

The Supreme Court of the State of Louisiana

IN RE: MAXWELL PETER SMITKO

No. 2023-B-01208

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

December 19, 2023

Suspension imposed. See per curiam.

WJC

JLW

JDH

SJC

JTG

JBM

PDG

Supreme Court of Louisiana

December 19, 2023



Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 2023-B-1208

IN RE: MAXWELL PETER SMITKO

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

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

FORMAL CHARGES

Count I

On July 11, 2019, the ODC received a disciplinary complaint against respondent from Sarah Harris. In her complaint, Ms. Harris stated that she paid respondent \$1,000 to represent her son in a criminal matter. Not long thereafter, during a February 8, 2019 hearing in her son’s case, respondent withdrew from the representation due to a conflict of interest. Ms. Harris further stated that, although respondent withdrew, he did not refund any portion of the \$1,000.

In his initial response to the complaint, respondent informed the ODC that he recalled only receiving \$500 from Ms. Harris, which he had already refunded. However, he indicated that, “out of an abundance of caution,” he would pay Ms. Harris an additional \$500 plus interest.

¹ Respondent has been ineligible to practice law since November 1, 2021 for failing to pay his bar dues and the disciplinary assessment. He was additionally declared ineligible on June 23, 2022 for failing to comply with the mandatory continuing legal education requirements and on September 16, 2022 for failing to submit his trust account disclosure statement.

Subsequently, the ODC requested from respondent “documents sufficient to confirm the date and amount of any refund(s) provided by you to Mrs. Harris.” The ODC made this same request to respondent on three different occasions. Each time, he failed to provide the requested documents. Accordingly, the ODC subpoenaed him to provide a sworn statement.

On July 7, 2020, the ODC took respondent’s sworn statement, during which respondent again stated that he received at least \$500 from Ms. Harris. He also reiterated that he would pay Ms. Harris an additional \$500. The ODC gave respondent two weeks to submit documentary evidence of any refunds provided to Ms. Harris. Respondent failed to do so.

The ODC alleged that respondent’s conduct violated Rules 1.5(f)(5) (failure to refund an unearned fee), 8.1(b) (knowing failure to respond to a lawful demand for information from a disciplinary authority), and 8.1(c) (failure to cooperate with the ODC in its investigation) of the Rules of Professional Conduct.

Count II

On October 31, 2019, the ODC received three disciplinary complaints against respondent from the District Attorney’s Office in Lafourche Parish. The complaints collectively stated that respondent represented clients in open court in four separate criminal cases while he was ineligible to practice law. Specifically, respondent represented these clients on September 17, 19, 25, and 26, 2019, during which time he was ineligible to practice law for failing to pay his bar dues and the disciplinary assessment as well as for failing to submit his trust account disclosure statement.²

The ODC sent respondent notice of the complaints on two separate occasions. He failed to respond to either notice. Accordingly, the ODC subpoenaed him to

² Respondent’s ineligibility began on September 16, 2019, and his eligibility was reinstated on October 11, 2019.

provide a sworn statement. During his July 7, 2020 sworn statement, respondent admitted that he had practiced law while ineligible to do so on the dates at issue. He also agreed to provide the ODC, within two weeks, with a copy of the check he allegedly used to pay his late bar dues and disciplinary assessment in order to have his eligibility reinstated. Nevertheless, he failed to do so.

The ODC alleged that respondent's conduct violated Rules 1.1(c) (failure to fulfill annual professional obligations), 5.5(a)(e)(3) (engaging in the unauthorized practice of law), 8.1(b), and 8.1(c) of the Rules of Professional Conduct.

Count III

On January 27, 2020, the ODC received a disciplinary complaint against respondent from William and Tammy Brown. In the complaint, the Browns stated that respondent was hired in February 2018 to get Mr. Brown released from jail and that they paid him \$4,000 plus a \$175 consultation fee. The Browns requested that respondent either complete the job or refund the fee.

The ODC sent respondent notice of the complaint, but he failed to respond. Accordingly, the ODC subpoenaed respondent to provide a sworn statement and to produce a copy of his client file. Respondent appeared for his sworn statement on July 7, 2020 but did not bring a copy of the Browns' file. During the sworn statement, the ODC requested that respondent provide a written response to the complaint as well as a copy of the Browns' file within two weeks. Respondent promised to provide a copy of the file by the end of the day. Respondent provided neither the file nor a written response to the complaint. Therefore, the ODC was unable to complete its investigation of the Browns' complaint.

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

Count IV

On February 10, 2020, the ODC received a disciplinary complaint against respondent from Drew Lagarde. In the complaint, Mr. Lagarde stated that, in February 2019, he paid respondent at least \$1,500 to represent him in a child custody matter. Mr. Lagarde further stated that, despite respondent providing numerous assurances, he never filed any pleadings and also failed to adequately advise him of the status of his legal matter.

The ODC sent respondent notice of the complaint, but he failed to respond. Accordingly, the ODC subpoenaed respondent to provide a sworn statement and to produce a copy of his client file. Respondent appeared for his sworn statement on July 7, 2020 but did not bring a copy of Mr. Lagarde's file. During the sworn statement, respondent acknowledged that he "dropped the ball on this one." He indicated that, although he had drafted a pleading to modify child custody, he failed to file same with the court. Respondent also admitted that he had not refunded any of the fee Mr. Lagarde had paid.

The ODC requested that respondent provide a written response to the complaint as well as a copy of Mr. Lagarde's file within two weeks of the sworn statement. Respondent promised to provide a copy of Mr. Lagarde's file by the end of the day. Respondent provided neither the file nor a written response to the complaint.

The ODC alleged that respondent's conduct violated Rules 1.1(a) (failure to provide competent representation to a client), 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), 1.5(f)(5), 8.1(b), and 8.1(c) of the Rules of Professional Conduct.

Count V

On May 15, 2020, the ODC received a disciplinary complaint against respondent from Cedric Scott. In the complaint, Mr. Scott stated that respondent received \$7,000 to represent him in a criminal matter. Mr. Scott further stated that respondent failed to attend a hearing in his criminal matter and failed to file any pleadings on his behalf. Accordingly, Mr. Scott requested a full refund of the \$7,000 paid to respondent.

The ODC sent respondent notice of the complaint, but he failed to respond. Accordingly, the ODC subpoenaed respondent to provide a sworn statement and to produce a copy of his client file. Respondent appeared for his sworn statement on July 7, 2020 but did not bring a copy of Mr. Scott's file. During the sworn statement, the ODC requested that respondent provide a written response to the complaint as well as a copy of Mr. Scott's file within two weeks. Respondent failed to do so. Therefore, the ODC was unable to complete its investigation of Mr. Scott's complaint.

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

Count VI

In June 2020, Judy Johnson and Kevin Williams hired respondent to represent Mr. Williams in a criminal matter. Ms. Johnson paid respondent \$800 of a \$3,000 fixed fee for the representation. Respondent never filed any pleadings on Mr. Williams' behalf, nor did he make any appearances in court. He also failed to adequately communicate with Mr. Williams and falsely represented to Ms. Johnson that he had enrolled as Mr. Williams' counsel. As a result, Ms. Johnson retained new counsel for Mr. Williams. Despite requests to do so, respondent never refunded any portion of the \$800 paid toward the fixed fee.

On July 1, 2020, respondent was declared ineligible to practice law for failing to comply with mandatory continuing legal education requirements. He did not regain his eligibility until January 28, 2021. Therefore, during part of his representation of Mr. Williams, respondent was ineligible to practice law. Nevertheless, in text messages sent to Ms. Johnson in July 2020, he held himself out as an attorney licensed to practice law.

On August 21, 2020, the ODC received a disciplinary complaint against respondent from Ms. Johnson and Mr. Williams. Documentary evidence provided with the complaint confirmed that Ms. Johnson paid respondent \$800 in two installments of \$400 each. The ODC sent respondent notice of the complaint, but he failed to respond.

The ODC alleged that respondent's conduct violated Rules 1.1(a), 1.1(b) (failure to comply with MCLE requirements), 1.1(c), 1.3, 1.4, 1.5(f)(5), 5.5(a)(e)(3), 8.1(b), 8.1(c), 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 VII

In November 2019, Tammy Guillot hired respondent to assist her in obtaining visitation rights with her grandson. During this initial meeting, respondent indicated he would file a pleading on Ms. Guillot's behalf. Despite being paid the entirety of the \$800 flat fee required for the representation, respondent failed to file the pleading seeking grandparent visitation.

When they met again in June 2020, during which respondent collected from Ms. Guillot the final \$150 payment toward the fee, respondent falsely represented to Ms. Guillot that he had received a court date for her matter but that he could not remember the date on which the matter had been set. According to Ms. Guillot, after

this meeting, respondent failed to respond to her numerous telephone calls and text messages.

In July 2020, Ms. Guillot called the clerk of court's office and learned that respondent had not filed anything on her behalf. In November 2020, respondent's mother, Jerri Smitko, informed Ms. Guillot that respondent had checked himself into a rehabilitation facility earlier that month.

On February 11, 2021, the ODC received a disciplinary complaint against respondent from Ms. Guillot. The ODC sent respondent notice of the complaint via certified mail and email. Nevertheless, he failed to respond. The ODC's investigator confirmed with the various courts in Ms. Guillot's area that respondent had not filed anything on her behalf.

The ODC alleged that respondent's conduct violated Rules 1.1(a), 1.3, 1.4, 1.5(f)(5), 8.1(c), and 8.4(c) of the Rules of Professional Conduct.

DISCIPLINARY PROCEEDINGS

In June 2022, the ODC filed formal charges against respondent. Although respondent hired counsel to represent him in this matter and was given an extension of time to file an answer to the formal charges, he ultimately failed to do so. 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).

On October 13, 2022, respondent's counsel filed a request for a hearing in mitigation. In the motion, respondent's counsel indicated that respondent had intended to file an answer admitting to the factual allegations set forth in the formal charges and, thus, did not wish to recall the deemed admitted order. On October 27, 2022, the hearing committee chair granted respondent's request for a mitigation hearing and conducted same on March 17, 2023.

During the mitigation hearing, respondent testified that he began working as an associate attorney for his mother, attorney Jerri Smitko, as soon as he received his license to practice law in October 2016. Almost immediately, friction arose between himself and his mother, as well as between him and his mother's staff.

In May 2017, respondent ran out of his prescription Adderall medication, which he had been taking for nine years, and one of his friends gave him methamphetamine to take instead. He continued to use methamphetamine until September 2020. He indicated that his methamphetamine use destroyed his marriage, and he and his ex-wife divorced in December 2018. His ex-wife gave birth to their daughter in March 2018, three months after they separated.

Respondent's drug use also caused a gradual degradation of his ability to function as an attorney. Eventually, he began missing court dates and began to engage in a pattern of ineffective and inattentive behavior. When most of the disciplinary complaints against him were filed, he was "in active drug addiction."

In July or August 2020, respondent's girlfriend told him she was pregnant, which finally made him realize he needed help for his drug addiction. In September 2020, he sought inpatient treatment at Whispering Oaks Lodge, where he stayed for more than ninety days. While he was in treatment, his mother took over the representation of the few clients he had remaining.

When he got out of inpatient treatment, he executed a five-year recovery agreement with the Judges and Lawyers Assistance Program ("JLAP") based upon Whispering Oaks' recommendation. However, in September 2021, he was required to provide a hair sample for testing. The testing facility told him the hair on his head was too short, and they used his body hair instead. The body hair test revealed a small amount of THC (indicating cannabinoid use), but respondent asserted he had not used marijuana since before he entered Whispering Oaks a year earlier. He also explained that, because body hair grows so slowly, the body hair can detect drug use

up to two years previous to the date of the test. Despite his assertion that he had not used any drugs, JLAP required him to undergo a Multidisciplinary Inpatient Professional Evaluation. He did not have the financial means to do so at the time, so JLAP kicked him out of the program in January 2022. He also admitted that he was kicked out of JLAP because he failed to check in daily for drug testing. In February 2023, he finally had the funds to afford the Multidisciplinary Inpatient Professional Evaluation, and he is eager to participate in JLAP again. Finally, he indicated that the one benefit of being kicked out of JLAP was realizing he was staying sober because he wanted to and not because he was afraid of a positive drug test.

Kristen Caldwell, respondent's fiancée, also testified at the mitigation hearing, indicating that she and respondent have a two-year-old daughter together. Ms. Caldwell also has two children from a previous relationship. The five of them live together in Houma, and respondent also has a daughter with his ex-wife.

Ms. Caldwell described respondent as a very hands-on partner and father. He is very involving in raising the kids, including getting them ready for school, making sure they get on the school bus, helping them with their extracurricular activities, and dropping off and picking up the two-year-old from daycare. These things are a big help to Ms. Caldwell because she works 8:00 a.m. to 5:00 p.m. during the week as a dental assistant.

When she and respondent first started dating in April 2019, she was unaware of his drug problem. However, she felt as if something was going on with him because he would not contact her for days at a time. It was not until respondent's mother reached out to her that Ms. Caldwell realized he may be using drugs. One day, she and respondent's mother confronted him about his drug use, which prompted him to enter treatment at Whispering Oaks. Once respondent received

treatment, he became much more present in their relationship, and she has seen no signs of him using drugs since he got out of treatment.

The documentary evidence introduced by the parties included the following:

1. Proof of a \$1,199.89 refund to Sarah Harris paid on March 14, 2023;
2. Proof of an \$892.10 refund to Judy Johnson paid on March 14, 2023;
3. Proof of a \$2,377.96 refund to Drew Lagarde paid on March 14, 2023;
4. Proof of a \$921.99 refund to Tammy Guillot on March 14, 2023;
5. Proof of a \$4,989.18 refund to Tammy and William Brown paid on March 31, 2023; and
6. Proof of a \$7,871.26 refund to Sharlita McKay (Count V, the Scott matter) paid on March 3, 2023.

Hearing Committee Report

After acknowledging the deemed admitted factual allegations set forth in the formal charges, the hearing committee also determined there was no dispute regarding the violation of the Rules of Professional Conduct. Therefore, the committee determined respondent violated the Rules of Professional Conduct as charged. Additionally, the committee determined respondent's testimony was genuine and truthful, as was that of his fiancée.

The committee then determined respondent knowingly and intentionally violated duties owed to his clients, the legal system, and the legal profession. His conduct caused actual, serious harm to several clients. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the baseline sanction is disbarment.

In aggravation, the committee found the following: 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,

and vulnerability of the victims. In mitigation, the committee found personal or emotional problems, inexperience in the practice of law (admitted 2016), and remorse. The committee declined to find the mitigating factor of mental disability or chemical dependency including alcoholism or drug abuse, reasoning that respondent did not provide evidence of a meaningful and sustained period of successful rehabilitation, nor that the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

After further considering this court's prior jurisprudence addressing similar misconduct and emphasizing the mitigating factors present in this matter, the committee recommended respondent be suspended from the practice of law for three years and be ordered to pay restitution, with interest, to his former clients.³

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

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.

³ The committee further recommended that respondent be required to comply with his current JLAP agreement. However, the record as presented indicates that respondent is not currently under a JLAP agreement.

In this matter, the record supports a finding that respondent practiced law while ineligible to do so, neglected legal matters, failed to communicate with clients, failed to timely refund unearned fees, and failed to cooperate with the ODC in its investigations. This misconduct amounts to a violation of 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 further supports a finding that respondent knowingly and intentionally violated duties owed to his clients, the legal system, and the legal profession. His misconduct caused actual harm to his clients and potential harm to the legal system when he appeared in court while ineligible to practice law. We agree with the hearing committee that the baseline sanction is disbarment. We also agree with the aggravating and mitigating factors found by the committee. Additionally, respondent has no prior disciplinary history, which is mitigating.

It is clear from the record that respondent's drug addiction caused his misconduct. It is also clear from the record that respondent is addressing his drug problem and is currently in sustained remission. Furthermore, the record reflects that respondent has already made restitution, with interest, to all of the clients who are the subject of this matter. In light of these factors and the other mitigating factors

present, we agree with the committee that a downward deviation from disbarment is warranted.

Accordingly, we will adopt the committee's recommendation and suspend respondent from the practice of law for three years. We will further order respondent to pay restitution, with interest, to any former clients who are owed refunds, if he has not already done so.

DECREE

Upon review of the findings and recommendations of the hearing committee, and considering the record, it is ordered that Maxwell Peter Smitko, Louisiana Bar Roll number 37317, be and he hereby is suspended from the practice of law for a period of three years. It is further ordered that respondent shall pay restitution, with interest, to any former clients who are owed refunds, if he has not already done so. 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.