committee made factual findings consistent with the factual allegations set forth in the formal charges and in the underlying facts section above. Additionally, the committee found the following:

- Respondent disregarded the requirement of a conflict-free representation of Mr. Taylor and Lawan, jeopardizing their constitutional Sixth Amendment rights;
- Respondent jeopardized their recovery of damages for their injuries;
- Respondent caused additional work by and placed additional burdens upon legal counsel in at least two law firms who were required to prevent his violation of the Rules of Professional Conduct;
- Respondent unnecessarily increased the workload of both the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals;

⁴ In a sealed portion of the transcript, the ODC reported that Mr. Fontana's paralegal had an extensive criminal history in several states.

- Respondent contributed to the erosion of trust in the integrity of the bar and the judicial system;
- Respondent delayed, for approximately eight or nine months, the payment of damages in the form of settlement funds to three plaintiffs and their families due to his persistent litigation;
- Respondent caused added expenses, including costs and attorney's fees, for all parties due to his motion to intervene in the federal court settlement and his frivolous appeal to the United States Fifth Circuit Court of Appeals;
- Because of the increased attorney's fees, respondent reduced the parties' recoveries;
- Even if respondent believed he was represented at the May 11, 2022 disciplinary hearing, he has since learned he was not; yet he still has not provided any mitigating evidence or an explanation for his absence at the September 23, 2022 hearing;
- The medical note provided to the committee was presented by fraudulent means either by respondent or by Mr. Fontana's paralegal; respondent has provided no subsequent information regarding his absence, the fraudulent filing, or his position as to the formal charges; and
- Despite the September 23, 2022 hearing, the committee is unable to reach a conclusion as to whether respondent's absence at the May 11, 2022 hearing was due to his own attempted fraud or because he was a victim of Mr. Fontana's paralegal.

Based upon these facts, the committee determined respondent violated the Rules of Professional Conduct as charged. The committee then determined respondent knowingly and intentionally violated duties owed to his clients, the legal system, and the legal profession, which caused actual harm.

The committee found the following aggravating factors are present: a dishonest or selfish motive, a pattern of misconduct, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, and refusal to acknowledge the wrongful nature of the conduct. In mitigation, the committee found the absence of a prior disciplinary record and only moderate harm caused by his misconduct.

After further considering the court's prior case law addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for two years and one day, with one year deferred.

Respondent filed an objection to the hearing committee's report

Disciplinary Board Recommendation

After review, the disciplinary board determined that the hearing committee's factual findings were not manifestly erroneous and adopted same. Additionally, the board found the following:

- During the ODC's investigation, respondent was scheduled to provide his sworn statement on September 10, 2020. Respondent requested the sworn statement be postponed so he could obtain counsel. During his rescheduled sworn statement on October 5, 2020, which was almost one year after he received notice of the disciplinary complaint, respondent admitted that he had made no effort to retain an attorney to represent him;
- Also during his sworn statement, respondent admitted that he knew Mr. Taylor may have some fault in the accident; however, respondent never disclosed to his clients that an unwaivable conflict of interest would exist in representing both Mr. Taylor and Lawan;

- When asked during his sworn statement why he had the civil lawsuit that was removed to federal court dismissed, respondent indicated that it was because there may have been conflicts of interest;
- On May 10, 2022, one day before the formal hearing in this matter, the board contacted respondent, but he refused to speak with the board, claiming advice of counsel even though he had not spoken to his purported counsel (Mr. Fontana) at the time of or even after this false representation; and
- On August 26, 2022, the ODC served respondent with a subpoena duces tecum for the production of documents related to Mr. Fontana's alleged representation. Respondent did not produce any documents by or after the September 15, 2022 deadline, nor did he provide an explanation for his failure to comply with the subpoena duces tecum or for his absence from the September 23, 2022 hearing.

Based upon these facts, the board determined respondent violated Rules 1.4, 1.7(a), and 8.4(d) of the Rules of Professional Conduct as alleged in the formal charges and as found by the committee. The board, however, determined that the committee erred in finding a violation of Rule 3.3, finding that the citing of this alleged rule violation in the formal charges appeared to be a typographical error. Instead, the board determined that the ODC intended to cite Rule 3.1 (meritorious claims and contentions) because he sought to intervene in the federal litigation so he could improperly receive attorney's fees for his conflicted representation of Lawan.

The board then determined respondent knowingly and intentionally violated duties owed to his clients, the legal system, and the legal profession, which caused actual harm. Based upon the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined the baseline sanction is suspension.

The board found the following aggravating factors are present: a prior disciplinary record (a 2002 diversion for settling a case without the client's consent),

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, and substantial experience in the practice of law (admitted 1989). The board found no mitigating factors present.

After further considering the court's prior case law addressing similar misconduct, the board recommended respondent be suspended from the practice of law for two years and one day, with one year deferred.

Neither respondent nor the ODC filed an objection to the board's report and 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.

The record of this matter supports a finding that respondent failed to adequately communicate with his clients, engaged in a conflict of interest, attempted to collect an impermissible fee, and engaged in conduct prejudicial to the administration of justice. Based upon these facts, respondent violated Rules 1.4, 1.7(a), 3.1, and 8.4(d) of the Rules of Professional Conduct.

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 caused actual harm by knowingly and intentionally violating duties owed to his clients, the legal system, and the legal profession. We agree with the disciplinary board that the baseline sanction is suspension. We also agree with the board's assessment of aggravating and mitigating factors.

Turning to the issue of an appropriate sanction, we find guidance from *In re: Bellaire*, 22-1084 (La. 9/27/22), 347 So. 3d 143, and *In re: Lapeyrouse*, 22-0571 (La. 10/21/22), 352 So. 3d 59. In *Bellaire*, an attorney represented the buyer and the seller with respect to a property transfer without obtaining a waiver of the conflict of interest, which resulted in actual harm to the buyer when the sale fell through. The attorney then failed to cooperate with the ODC's investigation of the matter. For this negligent and knowing misconduct, we suspended the attorney from the practice of law for six months, with all but ninety days deferred. In *Lapeyrouse*, an attorney engaged in a conflict of interest by providing legal advice to both his client and his client's estranged wife in connection with their divorce and by disclosing confidential information to his client's estranged wife. The attorney then filed a defamation lawsuit against his client and another witness based upon the information they provided to the ODC regarding his conflict of interest. For this knowing misconduct, we suspended the attorney from the practice of law for one year, with six months deferred.

Arguably, respondent's misconduct is more egregious than the misconduct found in *Bellaire* and *Lapeyrouse*. Respondent never adequately explained the conflict of interest to the clients and inappropriately obtained a waiver of an unwaivable conflict. He also attempted to obtain a fee he was barred from receiving

because of the conflict and filed frivolous pleadings, all of which delayed the parties' receipt of their settlement funds for months. Respondent's delaying tactics spilled over into the disciplinary proceedings, and he failed to appear at both disciplinary hearings without explanation.

Under these circumstances, a sanction requiring a formal application for reinstatement is warranted. Accordingly, we will adopt the board's recommendation and suspend respondent from the practice of law for two years and one day, with one year deferred.

DECREE

Upon review of the findings and recommendation of the hearing committee and the disciplinary board, and considering the record, it is ordered that Kenneth M. Plaisance, Louisiana Bar Roll number 19738, be and he hereby is suspended from the practice of law for a period of two years and one day, with one year deferred. 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.