

NO. 2019-B-1918

IN RE: HILLIARD CHARLES FAZANDE, III

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Hilliard Charles Fazande, III, an attorney licensed to practice law in Louisiana but currently on interim suspension pursuant to a joint petition of the parties filed in April 2018. *In re: Fazande*, 18-0683 (La. 5/9/18), 241 So. 3d 1002.

PRIOR DISCIPLINARY HISTORY

Before we address the current charges, we find it helpful to review respondent’s prior disciplinary history. Respondent was admitted to the practice of law in Louisiana in 2000.

In 2009, we suspended respondent from the practice of law for six months, with all but thirty days deferred, followed by one year of supervised probation with conditions, for taking on the representation of a client without the client’s knowledge or consent and for practicing law while ineligible to do so. *In re: Fazande*, 09-0938 (La. 10/20/09), 23 So. 3d 247.

In 2013, we considered a joint petition for consent discipline wherein respondent and the ODC proposed that he be suspended from the practice of law for six months, fully deferred, subject to two years of probation with conditions, for his mishandling of his client trust account by allowing it to become overdrawn. We

accepted the petition and imposed the parties' proposed discipline upon respondent on May 17, 2013. *In re: Fazande*, 13-0847 (La. 5/17/13), 117 So. 3d 93.

Against this backdrop, we now turn to a consideration of the misconduct at issue in the instant proceeding.

FORMAL CHARGES

16-DB-072

The Brown Matter

Gladys Fuentes Brown hired respondent to prepare and file a petition for preliminary injunction. On February 19, 2015, respondent received \$500 to cover the necessary filing fees. On February 21, 2015, respondent received \$2,000 in attorney's fees. Respondent informed Ms. Brown that he would promptly file the petition. However, after unsuccessfully trying to contact respondent on two occasions thereafter, Ms. Brown terminated his services on February 27, 2015. At that time, she also requested a full refund. Respondent failed to provide the refund.

In May 2015, Ms. Brown filed a disciplinary complaint against respondent. Ms. Brown also filed a lawsuit against respondent and obtained a \$1,200 default judgment against him on November 19, 2015. Although respondent submitted an initial response to Ms. Brown's disciplinary complaint, he failed to respond to the ODC's requests for additional information, necessitating the issuance of a subpoena to obtain his sworn statement. During his April 7, 2016 sworn statement, respondent disclosed that he had not complied with the default judgment to pay Ms. Brown \$1,200. He also indicated that he had not placed Ms. Brown's deposit for filing fees into his client trust account. The ODC requested that respondent provide a copy of the default judgment, but he failed to do so.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.5(a) (charging an unreasonable fee),

1.5(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), 1.5(f)(4) (failure to place advanced deposit for costs and expenses in a client trust account), 1.15(a)(c) (safekeeping property of clients or third parties), 8.1(c) (failure to cooperate with the ODC in its investigation), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice).

18-DB-055

Count I – The Menendez Matter

In March 2016, Shamira Menendez hired respondent to represent her in a criminal matter. Ms. Menendez's father paid respondent in full for the representation. Ms. Menendez alleged respondent provided ineffective assistance of counsel and stated that respondent failed to return telephone phone calls. Ms. Menendez also stated that respondent failed to provide copies of documents requested in connection with the underlying criminal matter.

In November 2016, Ms. Menendez filed a disciplinary complaint against respondent. The ODC mailed a copy of the complaint to respondent on January 18, 2017. Respondent failed to respond to this initial notice as well as to a second notice mailed to him on February 15, 2017. Accordingly, the ODC issued a subpoena to obtain respondent's sworn statement on September 13, 2017, but he failed to appear pursuant to the subpoena.¹

¹ In fact, the record indicates that respondent did appear for the sworn statement but was fifteen minutes late. During the sworn statement, respondent testified that he attempted to provide Ms. Brown with a copy of her file, but he could not locate her because she had been transferred to a different prison. He indicated he talked to Ms. Brown's father about her whereabouts, and her father was supposed to get back to him with an address. Finally, he indicated that he had not yet contacted the Department of Corrections to ascertain her location.

The ODC alleged 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), 8.1(c), and 8.4(a).

Count II – The Douse Matter

In November 2016, Frank Douse hired respondent to represent him in divorce proceedings, paying him \$750. Respondent failed to complete any of the work but only provided Mr. Douse with a \$250 refund.

In August 2017, Mr. Douse filed a disciplinary complaint against respondent. The ODC mailed a copy of the complaint to respondent on August 17, 2017. The ODC also personally served respondent with a copy of the complaint. Nevertheless, he failed to respond.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3, 1.4, 1.5 (fee arrangements), 8.1(c), and 8.4(a).

Count III – The Practicing Law While Ineligible Matter

On October 4, 2017, respondent was ineligible to practice law for failing to comply with mandatory continuing legal education requirements, failing to pay bar dues and the disciplinary assessment, and failing to submit an annual trust account registration and disclosure statement. Nevertheless, he appeared that day as counsel of record in several cases in Orleans Parish Criminal District Court. A supervisor in the Orleans Parish District Attorney's Office immediately notified the ODC of respondent's conduct.

The ODC mailed a copy of the disciplinary complaint to respondent on October 16, 2017. However, he failed to respond.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.1 (failure to comply with professional obligations), 5.5 (engaging in the unauthorized practice of law), 8.1(c), and 8.4(a).

Count IV – The Burkette Matter

In October 2016, Joseph and Cherryn Burkette hired respondent to handle the interdiction of Mr. Burkette's mother, paying him \$800. Respondent failed to complete the work and failed to communicate with the Burkettes. Respondent also failed to respond to their request for an accounting and refund.

In June 2017, the Burkettes filed a disciplinary complaint against respondent. Initially, the matter was referred to the Louisiana State Bar Association's Relational Referral Program. During a September 21, 2017 conference call, respondent agreed to refund the entire fee. However, he failed to do so. The ODC then mailed a copy of the initial disciplinary complaint to respondent on January 24, 2018 and on February 16, 2018. Nevertheless, he failed to respond.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3, 1.4, 1.5, 8.1(c), and 8.4(a).

Count V – Bank Theft Matter

On October 26, 2015, respondent opened a bank account at a Whitney Bank branch in New Orleans. On October 30, 2015, respondent deposited into the account a \$387,000 cashier's check made payable to "Attorney Hilliard C. Fazande, III." The next day, he went to a Whitney Bank branch in Belle Chasse and presented the teller with a temporary check drawn on the account in the amount of \$5,000 even though he knew he did not have sufficient funds in the account due to a bank hold on the \$387,000 check. Nevertheless, he proceeded to cash the \$5,000 check. On November 4, 2015, a Whitney Bank employee informed respondent that the

\$387,000 check was counterfeit and that he needed to return the \$5,000. Although respondent indicated he would return the \$5,000, he failed to do so.

On March 22, 2017, a bill of information was filed against respondent in federal court on charges of bank theft in violation of 18 U.S.C. § 2113(b). On November 22, 2017, respondent was arraigned and pleaded guilty to the charges.

The ODC did not learn of this matter until March 2018. On March 29, 2018, the ODC mailed notice of the disciplinary complaint to respondent. However, he failed to accept service of the certified mailing, and the correspondence was returned to the ODC. Respondent never submitted a response to the allegations concerning this matter.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 8.1(c), 8.4(a), 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and 8.4(c).

Count VI – The Legendre Matter

In March 2018, JoAnn Legendre hired respondent to represent her in a criminal matter. Ms. Legendre paid respondent \$500 to appear in court on her behalf on March 23, 2018. However, respondent failed to appear or refund the unearned fee.

In April 2018, Ms. Legendre filed a disciplinary complaint against respondent. The ODC mailed a copy of the complaint to respondent on April 16, 2018. He failed to respond to the complaint.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3, 1.4, 1.5, 8.1(c), and 8.4(a).

DISCIPLINARY PROCEEDINGS

In September 2016, the ODC filed formal charges against respondent in 16-DB-072, as set forth above. Respondent failed to file an answer. 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). Respondent subsequently filed a motion to recall the deemed admitted order and requested a hearing in mitigation. The hearing committee conducted the hearing on June 23, 2017. Respondent appeared at the hearing and represented himself.

In August 2018, the ODC filed formal charges against respondent in 18-DB-055, as set forth above. Again, respondent failed to file an answer, and the factual allegations contained therein were deemed admitted and proven by clear and convincing evidence. In light of respondent's failure to answer the formal charges, the hearing committee did not conduct a formal hearing. The parties, however, were given an opportunity to file with the committee written arguments and documentary evidence on the issue of sanctions. Respondent filed nothing for the committee's consideration.

After being considered by separate hearing committees, the matters were consolidated by order of the disciplinary board. On December 6, 2019, the board filed with this court its report and recommendation encompassing both sets of formal charges.

Hearing Committee Reports

16-DB-072

After considering the evidence and testimony presented at the hearing, the hearing committee made the following factual findings:

1. Respondent did not place into his trust account the \$500 he received as an advance deposit for court costs;

2. Respondent did not place into his trust account the additional \$2,000 he received as an advance deposit to prepare the petition;
3. Respondent failed to prepare or file any petition on behalf of his client. This resulted in a fee dispute with his client, who ultimately obtained a civil judgment fixing \$1,200 as the unearned fee respondent needed to refund. Respondent has never paid or satisfied this judgment;
4. Respondent admitted that he was previously disciplined for mishandling his trust account and ordered to submit trust account information, attend Trust Accounting School, and have his trust account audited.

Based on these facts, the committee determined respondent violated Rules 1.5, 8.4(c), and 8.4(d) of the Rules of Professional Conduct. In aggravation, the committee found a prior disciplinary record and indifference to making restitution. The committee did not discuss mitigating factors.

Under these circumstances, a majority of the committee recommended respondent be suspended from the practice of law for two years. One committee member dissented and would recommend disbarment.

The ODC filed an objection to the leniency of the sanction recommended by the majority of the hearing committee.

18-DB-055

After considering the ODC's deemed admitted submission, the hearing committee acknowledged that the factual allegations set forth in the formal charges were deemed admitted upon respondent's failure to file an answer, specifically noting that respondent failed to attend a sworn statement in the Menendez matter.²

² This finding is in error. See note 1, *supra*.

Based on those facts, the committee determined respondent violated the Rules of Professional Conduct as charged.

The committee further determined respondent intentionally violated duties owed to the public, the legal system, and the legal profession, causing actual harm to his clients. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the baseline sanction is disbarment.

According to the committee, the aggravating factors present are a dishonest or selfish motive, 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, refusal to acknowledge the wrongful nature of the conduct, substantial experience in the practice of law (admitted 2000), and illegal conduct. The committee found no factors in mitigation.

After further considering this court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be disbarred. The committee further recommended respondent pay restitution, return unearned fees, and return client files.

Neither respondent nor the ODC filed an objection to the hearing committee's report.

Disciplinary Board Recommendation

16-DB-072 & 18-DB-055

After reviewing these consolidated matters, the disciplinary board found that the hearing committee's factual findings in 16-DB-072 are supported by the record and adopted same. The board then found that the deemed admitted factual allegations in 18-DB-055 are supported by the evidence submitted. Based on these facts, the board determined that, with respect to 16-DB-072, respondent violated Rules 1.5(a), 1.5(f)(4), 8.4(a), 8.4(c), and 8.4(d) of the Rules of Professional Conduct

but not Rules 1.5(b), 1.15(a), 1.15(c), and 8.1(c). With respect to 18-DB-055, the board found that respondent violated the Rules of Professional Conduct as charged with the exception of Rule 8.1(c) in the bank theft matter because respondent cooperated with the ODC in filing a joint petition for interim suspension based on his conviction in the matter.

The board determined respondent knowingly and intentionally violated duties owed to his clients, the public, the legal system, and the legal profession. His conduct caused actual harm to several clients as well as to the public through his theft of \$5,000 from Whitney Bank. His criminal conduct and conviction also caused potential harm to the legal profession, and his failure to cooperate with the ODC or participate in these proceedings caused actual harm to the legal profession. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined the baseline sanction is disbarment.

In aggravation, the board found the following: a prior disciplinary record, a dishonest or selfish motive, 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, refusal to acknowledge the wrongful nature of the conduct (with the exception of the criminal conduct in Count V), vulnerability of the victims, substantial experience in the practice of law, indifference to making restitution, and illegal conduct. The board further determined the record establishes no mitigating factors.

After further considering this court's prior jurisprudence addressing similar misconduct, the board recommended respondent be disbarred, retroactive to the date of his interim suspension. The board also recommended respondent be ordered to refund all unearned fees, return Ms. Menendez's file, and make restitution to Whitney Bank.

Neither respondent nor the ODC filed an objection to the disciplinary 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 record of these consolidated matters, one of which has been deemed admitted, supports a finding that respondent neglected legal matters, failed to communicate with clients, failed to refund unearned fees and unused costs, practiced law while ineligible to do so, pleaded guilty to federal bank theft charges, and failed to cooperate with the ODC in its investigations. We agree with the rule violations found by the disciplinary board, with two exceptions relating to the Brown matter and the Menendez matter.

In the Brown matter, we find there is clear and convincing evidence that respondent violated Rule 1.15(c) by failing to deposit into his client trust account the sum of \$500 paid to him as an advance deposit for court costs and the additional \$2,000 he received as an advance deposit against legal fees. Furthermore, we find that although respondent provided the ODC with a sworn statement in the Brown matter, he failed to cooperate with the ODC both before and after the statement occurred; therefore, we find that he violated Rule 8.1(c).

In the Menendez matter, we agree that respondent violated Rule 8.1(c) because he failed to respond to two notices of the disciplinary complaint; however, we note that the record indicates respondent did attend the sworn statement and provide testimony relevant to this matter. Therefore, we find the deemed admitted factual allegation that respondent failed to appear for his sworn statement on September 13, 2017 is not supported by the record and, thus, is manifestly erroneous.

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 and intentionally violated duties owed to his clients, the public, the legal system, and the legal profession, causing actual and potential harm. Aggravating factors include a prior disciplinary record, a dishonest or selfish motive, 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, vulnerability of the victims, substantial experience in the practice of law, indifference to making restitution, and illegal conduct. No mitigating factors are evident from the record.

Although all of respondent's misconduct is serious in nature, his most egregious conduct involves his intentional theft of \$5,000 from Whitney Bank, for which he pleaded guilty in federal court. Standard 5.11(a) of the ABA's *Standards for Imposing Lawyer Sanctions* establishes disbarment as the baseline sanction when:

a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses.

Therefore, the baseline sanction in this matter is disbarment. The case of *In re: Fahrenholtz*, 17-0261 (La. 4/7/17), 215 So. 3d 204, also supports disbarment as the appropriate sanction in this matter. In *Fahrenholtz*, an attorney, who was previously disciplined for egregiously failing to cooperate with the ODC in two investigations, was convicted of the crime of illegal possession of stolen things and subsequently failed to cooperate with the ODC in its investigation. Under these circumstances, we disbarred the attorney. As in *Fahrenholtz*, disbarment is clearly warranted here.

Accordingly, we will adopt the board's recommendation and disbar respondent. We will also order respondent to refund all unearned fees and unused costs, return Ms. Menendez's file, and make restitution to Whitney Bank.

DECREE

Upon review of the findings and recommendations of the hearing committees and disciplinary board, and considering the record, it is ordered that Hilliard Charles

Fazande, III, Louisiana Bar Roll number 26638, be and he hereby is disbarred, retroactive to May 9, 2018, the date of his interim suspension. His name shall be stricken from the roll of attorneys and his license to practice law in the State of Louisiana shall be revoked. It is further ordered that respondent shall refund all unearned fees and unused costs, return Shamira Menendez's file, and make restitution to Whitney Bank. 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.