

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: JOHN EDWARD WHALEN, JR.

DOCKET NO. 19-DB-009

REPORT OF HEARING COMMITTEE # 8

INTRODUCTION

This attorney disciplinary matter arises out of formal charges filed by the Office of Disciplinary Counsel (“ODC”) against John Edward Whalen, Jr. (“Respondent”), Louisiana Bar Roll Number 22182.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.3, 1.4, and 1.5.²

PROCEDURAL HISTORY

The formal charges were filed on March 8, 2019. By letters dated March 12, 2019, the formal charges were mailed via certified mail to Respondent’s primary registration address and his last known address.³ Respondent received the mailing sent to the last known address on or about March 16, 2019. Respondent failed to file an answer to the charges. Accordingly, on April 23, 2019, ODC filed a motion to deem the factual allegations admitted pursuant to Louisiana Supreme Court Rule XIX, §11(E)(3).⁴ By order signed April 29, 2019, the factual

¹ Respondent was admitted to the practice of law in Louisiana on April 23, 1993. Respondent is currently ineligible to practice law in Louisiana for failure to fulfill his annual MCLE, bar dues, disciplinary assessment, and trust account obligations.

² See the attached Appendix for the text of these Rules.

³ 10125 Stephen Dr., River Ridge, LA 70123 (primary); 92 Metairie Court, Metairie, LA 70001 (last known).

⁴ This rule states:

The respondent shall file a written answer with the Board and serve a copy on disciplinary counsel within twenty (20) days after service of the formal charges, unless the time is extended by the chair of the hearing committee. In the event, Respondent fails to answer within the prescribed time, or the time as extended, the factual allegations contained within the formal charges shall be deemed admitted and proven by clear and convincing evidence. Disciplinary Counsel shall file a motion with the chair of the hearing committee to which the matter is assigned requesting that the

allegations contained in the formal charges were deemed admitted. On June 27, 2019, ODC filed its submission on sanction.

For the following reasons, the Committee finds that the rule violations alleged by ODC have been proven by clear and convincing evidence and that a sanction of a three year suspension, no part deferred, and an order to make restitution is appropriate.

FORMAL CHARGES

The formal charges read, in pertinent part:

On August 26, 2016, the ODC received a complaint from Laura M. Keith ("Ms. Keith"), asserting that Respondent had committed various acts of misconduct in his handling of the succession of Ms. Keith's mother. On August 31, 2016, the initial complaint was forwarded to Respondent for reply. After receiving no response, the complaint was again forwarded to Respondent on September 21, 2016. The certified mail return indicates that Respondent signed for the complaint on October 11, 2016. Respondent offered his initial reply on November 12, 2016.

Ms. Keith hired Respondent to handle her mother's succession. Per the contract and engagement letter executed by Respondent and Ms. Keith on October 28, 2011, Respondent was to prepare the necessary pleadings to execute Ms. Keith's mother's last will and testament and place Ms. Keith, the estate's only heir, into ownership of the estate's property and assets. The contract specifically stated that after Ms. Keith was placed into ownership of assets, Respondent was to liquidate the assets and transfer to Ms. Keith as follows:

Pursuant to the scope of work provisions contained in the attached Engagement Letter, Client and Attorney agree that as the assets of the estate are liquidated, attorney shall deposit said liquidated funds into his trust account. Attorney shall deduct his fees, and any fees which may be due and owing under third-party professionals or service providers, and shall forward the remaining sums to Client's designated bank account in Italy via wire transfer.

factual allegations be deemed proven with proof of service of the formal charges upon the respondent. The order signed by the hearing committee chair shall be served upon respondent as provided by Section 13C. Within twenty (20) days of the mailing of the order of the hearing committee chair deeming the factual allegations contained in the formal charges proven, the respondent may move the hearing committee chair to recall the order thus issued upon demonstration of good cause why imposition of the order would be improper or would result in a miscarriage of justice.

The contract states that Ms. Keith would pay Respondent an "initial retainer fee" of \$10,000.00, to be billed at an hourly rate of \$250.00. The contract stated that the \$10,000.00 represented "attorney's estimate of Forty (40) hours of billable time to conclude this matter through Judgment of Possession, billed at attorney's normal billing rate[.]" The agreement provided that in the event the matter could not be concluded within the estimated timeframe, Ms. Keith would be responsible for payment of Respondent's hourly rate per Respondent's submission of an itemized billing statement detailing the services rendered.

Additionally, Ms. Keith provided Respondent \$1,000.00 as an advance for any costs associated with the representation. The advanced costs were to be held in Respondent's trust account.

Finally, the contract provided that Respondent "shall prepare and submit to Client an itemized statement of all time, costs and expenses incurred."

In April 2012, Respondent transferred \$403,000.00 to Ms. Keith's bank; however, Respondent did not provide a breakdown explaining how the sum was calculated. Respondent again transferred funds in October 2013 (\$125,000.00) and October 2014 (\$130,000.00), with no explanation as to the amount's calculation.

In her complaint, Ms. Keith asserted that following the last transfer, Respondent became increasingly more difficult to contact, even failing to respond for over a six-month period of time.

After the October 2014 wire transfer, Ms. Keith, concerned that she had received no accounting for any of the transfers or for the estate as a whole, began requesting a final accounting of the matter. After several ignored requests, Respondent promised to provide Ms. Keith an accounting by December 31, 2014.

In a November 12, 2016 response to ODC, Respondent admitted that he had not provided Ms. Keith an accounting as promised two years prior, but hoped to conclude Ms. Keith's matter within thirty days. On February 3, 2017, Ms. Keith sent an email to the ODC, requesting an update on the matter as she had not received a final accounting. On February 17, 2017, the ODC sent Respondent correspondence requesting an accounting within fifteen days of the date of the letter. On March 16, 2017, the Respondent provided the ODC with a purported final accounting.

On March 20, 2017, the ODC mailed Ms. Keith the accounting provided by Respondent. Ms. Keith responded, asserting that based upon the accounting he provided, Respondent received an unreasonable fee for his services, approximately \$280,475.00. Ms. Keith noted that the accounting provided by Respondent did not include a breakdown of the hours charged; rather, the accounting summarily provided that a certain remaining sum of the estate was billed for attorney fees. Ms. Keith's letter detailed all of the discrepancies and problems with Respondent's purported accounting. Lastly, Ms. Keith again reiterated her concern about his failure to adequately communicate with her throughout the representation.

A copy of Ms. Keith's supplemental correspondence was forwarded to Respondent for reply on April 4, 2017. After receiving no response, the ODC

subpoenaed Respondent to appear for a sworn statement and bring a copy of his trust account records for the period of time he represented Ms. Keith.

On September 7, 2017, Respondent appeared at ODC's office and rendered a sworn statement. Respondent testified that while he initially kept track of the hours worked on the matter, he stopped sometime in 2015. In regard to how he calculated the \$280,475.00 amount billed as attorney fees in the accounting rendered to Ms. Keith, he explained that he "went through what I had, what documentation 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 *what I could not account for it was showed as attorney fees.*" Essentially, despite knowledge that he lacked certain documentation, all funds that Respondent could not account for otherwise were labeled as attorney fees, evidencing conversion. Respondent has not returned any of the "attorney fees" to Ms. Keith nor has he made an effort to communicate with Ms. Keith and discuss the amount of fees disputed.

In his statement, Respondent also admitted that he did not, at all times during the representation, hold Ms. Keith's funds advanced for expenses in his client trust account as required by the Rules of Professional Conduct.

The Office of Disciplinary Counsel respectfully suggests that there exists clear and convincing evidence that Respondent has violated the following Rules of Professional Conduct: Rule 1.3 (diligence), Rule 1.4 (failure to communicate), and Rule 1.5 (failure to deposit advanced fees in client trust account, failure to deposit advanced costs and expenses in client trust account, failure to return an unearned fee, failure to render accounting).

EVIDENCE

The Committee reviewed the exhibits submitted by ODC, which are Exhibits ODC 1-22.

Respondent did not submit evidence or argument for the Committee's consideration, nor did he request to be heard in mitigation pursuant to Rule XIX, §11(E)(4).

FINDINGS OF FACT

As Respondent did not file an answer, the factual allegations of the charges are deemed admitted, and no further discussion is needed.

RULES VIOLATED

The Committee finds that Rules 1.3 (diligence), 1.4 (failure to communicate) and Rule 1.5 (failure to deposit advanced fees in client trust account, failure to deposit advanced costs and

expenses in client trust account, failure to return an unearned fee, failure to render an accounting) were violated.

SANCTION

Louisiana Supreme Court Rule XIX, §10(C), states that when imposing a sanction after a finding of lawyer misconduct, a committee shall consider the following factors:

- (1) Whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
- (2) Whether the lawyer acted intentionally, knowingly, or negligently;
- (3) The amount of the actual or potential injury caused by the lawyer's misconduct; and
- (4) The existence of any aggravating or mitigating factors.

Here, Respondent violated duties owed to his client. Respondent, by his own admission, acted knowingly, if not intentionally. Respondent's 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.

The *ABA Standards for Imposing Lawyer Sanctions* suggest that disbarment or suspension is the baseline sanction for Respondent's misconduct. Standard 4.11 provides that disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to the client. Standard 4.12 provides that suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to the client. See also Standards 4.41 and 4.42 which are also applicable to Respondent's actions/lack of action in this matter.

The Committee also considered aggravating and mitigating factors. Respondent did not request a mitigation hearing, and submitted no evidence of mitigating factors. ODC suggested four aggravating factors: (1) dishonest or selfish motive; (2) vulnerability of the victim; (3) substantial experience in the practice of law; and (4) indifference to making restitution. Based

upon the factual record and exhibits, the Committee finds the aggravating factors proven by clear and convincing evidence.

La. State Bar Association v. Hinrichs, 486 So.2d 116 (1986), is the seminal case for violations of the sort proven herein. A three year suspension is appropriate when the lawyer is guilty of a high degree of negligence in causing his client's funds to be withdrawn or retained in violation of the disciplinary rules, but the lawyer does not commit other fraudulent acts in connection therewith. *Hinrichs*, at 122-123.

CONCLUSION

The Committee agrees with ODC that a three year suspension, none of which is deferred, and an order to make restitution is appropriate. The Committee also recommends that Respondent be assessed with the costs and expenses of the proceeding pursuant to Rule XIX, §10.1.

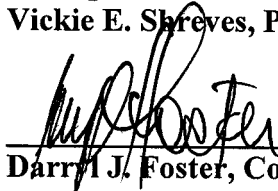
This opinion is unanimous and has been reviewed by each committee member, who fully concur and who have authorized Darryl J. Foster, to sign on their behalf.

New Orleans, Louisiana, this 23rd day August, 2019.

**Louisiana Attorney Disciplinary Board
Hearing Committee # 8**

**Darryl J. Foster, Committee Chair
Monique M. Lafontaine, Lawyer Member
Vickie E. Shreve, Public Member**

BY:



Darryl J. Foster, Committee Chair
For the Committee

APPENDIX

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication

(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement,

trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if: (1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive; (2) the total fee is reasonable; and (3) each lawyer renders meaningful legal services for the client in the matter.

(f) Payment of fees in advance of services shall be subject to the following rules: (1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account. (2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account. (3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances. (4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances. (5) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.