

The Supreme Court of the State of Louisiana

**IN RE: ROBERT WESLEY MALONE**

No.2020-B-00762

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IN RE: Disciplinary Counsel - Applicant Other; Findings and Recommendations  
(Formal Charges);  
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**November 04, 2020**

Suspension imposed. See per curiam.

JDH

JLW

SJC

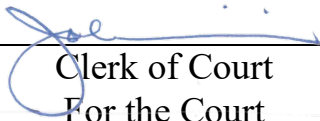
JTG

WJC

JHB

Johnson, C.J., dissents and assigns reasons.

Supreme Court of Louisiana  
November 04, 2020

  
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Clerk of Court  
For the Court

11/04/20

SUPREME COURT OF LOUISIANA

NO. 2020-B-0762

IN RE: ROBERT WESLEY MALONE

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Robert Wesley Malone, an attorney licensed to practice law in Louisiana, but currently ineligible to practice.<sup>1</sup>

**FORMAL CHARGES**

*Count I – The Rachal Matter*

Sean Rachal hired respondent to represent him in a post-conviction relief matter, paying respondent a \$5,000 flat fee in August 2013. According to Mr. Rachal, the deadline to file his application for post-conviction relief was June 15, 2014. Also according to Mr. Rachal, respondent consistently ignored his warnings about the deadline and insisted that the deadline was June 20, 2014. Ultimately, the application for post-conviction relief that respondent filed was considered untimely. Furthermore, respondent ignored two letters Mr. Rachal sent him in late 2014 in which Mr. Rachal requested a copy of his file.

In November 2015, Mr. Rachal filed a disciplinary complaint against respondent. The ODC made several attempts to serve respondent with notice of the

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<sup>1</sup> On May 31, 2019, respondent was declared ineligible to practice law for failure to comply with the mandatory continuing legal education requirements. He is also ineligible to practice law for failure to pay his bar dues and the disciplinary assessment, and for failure to file a trust account registration statement.

complaint, finally succeeding when the ODC's investigator hand-delivered the notice to respondent on March 7, 2016. On March 31, 2016, respondent provided a sworn statement to the ODC, during which he acknowledged his failure to provide the ODC with a response and asked for an extension of time to provide same. The ODC gave respondent two weeks to submit a response as well as a copy of Mr. Rachal's file. Respondent never provided the ODC with either a response to the complaint or a copy of the file.

The ODC alleged that respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), 1.16 (obligations upon termination of the representation), 8.1(c) (failure to cooperate with the ODC in its investigation), and 8.4(a) (violation of the Rules of Professional Conduct).

### *Count II – The Green Matter*

Eric Green hired respondent to represent him in a criminal matter, paying respondent a \$500 fee to try to modify his sentence so his incarceration time would run concurrently. On September 23, 2014, Mr. Green saw respondent for the first and only time in order to pay the fee.

When Mr. Green filed his disciplinary complaint against respondent in March 2016, he had not heard from respondent for more than eighteen months. In his complaint, Mr. Green indicated the deadline to file was drawing near. He also indicated he wanted to terminate respondent's services and wanted a refund of the unearned fee.

Respondent received notice of Mr. Green's complaint via hand delivery by the ODC's investigator on March 31, 2016, when he appeared for a sworn statement.

During the sworn statement, respondent indicated he would provide a written response to the complaint. However, he failed to do so.

The ODC alleged that respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3, 1.4, 1.16, 8.1(c), and 8.4(a).

*Count III – The Sanchez/Welch Matter*

Jon Welch's family paid respondent \$7,000 to represent Mr. Welch in a criminal matter. Shortly thereafter, Mr. Welch became dissatisfied with respondent's lack of communication and terminated respondent's services. Mr. Welch then hired attorney Walter M. Sanchez to represent him.

Mr. Sanchez, on Mr. Welch's behalf, made numerous calls to respondent's office to request an accounting and a refund of the unearned portion of the \$7,000 fee. However, respondent failed to respond to those requests. On September 26, 2017, Mr. Sanchez sent respondent a formal request for an accounting and refund via e-mail and facsimile. Respondent also failed to respond to this request.

According to Mr. Sanchez, at an October 3, 2017 pre-trial conference in Mr. Welch's case, he learned the prosecutor had sent discovery responses to respondent's office. Mr. Sanchez tried several times to retrieve the discovery material from respondent, but respondent ignored his calls and requests. Consequently, Mr. Welch's trial had to be rescheduled.

In October 2017, Mr. Sanchez filed a disciplinary complaint against respondent. After several unsuccessful attempts to serve respondent with notice of the complaint, the ODC's investigator finally served respondent with notice via hand delivery on November 27, 2017. Respondent failed to respond to the complaint.

The ODC alleged that respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.4, 1.5 (failure to refund an unearned fee), 1.16, 8.1(c), and 8.4(a).



## DISCIPLINARY PROCEEDINGS

The ODC filed formal charges against respondent in June 2018. Respondent failed to answer the formal charges. Accordingly, the factual allegations contained therein were deemed admitted and proven by clear and convincing evidence pursuant to Supreme Court Rule XIX, § 11(E)(3). No formal hearing was held, but the parties were given an opportunity to file with the hearing committee written arguments and documentary evidence on the issue of sanctions.

In his submission on sanctions, respondent only addressed the Rachal matter, indicating that Mr. Rachal's application for post-conviction relief was declared untimely simply because he did not pay the \$5 fax transmission fee, which he claimed the clerk of court told him he did not have to pay. The prosecutor objected based on respondent's failure to pay the fee, and the judge declared the application untimely based on this failure. Respondent then indicated that Mr. Rachal's family began to threaten him, and he felt pressured to appeal the judge's decision. However, when Mr. Rachal's half-brother texted him with threats, he stopped working on Mr. Rachal's case and reported the threats to the police. Respondent also offered to refund half of Mr. Rachal's \$5,000 fee. Finally, respondent indicated he is currently out of the country with his family on his wife's military permanent change of station tour.

### *Hearing Committee Report*

After considering the parties' submissions on sanctions, the hearing committee noted that the factual allegations set forth in the formal charges were deemed admitted. Based on those deemed admitted facts, the committee determined respondent violated Rules 1.3, 1.4, 1.5, 1.16, 8.1(c), and 8.4(a) of the Rules of Professional Conduct.

The committee then determined respondent knowingly violated duties owed to his clients. Respondent's untimely application for post-conviction relief caused actual harm to Mr. Rachal. Respondent's conduct caused potential harm as follows: (1) he ignored two letters from Mr. Rachal in which Mr. Rachal requested a copy of his file; (2) he accepted a \$500 fee from Mr. Green and then neglected Mr. Green's legal matter; (3) he failed to provide Mr. Sanchez with an accounting and refund of unearned fees paid on behalf of Mr. Welch; and (4) he failed to provide Mr. Sanchez with Mr. Welch's file. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the baseline sanction is in the range of suspension to disbarment.

In aggravation, the committee found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law (admitted 2002). In further aggravation, the committee noted respondent's failure to cooperate with the ODC's investigations. The committee found no mitigating factors present.

After also considering this court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for one year and one day. The committee further recommended that respondent be ordered to pay restitution, refund unearned fees, and return client files. One committee member concurred but noted that a two-year suspension would not be unreasonable considering the aggravating factors present and the lack of mitigating factors.

Neither respondent nor the ODC filed an objection to the committee's report. Respondent did, however, file a brief prior to oral argument before a panel of the disciplinary board.

In his brief, respondent acknowledged he made mistakes in his handling of his clients' legal matters and failed to timely resolve the matters. However, in

mitigation, he offered that his twenty-three years of service in the Louisiana Army National Guard left him with post-traumatic stress disorder, depression, and anxiety. Because of his mental health issues, he has not worked in approximately one year, but he is now taking medication to treat his depression and anxiety. Furthermore, in October 2018, his wife was ordered to active duty service with the United States Army and was stationed in Belize for two years. He and his four children moved to Belize the following month, and he has not had access to his law office files since.

Regarding the Rachal matter, respondent incorporated his previous response regarding Mr. Rachal's representation. Additionally, he indicated he was never hired to appeal the judge's decision regarding the application for post-conviction relief. When Mr. Rachal's family began threatening him, he did not know what to do, although he acknowledged he did not handle the matter properly. Finally, he claimed he told Mr. Rachal's family they could come to his office to retrieve Mr. Rachal's file, but they never did so.

Regarding the Green matter, respondent indicated he was only hired to file a motion for modification of sentence, which he did and which was granted. However, Mr. Green was upset because it took the Louisiana Department of Corrections longer than he wanted to recalculate his time and release him. Even though respondent had only been hired to file the motion, he tried to help Mr. Green further by calling the Louisiana Department of Corrections to try to expedite the matter.

Regarding the Sanchez/Welch matter, respondent indicated he made numerous out-of-town trips related to Mr. Welch's representation and was actively working with multiple jurisdictions to limit Mr. Welch's exposure. He missed Mr. Welch's court date because he was in court relative to another criminal matter. The next time he called to check on the matter, he learned Mr. Welch's new attorney had rescheduled the court date. When Mr. Sanchez requested the discovery responses, respondent claimed he was not aware they had been forwarded to his office. He

located the discovery responses underneath the receptionist's desk when he was closing his office.

### *Disciplinary Board Recommendation*

After review, the disciplinary board adopted the hearing committee's factual findings, with one clarification. The board found that, in the Rachal matter, the record indicates the filing deadline for Mr. Rachal's application for post-conviction relief was actually June 20, 2014. Although respondent fax-filed the pleading on this date, he failed to timely file the original pleading within five days of the fax-filing.<sup>2</sup> Therefore, the judge found the application was untimely filed and denied same. In all other respects, the board adopted the deemed admitted facts and the committee's factual findings.

Based on these facts, the board determined that respondent violated the Rules of Professional Conduct as charged, with the exception of Rule 1.16. More specifically, respondent violated Rule 1.3 by untimely filing Mr. Rachal's application for post-conviction relief; by not promptly handling Mr. Green's legal matter, causing at least an eighteen-month delay in the matter; and by neglecting Mr. Welch's legal matter, causing the case and trial to be delayed. By failing to properly communicate with his clients and/or comply with their reasonable requests for information or their files, respondent violated Rule 1.4. Respondent violated Rule 1.5 by failing to refund the unearned \$500 to Mr. Green and by failing to provide an accounting and a refund of the unearned fee paid on Mr. Welch's behalf. In all three matters, respondent failed to file responses to the disciplinary complaints in violation of Rule 8.1(c). Finally, respondent violated Rule 8.4(a) by violating the above-cited rules. However, the board determined the ODC failed to prove by clear and

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<sup>2</sup> In fact, the record indicates the judge determined the pleading was untimely because the \$5 fax transmission fee was not paid within five days of the pleading being faxed, which negated the effect of the fax-filing.

convincing evidence that respondent violated Rule 1.16 because the deemed admitted facts do not allege respondent ever formally withdrew from the three representations, reasoning that respondent completed the representation of Mr. Rachal, although unsuccessfully, and that both Mr. Green and Mr. Welch terminated respondent's services.

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

The board agreed with the committee's determination of aggravating factors and found the presence of the additional aggravating factors of a prior disciplinary record (a 2012 admonition for failing to cooperate with the ODC in an investigation) and vulnerability of the victims. In mitigation, the board found only personal or emotional problems.

After further considering this court's prior jurisprudence addressing similar misconduct, the board recommended respondent be suspended from the practice of law for two years. The board also recommended respondent make restitution to Mr. Green in the amount of \$500, provide Mr. Welch with an accounting of the \$7,000 fee and a refund of any unearned fees, and provide Mr. Rachal and Mr. Welch with copies of their files.

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

## **DISCUSSION**

Bar disciplinary matters fall within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has

been proven by clear and convincing evidence. *In re: Banks*, 09-1212 (La. 10/2/09), 18 So. 3d 57.

In cases in which the lawyer does not answer the formal charges, the factual allegations of those charges are deemed admitted. Supreme Court Rule XIX, § 11(E)(3). Thus, the ODC bears no additional burden to prove the factual allegations contained in the formal charges after those charges have been deemed admitted. However, the language of § 11(E)(3) does not encompass legal conclusions that flow from the factual allegations. If the legal conclusion the ODC seeks to prove (i.e., a violation of a specific rule) is not readily apparent from the deemed admitted facts, additional evidence may need to be submitted in order to prove the legal conclusions that flow from the admitted factual allegations. *In re: Donnan*, 01-3058 (La. 1/10/03), 838 So. 2d 715.

The evidence in the record of this deemed admitted matter supports a finding that respondent neglected legal matters, failed to communicate with clients, failed to return client files upon request, failed to provide accountings and refunds of unearned fees upon request, and failed to cooperate with the ODC in its investigations. This misconduct is a violation of the Rules of Professional Conduct as found by the disciplinary board except with respect to Rule 1.16. We disagree with the board and instead find respondent violated Rule 1.16 when he failed to return client files upon request and failed to account for and refund unearned fees upon termination of the representations.

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 knowingly violated duties owed to his clients and the legal profession, causing actual harm. The baseline sanction for this type of misconduct is suspension.

Aggravating factors include a prior disciplinary record, a pattern of misconduct, multiple offenses, vulnerability of the victims, and substantial experience in the practice of law. The only mitigating factors evident from the record are respondent's personal or emotional problems and his remorse.

In support of its recommended sanction, the board cited three cases: *In re: Hicks*, 18-1211 (La. 11/5/18), 255 So. 3d 1021; *In re: Gray*, 14-2085 (La. 3/17/15), 166 So. 3d 969; and *In re: Lewis*, 08-2293 (La. 1/21/09), 1 So. 3d 444. In *Hicks*, an attorney with no prior disciplinary record neglected legal matters, failed to communicate with his clients, failed to refund unearned fees, and failed to cooperate with the ODC in its investigations; for this misconduct, we imposed a two-year suspension. In *Gray*, an attorney neglected legal matters, failed to communicate with clients, failed to return client files upon request, failed to refund unearned fees, and failed to cooperate with the ODC in its investigations; for this misconduct, we again imposed a two-year suspension. Finally, in *Lewis*, an attorney neglected legal matters, failed to communicate with clients, failed to account for funds received from the clients or on their behalf, failed to properly withdraw from the cases upon relocating out of state, and failed to cooperate with the ODC in its investigations; as in *Hicks* and *Gray*, we imposed a two-year suspension.

Based on this case law, a two-year suspension is warranted here. With this sanction, respondent will be required to file a formal application for reinstatement, which is not an unreasonable requirement, particularly since he has been ineligible

to practice law for more than one year and has previously been disciplined for failing to cooperate with the ODC.

Accordingly, we will adopt the board's recommendation and suspend respondent from the practice of law for two years. We will further order respondent to make restitution to Mr. Green in the amount of \$500, provide Mr. Welch with an accounting and refund of any unearned fees, and provide Mr. Rachal and Mr. Welch with a copy of their respective files.

### **DECREE**

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, it is ordered that Robert Wesley Malone, Louisiana Bar Roll number 27841, be and he hereby is suspended from the practice of law for two years. It is further ordered that respondent shall make restitution to Eric Green in the amount of \$500, provide Jon Welch with an accounting and refund of any unearned fees, and provide Sean Rachal and Jon Welch with a copy of their respective files. 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.