

The Supreme Court of the State of Louisiana

IN RE: MATTHEW JOHN UNGARINO

No. 2021-B-01455

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

January 19, 2022

Discipline imposed. See per curiam.

WJC
JLW
SJC
JTG
JBM
PDG

Hughes, J., would accept the recommendation of the Disciplinary Board.

Supreme Court of Louisiana
January 19, 2022


Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 2021-B-1455

IN RE: MATTHEW JOHN UNGARINO

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Matthew John Ungarino, an attorney licensed to practice law in Louisiana.

BACKGROUND INFORMATION

By way of background, respondent and his law firm, Ungarino & Eckert, LLC (“U&E”), represented one of the defendants in a Louisiana case that U&E removed to the United States District Court for the Western District of Louisiana (hereinafter referred to as “*Hollier*” or “the *Hollier* case”). *Hollier* was assigned to United States District Judge Tucker Melancon.

On February 3, 2009, Judge Melancon ordered the *Hollier* case remanded to state court. Judge Melancon then commented that he was not surprised by U&E’s tactics in *Hollier* because the *Hollier* case “is but one in a long line of fraudulent and improper removals that Ungarino & Eckert, and more specifically Matthew Ungarino, have filed in this and other districts.” Citing more than 20 separate cases involving improper removals by respondent and U&E, Judge Melancon declared, “[e]nough is enough.” Judge Melancon then found that, “[a]s warnings and lesser sanctions in the past have failed to deter the firm of Ungarino & Eckert from its vexatious practices, the Court is left to consider whether a more major sanction is necessary to achieve the desired result.” Accordingly, he granted the *Hollier*

plaintiffs' motion for attorneys' fees and costs under 28 U.S.C. § 1447(c) and set a rule to show cause why the court: (1) should not impose sanctions of at least \$25,000 against U&E, and (2) should not recommend to the District Judges of the Western District of Louisiana that U&E be barred from practicing in the Western District.

Judge Melancon held the show cause hearing on May 1, 2009. During the hearing, respondent apologized to Judge Melancon for the improper removal of the Hollier case and accepted the \$25,000 sanction. Respondent also informed Judge Melancon that U&E had retained Professors Dane Ciolino and Mary Algero to provide U&E's attorneys with additional education and training on legal ethics and removal procedures. Finally, respondent informed Judge Melancon that U&E had established "a professional responsibility committee of equity partners who coordinate in-house ethics and removal training, review the form and content of all notices of removal and opposition to remand, and otherwise serve as a ready resource for ethics and removal issues" (hereinafter referred to as "the U&E committee"). At the conclusion of the hearing, Judge Melancon found that respondent failed to conduct a reasonable inquiry into the facts supporting removal of the Hollier case to federal court. However, based upon respondent's assurances that he had brought his firm "up to snuff" by creating the U&E committee, Judge Melancon declined to bar U&E from practicing in the Western District of Louisiana.

On April 6, 2011, the disciplinary board admonished respondent for violating Rules 1.1(a) (failure to provide competent representation to a client), 3.1 (meritorious claims and contentions), 5.1 (failure to reasonably supervise the work of a subordinate lawyer), and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct with respect to his conduct in *Hollier*.

UNDERLYING FACTS

In 2016, Michelle Nogess filed a wrongful death and survival action in the Orleans Parish Civil District Court, naming several defendants. Through their counsel, the defendants answered the plaintiff's petition. Thereafter, the plaintiff added Velocity Consulting, Inc. ("Velocity") as a defendant by an amended state court petition, and Velocity was served on September 13, 2016. Velocity retained respondent and U&E to defend its interests.

On October 5, 2016, Velocity removed the plaintiff's action to the United States District Court for the Eastern District of Louisiana. The case was assigned to Judge Jay Zainey and Magistrate Judge Michael North. In its notice of removal, Velocity alleged complete diversity between the plaintiff and the defendants. The plaintiff then moved to remand, pointing out that Velocity failed to allege the citizenship of the individual members of Poydras Center, LLC ("Poydras"), one of its co-defendants, as required by Fifth Circuit precedent. *See Harvey v. Grey Wolf Drilling*, 542 F.3d 1077 (5th Cir. 2008). Velocity, in turn, filed a motion for leave to file an amended notice of removal, which correctly set forth the citizenship of the members of Poydras.

The plaintiff opposed Velocity's motion for leave to amend, and the magistrate judge set the matter for hearing on December 21, 2016. The magistrate judge also ordered respondent to personally attend the hearing because he had signed Velocity's pleadings. Respondent requested that he be excused from attending the hearing because he had "no personal knowledge of the citizenship of the co-defendants' clients," and his law partner, attorney David Bordelon, had solicited the information on the citizenship of the co-defendants from their counsel. The magistrate judge declined to excuse respondent, and he and Mr. Bordelon both attended the December 21, 2016 hearing.

Based on the history of faulty removals by respondent and U&E as set forth by Judge Melancon in the Hollier case, as well as several inconsistent statements by respondent at the December 21, 2016 hearing (dealing with the issue of respondent's efforts to obtain jurisdictional facts related to members of Poydras, which are explained in more detail below), the magistrate judge became concerned that respondent had made misrepresentations to the court. Therefore, at the end of the hearing, the magistrate judge set another hearing, ordering Velocity and its counsel to show cause why they should not be sanctioned under 28 U.S.C. § 1447(c), 28 U.S.C. § 1927, and/or Rule 11 of the Federal Rules of Civil Procedure for filing the deficient notice of removal. The magistrate judge also ordered U&E and counsel for Poydras to produce for *in camera* inspection certain emails that were exchanged between them in connection with the drafting of the notice of removal, "including all efforts to ascertain jurisdictional facts pertaining to the members of each LLC." Upon being told in open court that the rule to show cause would be set, respondent repeatedly stated that he believed it was "unfair" for the court to issue the rule before reviewing the emails. The magistrate judge disagreed.

Later in the day on December 21, 2016, before the rule to show cause was entered into the record by the clerk's office, respondent telephoned the chambers of Judge Zainey and spoke with Judge Zainey's law clerk regarding the impending rule to show cause. The law clerk responded by sending an email to respondent, all counsel in the case, and the magistrate judge advising respondent of the proper procedure for objecting to the issuance of the rule to show cause, stating:

In response to your phone call today, I am informing you that the proper procedure of this court is for Judge North to first issue a ruling on the Rule to Show Cause on the Rule 11 motion. Then, should you disagree with Judge North's ruling, you may appeal to Judge Zainey. At this point in the process, however, it would be premature for Judge Zainey to intervene.

Shortly thereafter, respondent "replied all" to that email, stating:

I am requesting a status conference before a rule to show cause is issued. The emails with [codefendant's attorneys] indicate that we requested that [codefendant's] counsel on October 4 confirm the domicile of defendants. [Codefendant's] counsel signed the consent to remove subsequent to that email, and the removal was filed. This is unfair. The emails should be reviewed before a rule to [show] cause is issued.

Despite respondent's efforts to have Judge Zainey intervene, the magistrate judge held the show cause hearing on January 18, 2017. On January 27, 2017, the magistrate judge issued an Order and Reasons with respect to the show cause hearing, focusing on three issues.

Issue One – Whether respondent misrepresented material facts regarding the timing of U&E's investigation of the identities and citizenship of Poydras' members.

During the December 21, 2016 hearing, the magistrate judge verified that U&E still utilizes the U&E committee to review all notices of removal prior to filing. Respondent then identified himself, Mr. Bordelon, and two additional equity partners at U&E as the four members of the U&E committee, and he verified that the U&E committee reviewed Velocity's notice of removal before it was filed. When the magistrate judge asked respondent whether the U&E committee realized that the citizenship of Poydras' members was missing, respondent stated, "No. I had no knowledge as to any LLC or memberships – members that were missing." However, respondent also indicated that the members of the U&E committee knew Fifth Circuit precedent holds that an LLC's citizenship for diversity purposes is determined by the citizenship of all of its members. When the magistrate judge asked respondent why U&E removed the case without including this information for Poydras' members, respondent first stated that U&E asked for the information from Poydras' counsel "way in advance" but was not getting the information. Respondent then stated, "Well, frankly, Judge, we were unaware that the LLC membership was a problem."

Based on these conflicting statements, the magistrate judge set the show cause hearing and requested that U&E and Poydras' counsel submit all relevant emails for *in camera* inspection. The magistrate judge's inspection of the emails revealed that U&E did not request the citizenship information on Poydras' members until November 7, 2016, four days after the plaintiff filed her motion to remand.

Respondent, Mr. Bordelon, and U&E obtained counsel to represent them at the show cause hearing, and their counsel filed a brief in advance of the hearing. Twice, the brief indicated that all four members of the U&E committee knew of the Fifth Circuit precedent regarding LLC member citizenship, just as respondent had stated at the December 21, 2016 hearing. Nevertheless, during the show cause hearing U&E's counsel stated that Mr. Bordelon did not know the "specificity" required by the Fifth Circuit.

The brief also claimed that respondent did not state during the December 21, 2016 hearing that he had requested citizenship information of Poydras' members prior to filing the notice of removal. However, during the show cause hearing, U&E's counsel conceded that respondent had made the statement but only because he "misspoke and misunderstood the facts at the time..." At the end of the hearing, however, respondent refuted his counsel's explanation. Instead, respondent indicated it was not clear to him during the December 21, 2016 hearing that the magistrate judge wanted to know if U&E had asked Poydras' counsel about Poydras' member information before filing the notice of removal. Therefore, according to respondent, the magistrate judge had misunderstood what he had been trying to explain at the December 21, 2016 hearing. The magistrate judge specifically found that "that is not what happened [during the December 21, 2016 hearing]."

Given these circumstances, the magistrate judge determined respondent "knowingly misrepresented" the facts regarding the timing of U&E's investigation of the identities and citizenship of Poydras' members.

Issue Two – Whether respondent engaged in an *ex parte* communication with Judge Zainey’s chambers in an attempt to prevent or delay the issuance of the show cause order.

Based on the emails exchanged between Judge Zainey’s law clerk and respondent, the magistrate judge determined the *ex parte* communication was improper. More specifically, the magistrate judge found that the emails depicted an attempt by respondent to have Judge Zainey “intervene to prevent or delay the issuance” of the rule to show cause.

Issue Three – Whether respondent misrepresented the purpose and content of the *ex parte* communication with Judge Zainey’s chambers.

In the brief filed ahead of the show cause hearing, respondent’s counsel stated that respondent did not contact Judge Zainey’s chambers until after the magistrate judge had issued the rule to show cause. However, the magistrate judge found this not to be true based on the emails exchanged between Judge Zainey’s law clerk and respondent, elaborating that the reason respondent contacted Judge Zainey’s chambers was to try to prevent the magistrate judge from issuing the rule to show cause. During the show cause hearing, respondent conceded that the brief was incorrect about the timing of the *ex parte* communication.

The brief also stated that respondent did not discuss the issuance of the rule to show cause with Judge Zainey’s law clerk, which also contradicted the emails. During the hearing, when the magistrate judge asked respondent if he had discussed the issuance of the rule to show cause with the law clerk, respondent stated, “Judge, honestly I don’t remember.” Later, respondent told the magistrate judge that he did discuss the rule to show cause with the law clerk but could not remember if he talked to the law clerk about having Judge Zainey intervene to stop the issuance of the rule to show cause. The magistrate judge concluded that, “[t]o describe [respondent’s]

responses to this Court's rather direct questions as 'evasive' would be far too generous."

Given these circumstances, the magistrate judge found that respondent "compounded his ethical lapse" of engaging in an improper *ex parte* communication "by grossly mischaracterizing the contents of that conversation in brief and then by evading the truth when questioned directly about the matter at the show cause hearing." The magistrate judge further found that respondent's denial that the purpose of the *ex parte* communication was to try to get Judge Zainey to intervene in the matter "is not to be believed."

Based on these findings and reasons, the magistrate judge determined that U&E violated Rule 11 of the Federal Rules of Civil Procedure by failing to conduct a reasonable inquiry under the circumstances prior to removing the case to federal court, which the magistrate judge found to be "objectively unreasonable" in light of U&E's "lengthy history of improvident removals." U&E was ordered to pay a sanction of \$4,500 to the clerk of court, which it promptly paid. The magistrate judge further determined respondent's conduct in the matter established that he violated "one or more" of the following provisions of the Rules of Professional Conduct: Rules 3.3 (candor toward the tribunal), 3.4 (fairness to opposing parties and counsel), 3.5 (engaging in *ex parte* communications), and 8.4 (misconduct).

In his January 27, 2017 Order and Reasons, the magistrate judge also finally ruled on Velocity's motion for leave to file an amended notice of removal, which correctly detailed the citizenship of the members of Poydras. In granting Velocity leave to file the amended notice, the magistrate judge cautioned Velocity that no additional amendments would be allowed.¹

¹ On April 21, 2017, Judge Zainey denied the plaintiff's motion to remand. On June 13, 2018, Judge Zainey dismissed Velocity with prejudice from the litigation through summary judgment.

On January 30, 2017, the magistrate judge referred respondent to the Eastern District of Louisiana Lawyers' Disciplinary Enforcement Committee for further investigation, proceedings, and discipline, if warranted, concerning his knowing misstatements at the December 21, 2016 hearing, his improper *ex parte* communication with Judge Zainey's chambers, and his misstatements concerning the *ex parte* communication. In his complaint, the magistrate judge indicated that, for the reasons set forth in his January 27, 2017 Order and Reasons, he believed respondent had violated the following provisions of the Rules of Professional Conduct: Rules 3.3, 3.4, 3.5, 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).

On July 11, 2018, without setting forth any factual findings or determinations of rule violations, Chief Judge Nanette Jolivette Brown of the United States District Court for the Eastern District of Louisiana issued an order suspending respondent from the practice of law before the United States District Court in the Eastern District of Louisiana for one year, deferred in its entirety, and requiring respondent to take ten hours of ethics and professionalism training over the next two years. Previously on July 5, 2018, respondent had consented to this discipline.

DISCIPLINARY PROCEEDINGS

In February 2020, the ODC filed formal charges against respondent, alleging that his conduct as set forth above violated Rules 3.3, 3.4, 3.5, and 8.4 of the Rules of Professional Conduct. Respondent, through counsel, answered the formal charges, essentially denying any misconduct. Accordingly, the matter proceeded to a formal hearing on the merits.

Formal Hearing

Respondent was the only witness to testify at the hearing. In his testimony, respondent indicated the members of the U&E committee knew that the citizenship of the members of Poydras had to be considered; however, none of them knew the member information had to be listed in the notice of removal. He could not remember ever having an LLC party in any of the removals he filed before the Velocity case. He also stated that he did not understand how his answers at the December 21, 2016 hearing were misleading.

Regarding the *ex parte* communication, respondent denied contacting Judge Zainey's law clerk because he did not want the rule to show cause to be issued by the magistrate judge. Instead, he thought a status conference before the rule to show cause would help everyone understand the sequence of events and, perhaps, prevent the need for the rule to show cause. He could not understand why his communication with Judge Zainey's law clerk was a problem for the magistrate judge.

Finally, respondent claimed that, after the magistrate judge issued his Order and Reasons, the majority of U&E's clients fired the firm, causing the majority of U&E's attorneys to leave the firm. He claimed the fallout was devastating to his wife and children. However, respondent also indicated that he apologized numerous times to the magistrate judge and expressed his remorse.

Hearing Committee Report

The hearing committee issued a report which made no factual findings or determinations of rule violations, reasoning that such was unnecessary in light of the findings of the federal court.² The committee also declined to recommend

² In declining to make any findings, the committee stated it was "unnecessary ... to parrot the findings of the Federal Court." However, as discussed in the underlying facts section above, the Eastern District of Louisiana's disciplinary case against respondent does not detail any factual findings or determinations of rule violations.

“additional” sanctions for respondent’s conduct, but concluded that a fully deferred one-month suspension was appropriate “to the extent that such prior findings warrant any imposition of discipline” by this court.

The ODC filed an objection to the hearing committee’s report.

Disciplinary Board Recommendation

After review, the disciplinary board adopted the findings of fact detailed in the magistrate judge’s January 27, 2017 Order and Reasons, which facts the board determined are supported by the record and were proven by the ODC by clear and convincing evidence. Based on those facts, the board determined respondent violated the Rules of Professional Conduct as follows:

Rule 3.3 – The record shows that respondent made false statements to the magistrate judge during the December 21, 2016 hearing about why he did not properly include information identifying the members of Poydras and their citizenship in the original notice of removal. Respondent falsely attributed his failure to include this information to a lack of cooperation from Poydras’ counsel. However, the emails reviewed by the magistrate judge show that Poydras’ counsel was not asked for Poydras’ member/citizenship information until November 7, 2016, which was after the filing of the original notice of removal and the plaintiff’s motion to remand.

Then at the January 18, 2017 show cause hearing, respondent denied ever telling the magistrate judge at the December 21, 2016 hearing that he had asked Poydras’ counsel for the member/citizenship information before filing the notice of removal. Respondent claimed that his statements during the December 21, 2016 hearing were mistakes based upon his misunderstanding of the magistrate judge’s inquiry. However, both the magistrate judge and the board found respondent’s claim to lack credibility because the entire purpose of the December 21, 2016 hearing was

to discuss the information missing from the original notice of removal, and the only information that was missing was Poydras' member/citizenship information. The board also agreed with the magistrate judge that respondent knowingly attempted to mislead the magistrate judge during the December 21, 2016 hearing.

To summarize, the board found that the emails between respondent and Poydras' counsel, along with respondent's admissions during the January 18, 2017 show cause hearing, indicate he knowingly made false statements at the December 21, 2016 hearing, in violation of Rule 3.3.

Rule 3.4 – By contacting Judge Zainey's law clerk and seeking to have Judge Zainey intervene before the rule to show cause was issued, respondent disobeyed his obligation under the local rules of the Eastern District of Louisiana. Respondent should have waited until the magistrate judge had held the show cause hearing and issued his Order and Reasons before filing a motion or objection for Judge Zainey's consideration. Instead, respondent improperly sought to prevent the magistrate judge from holding the show cause hearing and deciding the sanction issues, in violation of Rule 3.4.

Rule 3.5 – Respondent's *ex parte* communication with Judge Zainey's law clerk was clearly an attempt to address the merits of the magistrate judge's rule to show cause and have Judge Zainey intervene. The purpose of the communication was to have Judge Zainey conduct a status conference on the issue of whether the rule to show cause should be ordered by the magistrate judge. It is highly unlikely that the law clerk would have told respondent that it was premature for Judge Zainey to intervene if respondent had not requested that Judge Zainey do so and if he had not addressed the substance of the rule to show cause. Based on this reasoning, the board determined respondent violated Rule 3.5.

Rule 8.4 – Respondent's misleading statements during the December 21, 2016 hearing violated Rules 8.4(c) and 8.4(d). His *ex parte* communication with Judge

Zainey's law clerk also violated Rule 8.4(d). Finally, by violating these provisions of the Rules of Professional Conduct, respondent also violated Rule 8.4(a).

The board then determined respondent knowingly violated duties owed to the legal system. His conduct caused actual harm in the form of additional time and resources expended by the parties. His conduct also caused potential harm to the integrity of the legal system and the administration of justice. Relying on the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined the baseline sanction is suspension.

In aggravation, the board found a prior disciplinary record, a dishonest or selfish motive, a pattern of misconduct, and substantial experience in the practice of law (admitted 1985). The sole mitigating factor found by the board was the imposition of other penalties or sanctions.

After further considering this court's prior jurisprudence addressing similar misconduct, the board recommended respondent be suspended from the practice of law for one year and one day, fully deferred, subject to respondent's attendance at the Louisiana State Bar Association's Ethics School. The board also recommended that any misconduct by respondent during the deferral period may be grounds for making the deferred suspension executory or for imposing additional discipline, as appropriate.

Although neither respondent nor the ODC filed an objection to the board's recommendation, on December 15, 2021, we ordered briefing addressing the issue of an appropriate sanction. Both parties filed briefs in response to the court's order.³

³ Respondent also filed a motion for oral argument. Finding no benefit to oral argument in this matter, we deny the motion.

DISCUSSION

Bar disciplinary matters fall within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. *In re: Banks*, 09-1212 (La. 10/2/09), 18 So. 3d 57. While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *See In re: Caulfield*, 96-1401 (La. 11/25/96), 683 So.2d 714; *In re: Pardue*, 93-2865 (La. 3/11/94), 633 So.2d 150.

The record supports a finding that respondent filed a defective notice of removal, misled the magistrate judge regarding the issue during the December 21, 2016 hearing, engaged in an *ex parte* communication with Judge Zainey's law clerk in an attempt to prevent or delay the show cause hearing, and then lied to the magistrate judge about the true intent of the *ex parte* communication. Based on these findings, respondent violated the Rules of Professional Conduct as detailed by the disciplinary board. The record also reflects that respondent additionally violated Rules 3.3 and 8.4(c) by lying about the true intent of the *ex parte* communication he engaged in with Judge Zainey's law clerk. The email exchange between respondent and the law clerk clearly proves that respondent's intent was to delay or prevent the show cause hearing. Therefore, respondent's claims to the contrary were attempts to mislead the magistrate judge, in violation of Rules 3.3 and 8.4(c).

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 client, the legal system, and the legal profession. His conduct caused actual and potential harm. The baseline sanction here is suspension. Aggravating factors include a prior disciplinary record (for the same misconduct at issue in this matter), 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. We agree with the board that the sole mitigating factor present is the imposition of other penalties or sanctions.

Turning to the issue of an appropriate sanction, we must reject any suggestion that respondent’s conduct warrants a fully deferred suspension. Respondent has a long history of filing improper removals, as two judicial officers in separate federal district courts have observed. Moreover, warnings and monetary sanctions have not deterred respondent from continuing to engage in this misconduct. Therefore, we find that an actual period of suspension is necessary to impress upon respondent the importance of taking seriously his obligations as an officer of the court and to ensure his compliance in the future.

Based on this reasoning, we will impose a suspension of one year and one day, with all but forty-five days deferred, followed by a one-year period of probation.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record and the briefs filed by the parties, it is ordered that Matthew John Ungarino, Louisiana Bar Roll number 15061, be and

he hereby is suspended from the practice of law for a period of one year and one day. It is further ordered that all but forty-five days of this suspension shall be deferred. Following the active portion of the suspension, respondent shall be placed on unsupervised probation for a period of one year. The probationary period shall commence from the date respondent and the ODC execute a formal probation plan. Any failure of respondent to comply with the conditions of probation, or any misconduct during the probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. 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.