

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: ROBERT WESLEY MALONE

DOCKET NO. 18-DB-045

REPORT OF HEARING COMMITTEE # 43

INTRODUCTION

This attorney disciplinary matter arises out of formal charges consisting of three counts filed by the Office of Disciplinary Counsel (“ODC”) against Robert Wesley Malone (“Respondent”), Louisiana Bar Roll Number 27841.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.16, 8.1(c), and 8.4(a).²

PROCEDURAL HISTORY

The formal charges were filed on June 12, 2018. By letters dated June 18, 2018, the formal charges were mailed via certified mail to Respondent’s primary and secondary registration addresses.³ The mailing to the secondary address was received on July 6, 2018. Respondent failed to file an answer to the charges. Accordingly, on August 14, 2018, ODC filed a motion to deem the factual allegations admitted pursuant to Louisiana Supreme Court Rule XIX, §11(E)(3).⁴ By

¹ Respondent was admitted to the practice of law in Louisiana on April 19, 2002. Respondent is currently eligible to practice law.

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

³ 1024 8th St., Alexandria, LA 71301 (primary); 728 Edgewood Dr., Pineville, LA 71360 (secondary).

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 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

order signed October 2, 2018, the factual allegations contained in the formal charges were deemed admitted. On December 3, 2018, ODC filed its submission on sanction.

For the following reasons, the Committee finds, as follows:

- Respondent failed to act with reasonable diligence and promptness when representing a client in violation of Rule 1.3;
- Respondent failed to communicate with his client and comply with a reasonable request for information in violation of Rule 1.4;
- Respondent failed to return an unearned fee in violation of Rule 1.5;
- Respondent failed to withdraw from representation of a client in a manner not adversely affecting the interest of the client in violation of Rule 1.16;
- Respondent failed to cooperate with the Office of Disciplinary Counsel in violation of Rule 8.1(c); and
- Respondent violated or attempted to violate the Rules of Professional Conduct, in violation of Rule 8.4 (a).

Accordingly, and especially in light of the fact that Respondent introduced no evidence of any mitigating factors, it is the recommendation of this Hearing Committee that Respondent be suspended from the practice of law for one-year and one day, in addition to Respondent paying restitution found to be owed, refunding unearned attorney fees, returning client files, and paying all costs associated with these proceedings.

FORMAL CHARGES

The formal charges read, in pertinent part:

COUNT I – (SEAN STANLEY RACHAL - 0033896)

Complainant Sean Stanley Rachal hired the Respondent to represent him in a post-conviction relief matter. Respondent was paid a \$5,000.00 flat fee in August of

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.

2013. At the time of hire, Complainant had a deadline of June 15, 2014, to file the post-conviction relief pleading. Complainant stated that Respondent consistently ignored his warnings about the deadline and insisted that the deadline was June 20, 2014. Respondent untimely filed his *Application for Post-Conviction Relief*. Further, Respondent ignored two letters from Mr. Rachal, requesting a copy of his file.

ODC made several attempts to serve the Respondent with a copy of the complaint. Respondent was finally served with a copy of the complaint (along with others) via hand delivery by an ODC Investigator on March 7, 2016. On March 31, 2016, a sworn statement was taken regarding the underlying facts of the complaint. At the sworn statement the Respondent acknowledged that he failed to provide this office with a response and asked for an extension of time to provide the same. At that time, the Respondent was given two weeks to submit all outstanding responses. As of today, the ODC has not received it. Also, during that statement, the ODC requested a copy of everything filed on the client's behalf. The ODC has not received any response.

Respondent has failed to act with reasonable diligence and promptness when representing a client, in violation of Rule 1.3; failed to communicate with client, in violation of Rule 1.4; failed to withdraw from representation of a client in a manner not adversely affecting the interest of the client, in violation of Rule 1.16; failed to cooperate with the Office of Disciplinary Counsel, in violation of Rule 8.1(c); and violated or attempted to violate the Rules of Professional Conduct, in violation of Rule 8.4(a).

COUNT II – (ERIC WAYNE GREEN - 0034230)

Complainant Eric Wayne Green hired Respondent to represent him in an underlying criminal case. Complainant paid Respondent a \$500.00 legal fee to represent him in an effort to have his incarceration time to run concurrently. On September 23, 2014, Complainant saw the Respondent for the first and only time, in order to collect his attorney fee. At the time the complaint was filed, Mr. Green had not heard from Respondent for over 18 months. Because Mr. Green's deadline to file was drawing near, he terminated the services of the Respondent. Mr. Green desires the return of the unearned fee.

Respondent was served via hand delivery by an ODC Investigator on March 31, 2016 when he appeared for a sworn statement. At that sworn statement, Respondent stated that he would provide a written response to the complaint. As of today, the ODC has not received the same.

Respondent has failed to act with reasonable diligence and promptness when representing a client, in violation of Rule 1.3; failed to communicate with client, in violation of Rule 1.4; failed to return an unearned fee; failed to withdraw from representation of a client in a manner not adversely affecting the interest of the

client, in violation of Rule 1.16; failed to cooperate with the Office of Disciplinary Counsel, in violation of Rule 8.1(c); and violated or attempted to violate the Rules of Professional Conduct, in violation of Rule 8.4(a).

COUNT III – (WALTER M. SANCHEZ – 0036168)

The Complainant is Walter M. Sanchez, the successor attorney for Respondent's former client, Jon Davy Welch, II. Respondent formerly represented Mr. Welch in criminal proceedings in the 30th Judicial District Court. Respondent was initially retained by the family of Mr. Welch and paid a cash retainer in the amount of \$7,000.00. Shortly thereafter, and prior to the accepting of charges by the District Attorney, Mr. Welch became dissatisfied with Respondent's lack of communication, and terminated the Respondent and hired Mr. Sanchez.

On behalf of Mr. Welch, Complainant has made numerous telephone calls to Respondent's office requesting an accounting of any services rendered and a refund of any unearned fee. However, those requests were ignored. On September 26, 2017, Mr. Sanchez sent a formal request for an accounting and refund of the unearned fees via electronic mail and facsimile to Respondent. These requests were ignored as well.

Complainant states that at a pre-trial conference held in the underlying matter on October 3, 2017, Complainant was informed that the State had actually sent discovery responses to the Respondent's office. Complainant made several attempts to retrieve this information from the Respondent. Respondent ignored the Complainant's calls and requests to transfer over the discovery that he received from the State. Respondent's failure to respond, resulted in an additional delay in Complainant's ability to represent Mr. Welch and resulted in the rescheduling of his trial.

ODC made several attempts to serve the Respondent with a copy of the complaint. Respondent was finally served with a copy of the complaint via hand delivery by an ODC Investigator on November 27, 2017. The Respondent was given fifteen calendar days to submit a response. As of today, the ODC has not received any response from Respondent.

Respondent has failed to communicate with client, and comply with a reasonable request for information, in violation of Rule 1.4; failed to return an unearned fee, in violation of Rule 1.5; failed to withdraw from representation of a client in a manner not adversely affecting the interest of the client, in violation of Rule 1.16; failed to cooperate with the Office of Disciplinary Counsel, in violation of Rule 8.1(c), and has violated or attempted to violate the Rules of Professional Conduct, in violation of Rule 8.4(a).

EVIDENCE

The Committee reviewed the exhibits submitted by ODC, which are Exhibits ODC 1-15. 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 AND RULES VIOLATED

By order dated October 2, 2018, the following factual allegations were deemed admitted and proven by clear and convincing evidence:

- Respondent failed to act with reasonable diligence and promptness when representing a client in violation of Rule 1.3;
- Respondent failed to communicate with his client and comply with a reasonable request for information in violation of Rule 1.4;
- Respondent failed to return an unearned fee in violation of Rule 1.5;
- Respondent failed to withdraw from representation of a client in a manner not adversely affecting the interest of the client in violation of Rule 1.16;
- Respondent failed to cooperate with the Office of Disciplinary Counsel in violation of Rule 8.1(c); and
- Respondent violated or attempted to violate the Rules of Professional Conduct, in violation of Rule 8.4 (a).

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 Stanley Rachael, Eric Wayne Green, and Jon Davy Welch, II. He acted knowingly. Respondent's misconduct caused actual harm, as set forth below:

- Respondent untimely filed an Application for Post-Conviction Relief on behalf of his client, Stanley Rachal.

Respondent's misconduct also caused potential harm, as follows:

- Respondent ignored two (2) letters from Stanley Rachel, requesting a copy of his file;
- Respondent accepted a \$500.00 legal fee from Eric Wayne Green and thereafter failed to act with reasonable diligence and promptness during his representation of Mr. Green;
- Respondent failed to provide Walter M. Sanchez with an accounting and refund of unearned attorney fees with regard to Respondent's representation of Jon Davy Welch, II; and
- Respondent failed to provide Jon Davy Welch, II's new attorney, Walter M. Sanchez, with Mr. Welch's file materials.

The *ABA Standards for Imposing Lawyer Sanctions* suggest that suspension or disbarment is the baseline sanction for Respondent's misconduct. Standard 4.41 states that disbarment is generally appropriate when (b) a lawyer knowingly fails to perform services for a client and causes serious injury. Standard 4.42 states that suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

In this matter, the Committee considered the following aggravating factors, mitigating factors, and jurisprudence:

AGGRAVATING FACTORS:

- A. Dishonest or selfish motive;
- B. Pattern of misconduct;
- C. Multiple offenses;

- D. Refusal to acknowledge wrongful nature of conduct;
- E. Respondent has failed to cooperate with the ODC in this investigation; and
- F. Substantial experience in the practice of law; Respondent was admitted to practice law in 2002.

MITIGATING FACTORS:

None.

JURISPRUDENCE:

In *In Re Hicks*, a deemed admitted matter, the Court held that a two-year suspension, in conjunction with an order that the attorney make restitution, return unearned fees, and return a client file, was the appropriate sanction for an attorney who neglected multiple legal matters, failed to communicate with multiple clients, failed to refund unearned fees to multiple clients, abandoned his law practice, and failed to cooperate with the Office of Disciplinary Counsel in three separate investigations. *In Re Bradley O. Hicks*, 18 - 1211 (La. 11/5/2018), ___ So.3d ___, 2018 WL 5816979. Hicks had no prior disciplinary record. The Court held that the attorney violated rules 1.3, 1.4, 1.5, 1.16, 5.5, 8.1(c), and 8.4(a) of the Rules of Professional Conduct. *Id.*

In *In Re Harper*, the Court held that a three-year suspension, in conjunction with an order that the attorney provide an accounting and refund any unearned fees, was the appropriate sanction for attorney who neglected multiple legal matters, failed to communicate with multiple clients, failed to return unearned fees to multiple clients, practiced law while ineligible, and failed to cooperate with the Office of Disciplinary Counsel in five separate investigations. *In Re N. Dawn Harper*, 16 - 1635 (La. 11/15/2016), 205 So.3d 901. The Court found that the attorney violated Rules 1.3, 1.4, 1.5 (f)(5), 1.15, 1.16, 5.5, and 8.1(c) of the Rules of Professional Conduct. *Id.*

In *In Re Johnson*, the Court held that the attorney violated, through negligence, the Rules of Professional Conduct on safekeeping of client property and third person property, timely

remittance of funds to a client or third person, and obligations upon termination of representation. For such conduct, the Court held that suspension for one-year and one-day, fully deferred, subject to two years of supervised probation with conditions, was warranted. *In Re Alvin A. Johnson, Jr.*, 17 -1011 (La. 09/06/2017), 225 So.3d 1057. The Court held that the attorney violated Rules 1.15 (a), (b), and (d), 1.16 (d), and 8.4(a) of the Rules of Professional Conduct. Id.

In *In Re Aucoin*, a deemed admitted matter, the Court held that an attorney neglecting a client's request for an expungement of a criminal record, failing to communicate with client, and failing to refund unearned fees, warranted suspension for one-year and one-day. *In Toby James Aucoin*, 17-0541 (La. 05/26/2017). The Court held that attorney violated Rules 1.3, 1.4, 1.5, and 1.16 (d) of the Rules of Professional Conduct. Id.

CONCLUSION

For the reasons set forth above, it is the unanimous opinion of this Committee that Respondent be suspended from the practice of law for one-year and one day, in addition to Respondent paying restitution found to be owed, refunding unearned attorney fees, returning client files, and paying all costs associated with these proceedings.

This opinion is unanimous and has been reviewed by each committee member, who fully concur and who have authorized Robert L. Beck III to sign on their behalf. Committee Member R. Reed Medelson, Jr. also notes that while he concurs with this opinion, a two-year suspension would not be unreasonable, considering the aggravating factors present in this case, including, but not limited to, Respondent's lack of cooperation with the disciplinary process, and the lack of any mitigating factors

Alexandria, Louisiana, this 18th day of February, 2019.

**Louisiana Attorney Disciplinary Board
Hearing Committee # 43**

**Robert L. Beck III, Committee Chair
Paul J. Tellarico, Lawyer Member
R. Reed Mendelson, Jr., Public Member**

Robert L. Beck III
**Robert L. Beck III, 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.

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(c) Fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...