

ORIGINAL

Louisiana Attorney Disciplinary Board

FILED by: *Donna P. Burgess*

Docket#

Filed-On

22-DB-026

8/8/2023

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: MAXWELL PETER SMITKO

DOCKET NO. 22-DB-026

REPORT OF HEARING COMMITTEE # 34

INTRODUCTION

This attorney disciplinary matter arises out of formal charges consisting of seven counts filed by the Office of Disciplinary Counsel (“ODC”) against Maxwell Peter Smitko (“Respondent”), Louisiana Bar Roll Number 37317.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.1(a) (b) & (c), 1.3, 1.4, 1.5(f)(5), 5.5(a) & (e)(3), 8.1(b) & (c), 8.4(a) & (c).²

PROCEDURAL HISTORY

The formal charges were filed on June 15, 2022. By letters dated June 22, 2022, the formal charges were mailed via certified mail to Respondent’s primary and secondary registration addresses.³ The mailing to the primary registration address was received on June 27, 2022. On July 25, 2022, Julie Brown White enrolled as counsel for Respondent and requested an extension of time in which to answer the formal charges. By order dated July 26, 2022, Respondent was granted until August 24, 2022, to file his answer. Respondent failed to file an answer to the charges. Accordingly, on September 1, 2022, ODC filed a motion to deem the factual allegations admitted pursuant to Louisiana Supreme Court Rule XIX, §11(E)(3).⁴ By order signed September

¹ Respondent was admitted to the practice of law in Louisiana on October 10, 2016. Respondent is currently ineligible to practice law. He has been ineligible since November 1, 2021.

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

³ 622 Belanger St., Houma, LA 70360 (primary); 1 Austin Dr., Houma, LA 70360 (secondary).

⁴ This rule states:

20, 2022, the factual allegations contained in the formal charges were deemed admitted. On October 13, 2022, Respondent filed a request to be heard in mitigation pursuant Rule XIX, §11(E)(4). This request was granted by order signed October 27, 2022. The hearing of this matter was held on March 17, 2023. Deputy Disciplinary Counsel Christopher D. Kiesel appeared on behalf of ODC. Respondent appeared with counsel, Julie Brown White.

For the following reasons, the Committee finds that although Respondent's testimony during the mitigation hearing was believed to be genuine, this testimony was not enough to absolve Respondent of any discipline. Therefore, the committee recommends that the Respondent be suspended from the practice of law for a period of three years. Additionally, the committee recommends that during the period of suspension that Respondent provide restitution to all clients to which it is owed with interest and fully comply with the terms of the most recent JLAP agreement and any modifications that may be implemented during the suspension period. The committee further recommends that Respondent give full authority to the ODC to communicate with JLAP on a basis that ODC finds appropriate to monitor compliance with the JLAP requirements.

FORMAL CHARGES

The formal charges read, in pertinent part:

Count One (ODC 37813)

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 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.

On July 11, 2019, the ODC received a complaint from Sarah Harris ("Ms. Harris") regarding Respondent. The complaint ("Harris Complaint") was opened for investigation as ODC 37813. The Harris Complaint states, in pertinent part, that Ms. Harris paid \$1,000.00 for Respondent to represent her son (Justen Harris) in his pending criminal case; during an initial February 8, 2019 hearing in that matter, Respondent withdrew from that representation due to a conflict of interest; and Respondent has failed to refund any portion of the \$1,000.00 paid for that representation.

On July 24, 2019, the ODC sent a copy of the Harris Complaint and a request for a response to the same to Respondent via certified mail to his Louisiana State Bar Association ("LSBA") registered primary/preferred address at 622 Belanger Street, Houma, Louisiana 70360. On July 29, 2019, delivery of the same was accepted on Respondent's behalf.

On August 12, 2019, the ODC received Respondent's response to the Harris Complaint. Therein, Respondent stated, in pertinent part:

What is ... in dispute is the amount collected from Ms. Harris. My understanding is that Ms. Harris was refunded \$500, and she asserts that she is owed an additional \$500. I only received two payments totaling \$500 in connection with this matter. ...

* * *

I will without hesitation remit an additional \$500 plus interest from the time of alleged payment to Ms. Harris out of an abundance of caution, and desire to ensure that the proper refund was issued

On August 20, 2019, the ODC sent a letter to Respondent to his LSBA-registered primary/preferred address to request that he provide certain documents and additional information regarding the Harris Complaint, including "documents sufficient to confirm the date and amount of any refund(s) provided by you to Mrs. Harris." The deadline to provide that supplemental response was September 3, 2019. Respondent failed to provide the requested documents and additional information by that deadline.

On September 13, 2019, the ODC sent Respondent a second letter to his LSBA-registered primary/preferred address to reiterate the ODC's prior request and to provide an additional extension until September 27, 2019 for Respondent to provide that supplemental response. Respondent failed to provide the requested documents and information by that extended deadline.

On October 16, 2019, the ODC sent Respondent a third letter to his LSBA-registered secondary address to again reiterate the ODC's prior request and to provide a final extension until October 25, 2019 for Respondent to provide that supplemental response. On October 25, 2019, the ODC received a partial supplemental response from Respondent via facsimile. However, that partial response failed to provide any "documents sufficient to confirm the date and amount of any refund(s) provided by you to Mrs. Harris," as had been requested in the ODC's August 20, 2019 letter to Respondent.

On February 26, 2020, the ODC issued a subpoena to take Respondent's sworn statement and to compel production of client files associated with Counts One (ODC 37813), Three (ODC 38277) and Four (ODC 38317) of the Formal Charges. Respondent's sworn statement was temporarily postponed due to the Covid-19 pandemic.

On June 4, 2020, the ODC issued a second subpoena to take Respondent's sworn statement and to compel production of client files associated with Counts One (ODC 37813), Three (ODC 38277), Four (ODC 38317) and Five (ODC 38531) of the Formal Charges.

On July 7, 2020, the ODC took Respondent's sworn statement. Therein, undersigned Deputy Disciplinary Counsel emphasized to Respondent that a failure to cooperate with the ODC could result in the filing of formal charges against him, regardless of whether he committed any substantive misconduct in connection with the underlying complaints.

During his sworn statement, Respondent confirmed receipt of at least \$500.00 from Ms. Harris to represent her son in his criminal case. Therein, the ODC reiterated its request for written confirmation that Respondent had repaid Ms. Harris at least that sum of money. As he previously had represented in his August 12, 2019 response to the Harris Complaint, Respondent testified that he would repay Ms. Harris the additional \$500.00 that she paid for Respondent to represent her son. The ODC gave Respondent two additional weeks, or until July 21, 2020, to provide written confirmation of any refunds paid to Ms. Harris. Respondent failed to provide any confirmation of the same by that deadline.

The ODC respectfully submits that there is clear and convincing evidence that, with regard to Count One (ODC 37813), Respondent has violated Rules 1.5(f)(5) and 8.1(b) and (c).

Count Two (ODC 38096)

On October 31, 2019, the ODC received three complaints from the District Attorney's Office, 17th Judicial District, Lafourche Parish regarding Respondent ("DA Complaints"). The DA complaints were opened for investigation as ODC 38096. The DA Complaints state that Respondent held himself out as an attorney authorized to practice law, in open court in representation of clients in four separate criminal matters, during a period of time when he was ineligible to practice law in Louisiana.

On August 12, 2019, the LSBA previously sent Respondent a "Notice of Delinquency" letter to his LSBA-registered primary/preferred address to notify Respondent that he had not filed his required attorney registration statement or paid his required 2019-2020 LSBA membership dues and Louisiana Attorney Disciplinary Board ("LADB") assessment. That letter concluded:

Your Attorney Registration Statement, with required payments, must be received by the office of the Louisiana State Bar Association no later than the close of business Monday, September 16, 2019, to avoid the assessment of penalties and the imposition of sanctions. If you have not made the required payments and/or fail to

file your attorney registration statement on or before Monday, September 16, 2019, our rules require that you be certified ineligible to practice law and assessed penalties. I ask that you take all necessary steps to ensure compliance with your obligations.

Respondent failed to file his attorney registration statement or pay his LSBA membership dues and LADB assessment by that September 16, 2019 deadline. As a result, on September 24, 2019, the Louisiana Supreme Court ("Court") sent Respondent a Certification of Ineligibility to his LSBA-registered primary/preferred address to notify Respondent that, effective on September 16, 2019, he was ineligible to practice law in Louisiana. According to the DA Complaints, Respondent held himself out as an attorney authorized to practice law on September 17, 19, 25 and 26, 2019, during that period of ineligibility.

On November 7, 2019, the ODC sent a copy of the DA Complaints and a request for a response to the same to Respondent via certified mail to his LSBA-registered primary/preferred address. On November 12, 2019, delivery of the same was accepted on Respondent's behalf. Respondent's written answer to the DA Complaints was due on November 27, 2019. Respondent failed to provide a written answer to the same by that deadline.

On December 4, 2019, the ODC sent a second letter to Respondent to his LSBA-registered primary/preferred and secondary addresses to request that he provide a written answer to the DA Complaints by an extended deadline of December 19, 2019. Respondent failed to provide a written answer to the same by that extended deadline.

On February 26 and June 4, 2020, the ODC issued subpoenas to take Respondent's sworn statement. During his sworn statement, Respondent admitted that he had practiced law during that period of ineligibility:

- Q. ... And I take it you don't dispute that you were in court those days on behalf of clients or that you were declared ineligible during that period of time, is that correct?
- A. I, I don't dispute that at all.

Respondent also testified therein that "the onus is on me to know this" and "the buck stops with me in terms of I should have known."

During his sworn statement, the ODC requested that Respondent provide, within two weeks, a copy of the check or money order allegedly used to late pay his LSBA membership dues and LADB assessment in order to be reinstated to the practice of law. Respondent failed to provide any such documentation by that deadline.

The ODC respectfully submits that there is clear and convincing evidence that, with regard to Count Two (ODC 38096), Respondent has violated Rules 1.1(c), 5.5(a) and (e)(3), and 8.1(b) and (c).

Count Three (ODC 38277)

On January 27, 2020, the ODC received a complaint from William and Tammy Brown regarding Respondent. The complaint ("Brown Complaint") was opened for investigation as ODC 38277. The Brown Complaint states that Respondent was paid "\$4000.00 + 175.00 consult" to "[g]et William [Brown] out of prison." The Brown Complaint further states, in part: "We either want him to do his job or give us our money back and pay us for time wasted and scamming us!"

On February 4, 2020, the ODC sent a copy of the Brown Complaint and a request for a response to the same to Respondent via certified mail to his LSBA-registered primary/preferred address. On February 6, 2020, delivery of the same was accepted on Respondent's behalf. Respondent's written answer to the Brown Complaint was due on February 21, 2020. Respondent failed to provide a written answer to the same by that deadline.

On February 26 and June 4, 2020, the ODC issued subpoenas to take Respondent's sworn statement. Both subpoenas requested that Respondent produce a copy of the client file for William Brown's criminal matter at his sworn statement. Respondent failed to produce a copy of that file at his sworn statement.

During his July 7, 2020 sworn statement, the ODC reiterated its request that Respondent provide, within two weeks, a written answer to the Brown Complaint and a copy of the client file for William Brown's criminal matter. Respondent therein promised to produce a copy of the William Brown client file by as early as the end of that day: "Currently as we speak someone is going through these storage units to look at the files. I, I hope to have them in your hands by the end of the day." Respondent thereafter failed to provide a written answer to the Brown Complaint or a copy of the William Brown client file. Without that information and documentation, the ODC could not complete its investigation of the Brown Complaint.

The ODC respectfully submits that there is clear and convincing evidence that, with regard to Count Three (ODC 38277), Respondent has violated Rule 8.1(b) and (c).

Count Four (ODC 38317)

On February 10, 2020, the ODC received a complaint from Drew Lagarde ("Mr. Lagarde") regarding Respondent. The complaint ("Lagarde Complaint") was opened for investigation as ODC 38317. The Lagarde Complaint states that Mr. Lagarde paid Respondent at least \$1,500.00 to represent him in a child custody matter beginning in February 2019. The Lagarde Complaint also states that, despite multiple assurances to the contrary, Respondent never filed any pleadings on Mr. Lagarde's behalf in the child custody matter. The Lagarde Complaint further states that Respondent failed to keep Mr. Lagarde reasonably informed about the status of that matter.

On February 14, 2020, the ODC sent a copy of the Lagarde Complaint and a request for a response to the same to Respondent via certified mail to his LSBA-registered primary/preferred address. On February 19, 2020, delivery of the same was accepted on Respondent's behalf. Respondent's written answer to the Lagarde Complaint was due on March 5, 2020. Respondent failed to provide a written answer to the same by that deadline.

On February 26 and June 4, 2020, the ODC issued subpoenas to take Respondent's sworn statement. Both subpoenas requested that Respondent produce a copy of the client file for Lagarde child custody matter at his sworn statement. Respondent failed to produce a copy of that file at his sworn statement.

During his July 7, 2020 sworn statement, the ODC reiterated its request that Respondent provide, within two weeks, a written answer to the Lagarde Complaint and a copy of the client file for the Lagarde child custody matter. Respondent promised to produce a copy of the Lagarde client file by as early as the end of that day. Respondent thereafter failed to provide a written answer to the Lagarde Complaint or a copy of the Lagarde client file.

During his sworn statement, Respondent testified that he had "dropped the ball on this one;" he had prepared, but never filed, a pleading to modify child custody ("the pleading wasn't filed when we wanted it filed ... that's my fault"); and no amount of the at least \$1,500.00 paid to Respondent had been refunded to Mr. Lagarde.

The ODC respectfully submits that there is clear and convincing evidence that, with regard to Count Four (ODC 38317), Respondent has violated Rules 1.1(a), 1.3, 1.4(a), 1.5(f)(5), and 8.1(b) and (c).

Count Five (ODC 38531)

On May 15, 2020, the ODC received a complaint from Cedric Scott ("Mr. Scott") regarding Respondent. The complaint ("Scott Complaint") was opened for investigation as ODC 38531. The Scott Complaint states that Respondent was paid \$7,000.00 to represent Mr. Scott in his pending criminal case. The Scott Complaint further states that Respondent failed to attend a hearing in that matter; Respondent failed to file any pleadings on Mr. Scott's behalf therein; and Mr. Scott requested a full refund of the amount paid to Respondent.

On May 27, 2020, the ODC sent a copy of the Scott Complaint and a request for a response to the same to Respondent via certified mail to his LSBA-registered primary/preferred address. On July 1, 2020, that correspondence was returned to the ODC for the following reason: "Return to Sender. Refused. Unable to Forward." Also on May 27, 2020, the ODC sent a second copy of the Scott Complaint and a request for a response to the same to Respondent via certified mail to his LSBA-registered secondary address. On June 2, 2020, delivery of the same was accepted on Respondent's behalf. Respondent's written answer to the Scott Complaint was due on June 17, 2020. Respondent failed to provide a written answer to the same by that deadline.

On June 4, 2020, the ODC issued its second subpoena to take Respondent's rescheduled sworn statement. That subpoena requested that Respondent produce a copy of the client file for Mr. Scott's criminal matter at his sworn statement. Respondent failed to produce a copy of that file at his sworn statement.

During his July 7, 2020 sworn statement, the ODC reiterated its request that Respondent provide, within two weeks, a written answer to the Scott Complaint and a copy of the client file for Mr. Scott's criminal matter. Respondent thereafter failed to do so. Without that information and documentation, the ODC could not complete its investigation of the Scott Complaint.

The ODC respectfully submits that there is clear and convincing evidence that, with regard to Count Five (ODC 38531), Respondent has violated Rule 8.1(b) and (c).

Count Six (ODC 38734)

On or about August 21, 2020, the ODC received a complaint from Judy Johnson ("Ms. Johnson") and Kevin Williams ("Mr. Williams") regarding Respondent. The complaint ("Williams Complaint") was opened for investigation as ODC 38734. The Williams Complaint states, in pertinent part, that Ms. Johnson paid a total of \$800.00 as part of a \$3,000.00 fixed fee for Respondent to represent her son (Mr. Williams) in his pending criminal case; per the attached representation agreement, Respondent's representation of Mr. Williams "include[d] handling plea negotiations," as well as "all aspects up to plea and sentencing;" Respondent failed to take any action on Mr. Williams's behalf in that case; Respondent falsely represented to Ms. Johnson that he had enrolled in Mr. Williams's case on "oral motion," when in fact he never enrolled therein; Respondent held himself out as an attorney authorized to practice law in Louisiana despite being ineligible during part of the period of representation; and, despite being requested, Respondent had failed to refund any portion of the \$800.00 paid for that representation.

On August 26, 2020, the ODC sent a copy of the Williams Complaint and a request for a response to the same to Respondent via certified mail to his LSBA primary/preferred address. That correspondence was not delivered to Respondent. On September 14, 2020, subsequent ODC correspondence sent to Respondent at that same address was returned to the ODC for the following reasons: "Return to Sender Attempted- Not Known Unable to Forward," and "Return to sender No longer works here."

On August 26, 2020, the ODC also sent a copy of the Williams Complaint and a request for a response to the same to Respondent via certified mail to his then LSBA-registered secondary address at 706 Canal Boulevard, Thibodaux, Louisiana 70301. On August 28, 2019, delivery of the same was accepted on Respondent's behalf. Respondent's written answer to the Williams Complaint was due on September 12, 2020. Respondent failed to provide a written answer to the same by that deadline.

The documents provided with the Williams Complaint confirm that, on June 6 and July 10, 2020, Ms. Johnson made two installment payments each of \$400.00 towards the fixed fee for Respondent's representation of her son. Despite being requested, no amount of the \$800.00 total paid has been refunded to Ms. Johnson.

During the period of representation, Respondent failed to provide competent representation of Mr. Williams; act with reasonable diligence and promptness in representing Mr. Williams; and reasonably communicate with Mr. Williams regarding the status of his case. Respondent further failed to file any pleadings for, or otherwise make any appearances on behalf of, Mr. Williams in his case. As a result, Ms. Johnson was forced to retain new counsel to represent her son in that matter.

On July 10, 2020, Respondent represented in a text message to Ms. Johnson that he had "enrolled on oral motion over a month ago" in Mr. Williams's case.

However, the docket report and minute entries for Mr. Williams's case indicate that Respondent never enrolled as Mr. Williams's counsel therein.

On March 16, 2020, the LSBA previously sent Respondent a "20 19 MCLE Noncompliance Notice" letter to his LSBA-registered primary/preferred address to notify Respondent that he was not in compliance with the MCLE requirement for the 2019 reporting year. That letter provided, in pertinent part, that Respondent had until May 15, 2020 to complete that requirement and to pay a \$250.00 penalty owed. Respondent failed to comply or otherwise pay the penalty by that deadline. On June 1, 2020, the LSBA sent Respondent another letter to his LSBA-registered primary/preferred address to notify Respondent that, if he did not meet his MCLE compliance requirement and pay the penalty owed before an extended June 30, 2020 deadline, he would become ineligible to practice law in Louisiana. Respondent failed to comply by that extended deadline. On June 1, 2020, the Court sent Respondent a Notice to his LSBA-registered primary/preferred address which certified that Respondent was ineligible to practice law in Louisiana, effective on July 1, 2020, unless certain requirements were satisfied before that date. Respondent failed to satisfy those requirements. As a result, Respondent became ineligible to practice law in Louisiana, effective on July 1, 2020.

In July 2020, during that period of ineligibility, Respondent sent multiple text messages to Ms. Johnson which held himself out as an attorney authorized to practice law in Louisiana.

The ODC respectfully submits that there is clear and convincing evidence that, with regard to Count Six (ODC 38734), Respondent has violated Rules 1.1(a), (b) and (c), 1.3, 1.4(a), 1.5(f)(5), 5.5(a) and (e)(3), 8.1(b) and (c), and 8.4(a) and (c).

Count Seven (ODC 39042)

On February 11, 2021, the ODC received a complaint from Tammy P. Guillot ("Ms. Guillot") regarding Respondent. The complaint ("Guillot Complaint") was opened for investigation as ODC 39042.

On February 19, 2021, the ODC sent a cover letter and the Guillot Complaint to Respondent via certified mail to his LSBA primary/preferred bar registration address. On February 22, 2021, delivery of the same was accepted on Respondent's behalf. Respondent's response to the Guillot Complaint was due within fifteen (15) days from receipt of the same. Respondent failed to provide any response to the Guillot Complaint by that deadline.

On February 19, 2021, the ODC also sent a cover letter and the Guillot Complaint to Respondent via certified mail to his now LSBA secondary bar registration address of 1 Austin Drive, Houma, Louisiana 70360. Delivery of the same was not accepted at that address.

On May 21, 2021, the ODC sent an email to Respondent at his LSBA-registered public/private email address. The email attached an additional ODC letter and the Guillot Complaint, and requested that Respondent provide a response to the same and a copy of Ms. Guillot's client file by June 4, 2021. Respondent failed to provide the ODC with any response to the Guillot Complaint or a copy of the client file by that extended deadline.

In November 2019, Ms. Guillot retained Respondent to obtain grandparent visitation rights with regard to her grandson. Ms. Guillot paid Respondent a total of \$800.00 as a flat fee for his legal services to be rendered.

Respondent failed to provide any competent representation of Ms. Guillot; act with reasonable diligence and promptness in handling Ms. Guillot's legal matter; reasonably communicate with Ms. Guillot regarding her matter; and return any portion of the unearned fee paid to him by Ms. Guillot.

During their November 2019 meeting, Respondent told Ms. Guillot that he would file a pleading in court to request the relief sought by her. Respondent never did so. In June 2020, Respondent again met with Ms. Guillot to collect the final \$150.00 installment payment for the flat fee charged. During their June 2020 meeting, 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. Ms. Guillot states that Respondent did not thereafter speak to her again.

Respondent failed to reply to Ms. Guillot's numerous telephone calls and text messages requesting a status update on her matter.

In or around July 2020, Ms. Guillot called the Lafourche Parish Clerk of Court's Office to check on the status of her matter. Ms. Guillot was advised that the Clerk's Office had no record of Respondent filing anything on her behalf.

In November 2020, Respondent's mother (Jerri G. Smitko) advised Ms. Guillot that Respondent had checked himself into a rehabilitation facility earlier that month.

Respondent never did anything to advance Ms. Guillot's pursuit of grandparent visitation rights.

On May 5, 2021, former ODC Staff Investigator Christopher N. Gwynn ("Mr. Gwynn") contacted the Lafourche Parish Clerk of Court's Office. The Clerk's Office confirmed that it had no record of any filings by Respondent on behalf of Ms. Guillot. On that same date, Mr. Gwynn also contacted Thibodaux City Court. That court confirmed it also had no record of any filings by Respondent on behalf of Ms. Guillot. On May 11, 2021, Mr. Gwynn spoke to the Assistant District Attorney ("ADA") in charge of juvenile cases in the 23rd Judicial District Court, Parish of Assumption. The ADA advised that both his office and the Assumption Parish Clerk of Court's Office had no record of any filings by Respondent on behalf of Ms. Guillot.

The ODC respectfully submits that there is clear and convincing evidence that, with regard to Count Seven (ODC 39042), Respondent has violated Rules 1.1(a), 1.3, 1.4(a), 1.5(f)(5), 8.1(c), and 8.4(c).

EVIDENCE

The Committee admitted into evidence the exhibits introduced by ODC, which are Exhibits ODC 1-18. The Committee also admitted into evidence the exhibits introduced by Respondent, which are Exhibits R 1 & 2. The Committee also held the record open for fourteen days for

Respondent to submit proof of restitution and an affidavit from his mother. The Committee held the record open for thirty days for Respondent to submit a report from JLAP. Respondent filed these exhibits on May 17, 2023.

FINDINGS OF FACT

A hearing in mitigation was held on March 17, 2023. At that hearing, Mr. Smitko testified that he had a substance abuse addiction since 2017 and personal problems that contributed to his substance abuse. Mr. Smitko worked in the family law firm that mainly dealt with criminal defense, among other matters. Mr. Smitko's substance abuse addiction negatively affected his ability to adequately do his job, as well as the strained relationships with his family. Mr. Smitko maintains that he has maintained his sobriety since September 13, 2020 and he is actively involved in therapy. Mr. Smitko admitted to feeling shame and guilt towards his failure to represent his clients adequately. In addition, he expressed that his actions had breached the trust of the public and his community. He effectively walked away from his practice. Mr. Smitko expressed his desire to return to the practice of law, once he could become eligible again to practice. The committee felt that Mr. Smitko's testimony was genuine and truthful.

Mr. Smitko's fiancée, Kristen Caldwell, also testified that she had seen a change in him as well. She testified that he is always home and helped out around the house, which to her, indicated a change from previous behavior. Ms. Caldwell also indicated that she saw no indication of current drug use from Mr. Smitko. She also noted that they were involved in therapy. Ms. Caldwell's testimony also appeared truthful.

It appears that Mr. Smitko has been struggling with a substance abuse addiction, which by his own testimony, began around 2017. This has contributed to his inability to adequately provide some of his clients with representation that he is obligated to provide.

RULES VIOLATED

The deemed admitted facts in this case involve violations of Rules 1.1(a), (b) and (c), 1.3, 1.4(a), 1.5(f), 5.5(a) and (e)(3), 8.1(b) and (c), and 8.4(a) and (c). Since the violation of these rules is not in dispute, the factual basis for the violations are the statements and evidence presented by the complainants, Mr. Smitko's former clients, along with the factual allegations in the formal charges.

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 clients, the profession, and the legal system. He acted knowingly and intentionally. Respondent's misconduct caused serious actual harm to several clients.

The *ABA Standards for Imposing Lawyer Sanctions* suggest that disbarment is the baseline sanction for Respondent's misconduct. Standard 4.41 states: "Disbarment is generally appropriate when: (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client." Here, Respondent's pattern of neglect caused serious harm to several clients.

The Respondent bears the burden of proof to establish any mitigating factors. Mr. Smitko argues that a mitigating factor in his misconduct was his substance abuse and lack of prior disciplinary record. The committee does not believe that Mr. Smitko proved that substance abuse was a mitigating factor in his misconduct. The ABA standards for mitigation due to mental disability or chemical dependency have not been met. They are as follows:

1. There is medical evidence that the respondent is affected by a chemical dependency or mental disability-this was proven;
2. The chemical dependency or mental disability caused the misconduct-this was proven;
3. The respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation-this was not proven as shown in the post hearing submission; and
4. The recovery arrested the misconduct and recurrence of that misconduct is unlikely-this was not proven.

As to factor (1), Mr. Smitko has provided a JLAP agreement, which included an evaluation with a diagnosis of substance abuse addiction. As to factor (2), Mr. Smitko testified that he often choose to take cases that involved minimal preparation, such as criminal cases, because he had a hard time staying organized while he was under the influence of substances. As to factor (3), Mr. Smitko testified that his sobriety date was September 13, 2020 and he entered into a JLAP agreement during that period. However, he was not consistent in complying with the terms of that agreement, including testing positive on drug screens. So Mr. Smitko's actual period of sobriety is not certain. As to factor (4), Mr. Smitko has agreed to a new JLAP agreement and the assessment for that agreement was just recently completed. Therefore, Mr. Smitko has not had an opportunity to show that he will comply with the new recommendations. While the committee does agree that Mr.

Smitko had a substance abuse addiction during the period of time his misconduct occurred, he has not proven each factor as detailed in the *In re Stoller* decision. 2004-2758 (La. 5/24/05), 902 So.2d 981.

The aggravating factors in this case include Mr. Smitko's pattern of misconduct, multiple offenses in a short period of time, his bad faith obstruction of the disciplinary proceeding by failing to comply with the rules or orders of the disciplinary agency when he failed to answer the ODC, and the vulnerability of the victims. The baseline sanction for knowing and intentional violations of the referenced rules is disbarment. However, the Committee believes that the mitigating factors include that Mr. Smitko is remorseful, was inexperienced in the practice of law, and had personal problems, which effected his personal and professional decision-making. Because of these mitigating factors, the Committee recommends a sanction of less than disbarment.

In a case similar to this, *In re: Williams*, 2006-2578 (La. 2/2/07), 947 So.2d 710, 713-714, Mr. Williams was disbarred for neglecting six legal matters, failing to communicate with seven clients, failing to protect one client's interest upon termination of representation, and failing to cooperate with the ODC in four investigations. 06-2578 (La. 2/2/07), 947 So.2d 710. He also allowed one client's claim to prescribe and did not inform her that she might have a malpractice claim against him for failure to file suit on time. Three aggravating factors, one mitigating factor and the absence of a prior disciplinary history was established. In disbaring Mr. Williams, the Court noted that respondent's "chronic neglect of legal matters entrusted to him as well as his lack of regard for the welfare of his clients reveals he is a danger to the public." 947 So.2d at 714. Here, unlike *Williams*, the Committee in this case has found multiple mitigating factors.

Similarly, in *In re: Voelkel*, 2021-0575 (La. 10/12/21), 325 So.3d 1056, 1061, the Court disbarred Mr. Voelkel for extensive misconduct (seven client matters plus additional other

violations). There several aggravating factors present and no mitigating factors. Here, as discussed above, Respondent has presented convincing evidence of multiple mitigating factors.

CONCLUSION

In conclusion, the committee recommends the sanction of a 3-year suspension, restitution with interest to his former clients, and strict compliance with the current JLAP agreement.⁵ In addition, Mr. Smitko should be ordered to pay all costs and expenses associated with this proceeding.

This opinion is unanimous and has been reviewed by each committee member, who fully concur and who have authorized Kimberly Avery, to sign on their behalf.⁶

Baton Rouge, Louisiana, this 7th day of August, 2023.

**Louisiana Attorney Disciplinary Board
Hearing Committee # 34**

**Kimberly D. Avery, Committee Chair
Henry G. Terhoeve, Lawyer Member
R. Thomas Brown, Public Member**

BY: 
**Kimberly D. Avery, Committee Chair
For the Committee**

⁵ The Committee understands that the Court will not consider conditions of reinstatement at the time of suspension if the suspension will require a petition and application for reinstatement pursuant to Rule XIX, §24. *In re Hansen, 2004-1988 (La. 11/19/04); 888 So.2d 172*. Nonetheless, the Committee feels it is very important for Respondent to continue compliance with his current JLAP contract.

⁶ While the Hearing Committee is not a court of law, it nevertheless is comprised of members of the bar and the public who volunteer their time to this important and necessary process. In so doing the Hearing Committee members are very mindful of the fact that they are asked to make decisions that can have significant consequences on the livelihood of an attorney which can affect not only the attorney, but also his family (and in some cases his clients). This is a heavy burden. The expectation of the Hearing Committee in this process is that those who come before the Committee are prepared and have fully complied with the very minimal procedures and rules that govern the process. Counsel for Respondent in this matter operated in a way that suggests she may not fully respect the procedures and deadlines by which all parties must abide in order to uphold the standards of this administrative process. The thoughts expressed in this footnote did not bear on the recommendation in this matter.

APPENDIX

Rule 1.1. Competence

- (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (b) A lawyer is required to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court rule.
- (c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

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

...

- (f) Payment of fees in advance of services shall be subject to the following rules: ... (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 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

...

(e) ... (3) For purposes of this Rule, the practice of law shall include the following activities: (i) holding oneself out as an attorney or lawyer authorized to practice law; (ii) rendering legal consultation or advice to a client; (iii) appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law; (iv) appearing as a representative of the client at a deposition or other discovery matter; (v) negotiating or transacting any matter for or on behalf of a client with third parties; (vi) otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.

...

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:

...

(b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6; or

(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;

...

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

...