

The Supreme Court of the State of Louisiana

IN RE: EDWARD J. MCCLOSKEY

No. 2022-B-01680

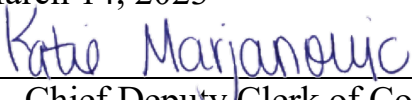
IN RE: Disciplinary Counsel - Applicant Other; Findings and Recommendations
(Formal Charges);

March 14, 2023

Discipline imposed. See per curiam.

PDG
SJC
JTG
WJC
JBM

Weimer, C.J., dissents and assigns reasons.
Hughes, J., dissents and would impose a lesser sanction.

Supreme Court of Louisiana
March 14, 2023


Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 2022-B-1680

IN RE: EDWARD J. McCLOSKEY

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

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

UNDERLYING FACTS

In August 2018, the ODC received notice from Capital One Bank that four checks drawn on respondent’s client trust account were returned unpaid for insufficient funds. Respondent attributed the overdrafts to an accounting error by his CPA.

In connection with its investigation of the overdrafts, the ODC’s forensic auditor, Angelina Marcellino, reviewed respondent’s trust account records for the period from September 1, 2017 through August 31, 2018. Ms. Marcellino determined that during this period, respondent collected at least \$1,476.17 in refunds from various clerks of court for unused cost deposits. Although these refunds were owed to respondent’s former clients, respondent acknowledges that he did not make any attempt to contact the clerks of court to determine which clients were owed the funds, nor did he refund the money to his former clients. Instead, respondent deposited the funds into his trust account under a miscellaneous income sub-account number (50003) and then disbursed the funds to himself, typically to pay himself for

pro bono or non-billable work he performed for current clients.¹ Respondent advised the ODC that he had handled the refund checks in this manner for more than ten years because “the fees associated with reviewing the client files and writing letters to return the checks would have exceeded the amounts received.”

In addition to the deposits during the one-year audit period, an additional \$15,775.33 was deposited to respondent’s sub-account number 50003 during the five years preceding the audit (April 1, 2012 through August 31, 2017). Based on the records provided to the ODC, it could not be determined if each deposit made during this five-year period is a clerk of court refund, but the practices described by respondent suggest it is likely that the sum of \$15,775.33 includes clerk of court refunds that would be due to clients.

Ms. Marcellino also determined that respondent made disbursements from his trust account in excess of the associated client balances. However, based upon the records provided to the ODC, the exact balances that should remain in the trust account at the end of the audit period could not be quantified.

DISCIPLINARY PROCEEDINGS

In July 2021, the ODC filed formal charges against respondent, alleging that his conduct as set forth above violated the following provisions of the Rules of Professional Conduct: Rules 1.15(a) (safekeeping property of clients and third persons) and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Respondent answered the formal charges and admitted that four checks drawn on his client trust account were returned for insufficient funds. Respondent denied that he intentionally converted the clerk of court refunds to his own use, suggesting

¹ Respondent created invoices for each payment, and the checks he wrote from the trust account referenced these invoices.

that any misconduct in this regard was the result of negligence. He also denied that he intentionally made disbursements from his trust account in excess of the associated client balances.

In light of respondent's answer, the matter proceeded to a formal hearing on the merits.

Formal Hearing

The hearing committee conducted the hearing on January 25, 2022. Respondent testified that he obtained accounting records from the Jefferson Parish Clerk's Office (which includes the 24th JDC, First Parish Court, and Second Parish Court) showing that from 2008 to 2018, he received cost refunds totaling \$9,950.05. Of that amount, respondent sent refunds totaling \$6,299.52 to the clients he could determine from his research. These refunds were made in January 2022, two weeks prior to the formal hearing. For the remaining \$3,650.53, respondent "didn't know who the client was," so he paid the funds to the Louisiana Bar Foundation, also in January 2022. Respondent admitted that he should have taken these steps "sooner," but it did not occur to him, even after the disciplinary complaint was opened in 2018. Respondent also acknowledged that he obtained some cost refunds from the St. Tammany Parish Clerk of Court and the Lafayette Parish Clerk of Court, as identified in Ms. Marcellino's audit report, but he maintained he could not determine who these funds belonged to. Nevertheless, respondent testified that he does not have any more client funds in his possession.

Hearing Committee Report

The hearing committee found respondent violated Rules 1.15(a) and 8.4(c) of the Rules of Professional Conduct by the manner in which he handled the clerk of court refund checks. Based on the evidence and testimony presented at the hearing,

the committee concluded that respondent's misconduct "falls in a gray area between negligent and knowing, and ... was akin to gross negligence." The committee explained:

The committee finds that Mr. McCloskey's conduct exceeds a breach of mere ordinary care that a reasonable and prudent lawyer would, and should, exercise in handling funds that belong to current or former clients. Rather Mr. McCloskey's misconduct represents a departure significant from the standard of care required by Rule 1.15(a) and was a gross deviation from what is expected of lawyers handling client or third-party funds. Moreover, the committee finds that Mr. McCloskey's conduct borders closely on a wanton and reckless disregard for the property rights of his clients and the Rules of Professional Conduct, but it is not squarely within the bandwidth of wanton and reckless conduct. Although Respondent's misconduct was closer to "knowing" than "negligent," the committee does not find that Respondent had a conscious desire to deprive clients or others of funds not belonging to Respondent. Rather, the committee finds that Mr. McCloskey perceived the refunds and having to deal with them as a nuisance or inconvenience. Respondent knew or should have known that he was improperly handling client property that caused, or could cause, harm to his clients.

The amounts of money involved, either individually or in whole, were not financially consequential to McCloskey, though from a public perspective the total amount of funds at issue is significant. The committee believes that laziness, not greed or a conscious, dishonest desire, was the foundation of Respondent's decision to avoid the required process and efforts to associate the refunds with persons he previously represented, and make an effort to remit the money to the rightful owners of it. Mr. McCloskey chose an easier, softer way than the Rules of Professional Conduct require, and it was a violation of Rules 1.15(a) and 8.4(c) to do so. [Internal footnote omitted.]

The committee found respondent violated duties owed to his clients or former clients, causing harm. The applicable baseline sanction is suspension.

The committee determined the following aggravating factors are present: a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law (admitted 1971). The committee

determined the following mitigating factors are present: the absence of a prior disciplinary record, timely good faith effort to make restitution or to rectify the consequences of the misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, and character or reputation.

Based on these findings, and considering the prior case law, the committee recommended that respondent be suspended for two years, with all but six months deferred, followed by a one-year period of probation governed by the following conditions: respondent shall attend the Louisiana State Bar Association's Ethics and Trust Accounting Schools, and respondent shall engage a CPA approved by the ODC to perform monthly audits of his trust account during the probationary period. The committee also recommended that respondent be assessed with all costs of this proceeding.

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

Disciplinary Board Recommendation

The disciplinary board determined that the hearing committee's findings of fact are supported by the record and adopted same, with the following exceptions and additions:

In her audit report, Ms. Marcellino identified \$15,775.33 as the total amount of money deposited under the 50003 file number from 2012 to 2017, and the committee apparently found this sum represented the amount of clerk of court refunds which respondent received and paid to himself for his own use. However, respondent testified that most, but not all, of the money deposited under the 50003 file number consisted of clerk of court refunds. Therefore, the board found there is insufficient evidence in the record to determine exactly how much of the \$15,775.33 represented clerk of court refunds.

Respondent testified that he deposited the clerk of court refunds into his trust account and then paid the money to himself from the time he began his solo practice in 2008 through the end of the audit period on August 31, 2018. It is not possible to determine from the record the exact total amount of the clerk of court refunds respondent received during this period. However, the clear and convincing evidence shows that the amount of refunds respondent received and paid to himself through his trust account totaled at least \$10,288.15. By his own accounting, using records he obtained from the Jefferson Parish Clerk of Court, respondent received approximately 130 checks totaling \$9,950.05 in refunds from the Jefferson Parish Clerk of Court during this time period. Additionally, during the audit period from September 1, 2017 through August 31, 2018, Ms. Marcellino identified six court refunds from St. Tammany Parish and one from Lafayette Parish which totaled \$338.10. The evidence suggests that respondent very likely received some amount of court refunds from parishes other than Jefferson Parish prior to the audit period. However, the record contains no evidence of the amounts of court refunds respondent may have received from St. Tammany Parish or any parish other than Jefferson Parish from 2008 through August 31, 2017. Therefore, the board could find only that the amount of refunds respondent received and paid to himself through his trust account was at least \$10,288.15 (\$9,950.05 + \$338.10).

The board also determined the committee erred in its finding that respondent's improper handling of the clerk of court refunds was negligent, and found he acted knowingly. Respondent is a very experienced lawyer who knew the refunds did not actually belong to him. He was consciously aware that the court refunds were refunds of client court costs and not earnings due to him. Although respondent's objective or purpose was not to take money from his clients or to enrich himself, his actions were motivated by laziness and not wanting to take the time to properly

handle what he saw as the nuisance of receiving checks of often low dollar amounts after billing had been completed.

Respondent engaged in misrepresentation and dishonest behavior by creating invoices for work he performed for other clients (with no intention of charging those clients) to justify the payments to himself of monies received from the court refunds. This misconduct was at least knowing. However, the purpose apparently was a means of showing what respondent considered to be nuisance income in order to declare the income on his tax returns.

Based on these findings, the board determined that respondent violated Rules 1.15(a) and 8.4(c) of the Rules of Professional Conduct.

The board determined respondent violated duties owed to his clients, the public, and the legal profession. He acted negligently in connection with the errors in accounting that may have resulted in the overdrafts and the disbursements from the trust account in excess of the associated client balances which were later rectified. He acted knowingly in converting the clerk of court refunds to his own use. Individually, the clerk of court refund checks which have been identified ranged in amount from approximately \$5.00 to \$280.00. The harm to any one individual client from the loss of any one check may not be considered significant. However, in the aggregate, the amount of the over 135 refund checks identified to date which were converted by respondent totals \$10,288.15, which is a significant amount. Further, some clients, including those whose refund amounts were paid by respondent to the Louisiana Bar Foundation, may never be able to be identified and personally reimbursed due to respondent's failure to identify and properly reimburse the client when the refund checks were initially received. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the board determined that the applicable baseline sanction ranges from suspension to disbarment.

The board determined the following aggravating factors are present: a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. The board determined the following mitigating factors are present: the absence of a prior disciplinary record, timely good faith effort to make restitution or to rectify the consequences of the misconduct (only as to the overdrafts and the disbursements from the trust account in excess of the associated client balances which were identified in the audit report, not as to the conversion of the clerk of court refunds), full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, and character or reputation.

The board specifically rejected the committee's finding that respondent should be credited in mitigation with a timely good faith effort to make restitution. The board noted that in 2018, respondent requested from the Jefferson Parish Clerk of Court a list of all refunds he had received during the entire period of his practice. However, respondent did not make restitution to any client until January 2022, after formal charges were filed and approximately two weeks prior to the hearing of this matter. Moreover, respondent has not made restitution to any client for the refunds issued by the St. Tammany Parish Clerk of Court or the Lafayette Parish Clerk of Court. Finally, respondent did not present convincing evidence that he exercised reasonable due diligence to locate the owners of the funds he received from Jefferson Parish which he remitted to the Louisiana Bar Foundation as unclaimed or unidentified funds.

Considering these circumstances, and the case law concerning similar misconduct, the board determined that respondent's misconduct warrants a more severe sanction than that recommended by the committee. Accordingly, the board recommended that respondent be suspended from the practice of law for two years, with all but one year deferred, and that following the active portion of his suspension,

respondent be placed on probation for a period of one year, governed by the following conditions:

1. During the probationary period, Respondent shall be required to obtain, at his cost and expense, monthly audits of his IOLTA trust account to be performed by a certified public accountant of his choosing, subject to the approval of the ODC, and the reports of the audits, in a form and manner approved by the ODC, shall be promptly submitted to the ODC;
2. Within one year of the imposition of sanction, Respondent must successfully complete both the Louisiana State Bar Association's Ethics School and the Louisiana State Bar Association's Trust Accounting School;
3. Within three months of the imposition of sanction, Respondent must make restitution for the refund checks received by him from the St. Tammany Parish Clerk of Court (six checks) and the Lafayette Parish Clerk of Court (one check) identified in the ODC's audit performed by Ms. Marcellino; and
4. Any failure of Respondent to comply with the conditions of probation or any misconduct during the probationary period will be grounds for making the deferred suspension executory, or for imposing additional discipline, as appropriate.

The board further recommended respondent be assessed with the costs and expenses of this proceeding.

One board member dissented and would adopt the sanction recommended by the hearing committee.

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. 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.

Respondent converted at least \$10,288.15 in clerk of court refunds owed to his clients. He paid these funds to himself based on invoices he created for work performed for other clients for which he never intended to charge those other clients. Respondent also allowed his trust account to become overdrawn and made disbursements from his trust account in excess of the associated client balances. This misconduct violated Rules 1.15(a) and 8.4(c) of the Rules of Professional Conduct as charged.

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 violated duties owed to his clients, the public, and the legal profession. He acted knowingly in converting the clerk of court refunds to his own use, and caused actual harm. He acted negligently in mishandling his client trust account. The applicable baseline sanction ranges from suspension to disbarment.

The aggravating and mitigating factors found by the board are supported by the record.

Turning to the issue of an appropriate sanction, the board has recommended that respondent be suspended for two years, with all but one year deferred, followed by a period of probation with conditions. We agree that the record supports this sanction, given that respondent's conduct was not motivated by greed or self-enrichment. Moreover, the mitigating factors present are significant, in particular the fact that respondent is an accomplished and respected lawyer who has practiced for more than fifty years without any prior discipline. Under these circumstances, we will adopt the board's recommended sanction.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, it is ordered that Edward J. McCloskey, Louisiana Bar Roll number 9152, be and he hereby is suspended from the practice of law for a period of two years. It is further ordered that all but one year of this suspension shall be deferred. Following the completion of the active portion of his suspension, respondent shall be placed on probation for a period of one year governed by the conditions recommended by the disciplinary board. 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.