

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: DAVID BAND, JR.

NUMBER: 21-DB-062

RECOMMENDATION TO THE LOUISIANA SUPREME COURT



INTRODUCTION

This is an attorney discipline matter based upon the filing of formal charges by the Office of Disciplinary Counsel (“ODC”) against David Band, Jr. (“Respondent”), Louisiana Bar Roll Number 02718.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 4.2(a) (communication with persons represented by counsel) and 8.1(a) (knowingly make a false statement of material fact in a disciplinary matter).² The hearing committee (“Committee”) assigned to the matter concluded that Respondent violated Rules 4.2(a) and 8.1(a) as charged. The Committee recommended that Respondent be suspended for six months, that he be ordered to submit to an examination by a licensed mental health care professional, and that he be assessed with the costs and expenses of these proceedings.

For the following reasons, the Board adopts the Committee’s factual findings and conclusions regarding rule violations. The Board recommends that Respondent be suspended for six months with the additional conditions set forth herein. The Board further recommends that Respondent be assessed with the costs and expenses of these proceedings in accordance with Louisiana Supreme Court Rule XIX, §10.1(A).

PROCEDURAL HISTORY

The formal charges were filed on November 12, 2021. The charges state, in pertinent part:

¹ Respondent was admitted to the Louisiana Bar on September 11, 1970. His primary registration address is 422 S. Broad St., New Orleans, LA 70119. Respondent is currently eligible to practice law in Louisiana.

² See attached Appendix for full text of the Rules.

On November 10, 2020, the ODC received a formal complaint from Complainant Christine Bowers. The investigation was opened under ODC file number 0038877. Via attached letter, Complainant explained that she was involved in civil litigation against a defendant named Mortimer Bishop. Mr. Bishop was represented by Respondent in the matter. Complainant advised that she was represented as well, first by attorney Eric Person and then by attorney F. Evans Schmidt. Complainant said that she had never met Respondent prior to the civil litigation.

During the process of the litigation, Respondent contacted Complainant multiple times without the authorization of Complainant's attorney. The various contacts were via social media and electronic mail. Respondent also contacted Complainant via telephone. Complainant attached copies of the contact to the formal complaint.

The copies of the email messages reflect that Respondent was attempting to discuss the instant legal matter with Complainant. In a message dated October 1, 2019, Respondent advised Complainant that his client sought a "usaf*ck." [FN1] In a message dated October 31, 2019, Respondent made comments to Complainant about the trial. In another message, Respondent requested that Complainant "wear something low cut." Also attached were messages from the Facebook social media website. In a Facebook [message] dated September 1, 2019, Respondent acknowledged that he was aware that Complainant was represented by counsel, precluding a claim that he did not know if Complainant was represented by an attorney. [FN2] Respondent also sent Complainant a Facebook "friend request," a copy of which was attached to the complaint.

[FN1] A vulgar spelling of a La.C.C.P. Article 890 usufruct.

[FN2] Respondent maintained that he held "reasonable belief" that Complainant was unrepresented by counsel.]

Respondent, in his written response to the complaint, refuted Complainant's allegations by suggesting that he had contacted her during time periods when he believed that she was unrepresented by counsel. However, in one of his messages, Respondent stated that he knew Complainant had an attorney. Respondent admitted having sent one of the email messages dated October 31, 2019. Respondent acknowledged that he sent the email requesting that Complainant "wear something low cut." Respondent also conceded that he sent the Facebook friend request to Complainant in an effort to find "provocative" material that he could then use to his advantage in the civil litigation.

Respondent appeared at the ODC for a sworn statement in the matter. At his statement, Respondent was advised that the ODC had spoken with attorney F. Evans Schmidt about the complaint. Mr. Schmidt advised the ODC that Respondent had contacted him on September 10, 2019 for the purpose of discussing discovery issues. Copies of email messages that Respondent sent to Complainant were dated as early as October 1, 2019. Therefore, it was not possible that Respondent was unaware that Complainant was represented by counsel at that time, given the earlier communications between Respondent and Mr. Schmidt. When asked whether or not he had called Complainant by telephone, Respondent said that he did not have

specific recollection [of] doing so, but he also did not deny the possibility that he had.

Respondent, by engaging in the above listed misconduct, has violated Louisiana Rules of Professional Conduct Rule 4.2(a) and Rule 8.1(a).

Although Respondent filed a notice of pro se representation with the Board on November 22, 2021, he did not file an answer to the formal charges. As a result of Respondent's failure to timely answer the charges, on January 25, 2022, ODC filed a motion to have the factual allegations deemed proven. In response, Respondent filed correspondence with the Board on February 1, 2022, with an enclosed copy of correspondence sent to ODC prior to the filing of the formal charges. In the combined correspondence, Respondent stated the positions that he did not believe he violated the rules as charged because he had a reasonable belief the Complainant did not have an attorney at the time and that he felt he could win at a hearing. ODC's motion to have the factual allegations deemed admitted was subsequently dismissed as moot on February 3, 2022.

The hearing in this matter was held on April 18, 2022, before Hearing Committee No. 37.³ Deputy Disciplinary Counsel Paul E. Pendley and Rene H. Pennington appeared on behalf of ODC. Respondent appeared pro se. The committee heard testimony from the following: Respondent; F. Evans Schmidt (attorney for Complainant in underlying litigation); and Candace Hughes (Respondent's employee). ODC's Exhibits ODC 1 through ODC 10 were admitted into evidence.

The Committee filed its report on September 6, 2022.

On September 13, 2022, Respondent filed an objection to the Committee's report. He challenged the Committee's conclusion that he repeatedly and intentionally contacted the Complainant knowing that she was represented by counsel. Respondent asserted that the Committee disregarded the testimony that he had an honest belief that she was between lawyers.

³ Hearing Committee No. 37 was comprised of Mark D. Latham (Committee Chair), Deidra C. Hill (Lawyer Member), and Robert P. Ventura (Public Member).

In the objection, Respondent also discussed factual information related to the underlying lawsuit which did not relate to his direct contacts with the Complainant. He asserted that he was unable to produce at the hearing two witnesses who had knowledge of facts involved in the underlying lawsuit due to the witnesses' unavailability for the hearing. Respondent further contended that the Committee drew the wrong impression that Respondent was "confused" to think that the Complainant suffered no damages, asserting that the Complainant "stole" from his "demented old man" client in the underlying matter. He also made allegations that the Complainant's lawyer in the underlying matter actually violated ethical rules in the lawyer's handling of that matter.

With respect to the Committee's concern regarding Respondent's mental clarity, Respondent stated in the objection that he has been under treatment by a neurologist for nerve difficulties to his legs from multiple back surgeries. Respondent previously reported to the neurologist concerns over what Respondent perceived were memory problems and the neurologist referred him to a neuropsychologist. Respondent related that after a battery of tests the neuropsychologist, who is now deceased, concluded that any neurological effects on his memory and reasoning powers are perfectly normal aging symptoms for his age. Respondent stated that he intended to forward a copy of the neuropsychologist's report to the Board when he received it.

Respondent additionally pointed out that he has had no prior discipline in his fifty-two years of practice as a trial lawyer or during his service in the Army Judge Advocate General's Corps. He offered an apology in the objection if the Board were to find that he violated the rules as charged. Respondent finally offered as an "alternative solution" (presumably alternative to sanction and/or costs) "his office and experience to mentor new lawyers (without charge) as they begin their practices."

Respondent further asserted that the recommendation that he be cast with costs was unwarranted and punitive for a Respondent presenting defenses to charges he believed were not supported by the law or evidence. He stated that the cost assessment would be particularly difficult due to his age and reduced practice and income. On September 13, 2022, he also filed a separate objection to the Committee's recommendation that he be assessed with the costs of the proceeding additionally asserting that he had no idea what costs would be assessed in the event of an unfavorable decision and that it would be premature to assess costs prior to a final determination by the Court or otherwise.

On September 16, 2022, Respondent filed a motion to supplement the record with a copy of a reply memorandum filed by Respondent in the underlying matter in connection with a rule to show cause relating to the merits of that matter. The motion was denied by the Board Adjudicative Committee Chair on September 25, 2022.

On September 26, 2022, ODC filed an objection to the Committee's recommendation only as to the recommended sanction. For the first time in the proceeding, ODC recommended that Respondent be suspended for one year and one day, with all but six months deferred, subject to a two-year period of supervised probation and numerous additional conditions including that he be referred to JLAP to submit to an evaluation by a licensed mental health professional to determine his mental competence to practice law and that he comply with all recommendations of the mental health professional and any agreements with JLAP.

Original briefs to the Board were due thirty days before the panel argument date of December 8, 2022. ODC filed its brief in support of its objection on November 8, 2022. Respondent did not file a timely brief with the Board.

In the late afternoon of December 7, 2022, the day before panel argument, Respondent emailed to the Board a Motion for Leave to File Pre-Argument Memorandum and Affidavit of Lindsay Scott, a new witness who had not testified at the hearing. The email was sent shortly after the Board closing hour.

Oral argument of this matter was held on December 8, 2022, before Board Panel “C.”⁴ Mr. Pendley appeared on behalf of ODC. Respondent appeared pro se. The panel heard argument from Respondent on his motion for leave to file the pre-argument memorandum and affidavit in addition to his argument on the merits of the matter. The panel ruled that the motion would be denied. On December 21, 2022, the panel chair signed an order denying the motion for leave to file the pre-argument memorandum and affidavit.

HEARING COMMITTEE REPORT

In its report filed on September 6, 2022, the Committee provided the following summary of the testimony presented at the hearing:

Christine Bowers

Ms. Bowers initially retained Eric Person to represent her in litigation involving a piece of property she had purchased from Mortimer Bishop (“Mr. Marty”), a client of the Respondent. Mr. Marty claimed Ms. Bowers granted him a usufruct of the property, refused to vacate the property, and sued Ms. Bowers seeking rescission of the sale. In August 2019, Ms. Bowers retained Evans Schmidt to represent her in the litigation and thereafter discharged Mr. Person. Ms. Bowers testified that she was represented by counsel during the entire time relevant to these proceedings.

Ms. Bowers identified several email messages [FN3] that the Respondent sent to her while she was represented by counsel. In these messages, the Respondent discussed the merits of the proceedings. He also requested that Ms. Bowers assist Mr. Marty in finding a place to live, which was a disputed issue because the proceedings involved Ms. Bowers’ request to evict Mr. Marty from her property.

[FN3 ODC-1, pp. 5-6.]

The email messages included a vulgar misspelling of the word “usufruct” and suggested that she “wear something low cut” when the Respondent requested that Ms. Bowers assist *his* client. Ms. Bowers testified that the request “made [her]

⁴ Board Panel “C” was composed of Paula H. Clayton (Chair), Aldric C. Poirier, Jr. (Lawyer Member), and Valerie S. Fields (Public Member).

feel like a piece of trash . . . because when somebody says this kind of stuff to a female, that you know, wear a low cut shirt, you're insinuating something sexual." She also observed that she had "to deal with this [her] whole life" and is not "something that feels good." [FN4]

[FN4 The Committee notes that the Respondent's language toward Ms. Bowers shows an extreme lack of professionalism. Although the LADB does not govern professionalism, the Committee cites the offensive language because it ultimately concludes that the language caused actual harm to the Complainant.]

Ms. Bowers also identified Facebook messages and a friend request that the Respondent sent to her Facebook account during the time she was represented by counsel. [FN5] She also testified that the Respondent called her directly after the hearing in which Mr. Marty was evicted congratulating her and discussing further action in the matter.

[FN5 ODC-1, pp. 7-11.]

F. Evans Schmidt

Mr. Schmidt has been in private practice in New Orleans for 30 years. Ms. Bowers met with him on August 20, 2019 and asked him to represent him [sic] regarding issues that arose regarding property she had purchased. The seller (Mr. Marty) refused to leave, and he sued her for lesion beyond moiety and other allegations alleging fraud. Mr. Schmidt agreed to represent her and called the Respondent on August 30, 2019 to advise him that he had been retained to take over the handling of the matter. He did not recall whether he spoke to the Respondent on that date, but he confirmed that they had a telephone conversation on September 3, 2019, during which he told the respondent that he was representing Ms. Bowers.

Mr. Schmidt also identified a voice mail message [FN6] that he received from the Respondent on September 10, 2019, in which the Respondent suggested certain disputed issues and requested that Mr. Schmidt call him back to discuss. Mr. Schmidt also confirmed that the Respondent continued to represent Ms. Bowers until July 2020 and in that interim time period, the Respondent participated in discovery issues in late 2019/early 2020. Finally, Mr. Schmidt confirmed that he never authorized direct communication between the Respondent and Ms. Bowers.

[FN6 ODC-10.]

David Band

The Respondent has been in private practice in New Orleans since 1970. He represented Mr. Marty with regard to his dispute with Ms. Bowers. He admitted that he never received authorization from Mr. Schmidt to contact Ms. Bowers directly.

The Respondent acknowledged he sent the email messages and the Facebook message and friend request. He also acknowledged that he knew an attorney is prohibited from directly contacting an opposing party who is represented by counsel. He testified that he was confused and thought Ms. Bowers was in between counsel during the occasions he sent the emails, the Facebook message, the Facebook friend request. He was not asked about and did not mention any phone contact with Ms. Bowers.

In his sworn statement to the ODC, the Respondent explained that he communicated directly with Ms. Bowers even though she was represented by Mr. Schmidt because he was having trouble contacting Mr. Schmidt. But at the hearing he agreed that this rationale is not a justification for the contact.

In his December 1, 2020 response to the complaint, the Respondent asserted that he “never did contact Ms. Bowers at any time during which [he] thought she was being represented by counsel.” [FN7] This representation was obviously false as explained above. At the hearing, the Respondent tried to justify this false statement by claiming he did it because he is “too much of a bullshitter.” [FN8] He repeated this false narrative five months later when [he] gave his sworn statement to the ODC. [FN9]

[FN7 ODC-5.

[FN8 Hearing Transcript, at 146:21-25.

[FN9 ODC-7, at 18:13-16.]

During the hearing, the Committee also observed that throughout the [h]earing, the Respondent did not appear to understand or appreciate the charges against him or the nature of the proceedings. He ultimately admitted he contacted the Complainant while he knew she was represent[ed] by counsel, but he steadfastly refused to accept or was unable to understand the fact that he believed his client was “wronged” by the Complainant did not justify his actions.

Candace Hughes

Ms. Hughes has been working for the Respondent since 2016 assisting him around his office. Although she had no personal knowledge of whether Ms. Bowers had a lapse between attorneys, she noted that there was “a discussion in the office” and that the Respondent “thought she did not have a lawyer there for a minute.”

Committee Report, pp. 4-7.

After reviewing the evidence, the Committee made the following findings of fact and conclusions regarding rule violations:

FINDINGS OF FACT

The Committee makes the following Findings of Fact:

1. The above discussion of the testimony and exhibits establishes that the ODC proved by clear and convincing evidence that the Respondent was aware at all times that Ms. Bowers was represented by another lawyer with respect to her dispute with his client.
2. The above discussion of the testimony and exhibits establishes that the ODC proved by clear and convincing evidence that the Respondent directly communicated with Ms. Bowers about the ongoing litigation between his client and Ms. Bowers by sending her email messages, Facebook messages, and a Facebook friend request and by telephoning her directly when he knew that she was represented by another lawyer in the ongoing litigation between his client and Ms. Bowers.

3. The above discussion of the testimony and exhibits establishes that the ODC proved by clear and convincing evidence that the Respondent did not obtain the consent of Ms. Bowers' counsel before directly communicating with her about the ongoing litigation between her and his client.
4. The above discussion of the testimony and exhibits establishes that the ODC proved by clear and convincing evidence that the Respondent knowingly submitted false statements of material fact to the ODC in connection with this disciplinary matter.
5. The Respondent's apparent inability to understand or accept the fact that he believed his client was "wronged" by the Complainant did not justify his actions indicates a *potential* lack of mental clarity sufficient to practice law.

RULES VIOLATED

The Committee concludes that the Respondent violated Rule 4.2 and Rule 8.1(a). He violated Rule 4.2 on several occasions when he directly communicated with Ms. Bowers, who was in litigation against his client, while he knew that she was represented by another lawyer and when he did not have the consent of Ms. Bowers' lawyer to make such communications. He violated Rule 8.1(a) by submitting false information to ODC.

Committee Report, pp. 7-8.

The Committee further provided the following analysis in support of the recommended sanction:

SANCTION

The Respondent violated duties owed to the legal system and the profession. [His] intentional actions caused actual and potential harm. Ms. Bowers was highly offended by the vulgar and suggestive nature of several messages. Through the Respondent's suggestions that she "help" his client, she potentially could have been put into a bad position from a litigation strategy standpoint. In addition, the Respondent's continued misrepresentations to the ODC required the ODC to expend additional resources in the investigation and prosecution of the case.

The *ABA Standards for Imposing Lawyer Sanctions* suggest that suspension is the baseline sanction for Respondent's misconduct. With respect to a violation of Rule 4.2, suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such a communication is improper and causes injury or potential injury to a party. *See* ABA Standard 6.3. Regarding the Respondent's violation of Rule 8.1(a), suspension is generally appropriate when a lawyer knows that false statements are being submitted to the tribunal and takes no action and causes an adverse or potentially adverse effect on the proceeding. *See* ABA Standard 6.1. In this

instance, the Respondent submitted a false statement in his response to the formal charges and failed to recant that false statement when he learned they were false.

The Committee concludes that the following aggravating factors, as set forth in Standard 9.22 of the *ABA Standards*, are present as to the Respondent:

1. dishonest or selfish motive;
2. a pattern of misconduct;
3. multiple offenses; and
4. substantial experience in the practice of law (admitted 1970).

The Committee concludes that one mitigating factor, as set forth in Standard 9.32 of the *ABA Standards*, [is] present as to the Respondent:

1. absence of a prior disciplinary record.

In the past, the Board and Court have imposed sanctions ranging from probation to one-year suspensions in cases involving violations of Rule 4.2(a). In *In re Sanford*, a consent disciplinary matter, the Board placed Mr. Sanford on probation for six months based upon his negligent violation of Rule 4.2(a) in one matter and his violation of Rule 8.4(d) in another matter. Ruling of the Disciplinary Board, 01-DB-060 (5/9/02). With regard to the 4.2(a) violation, Mr. Sanford represented heirs in a succession matter. He communicated with the executor of the estate who was represented by another attorney with regard to the succession. The Board recognized several mitigating factors: absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, good faith effort to rectify the consequences of the misconduct, cooperative attitude towards the disciplinary proceeding, and remorse.

In *In re Debose-Parent*, an attorney failed to safeguard funds belonging to a third party and communicated with a person represented by counsel without obtaining consent of opposing counsel. 2003-2422 (La. 2/20/04), 869 So.2d 80. The Court suspended the attorney for six months, four of which were deferred. The Court found that Ms. Debose-Parent's actions were negligent and did not cause actual harm. There was one aggravating factor present: prior disciplinary offenses. There was also one mitigating factor present: absence of a dishonest or selfish motive.

In *In re Juakali*, the Court suspended Mr. Juakali for one year, with six months deferred, for communicating with the opposing party in a domestic matter even though that party was represented by counsel, improperly charging fees in the domestic matter, and for failing to cooperate with ODC's investigations. 97-B-1460 (La. 9/5/97), 699 So.2d 361. The Court did not note any aggravating or mitigating factors.

In *In re Williams-Bansaadat*, the Court suspended Ms. Williams-Bensaadat for one year, with six months deferred, for communicating with a former client who was represented by counsel and mishandling a dispute over attorney's fees. 2015-B-1535 (La. 11/6/15), 181 So.3d 684. The attorney's conduct was knowing and there were no mitigating factors. The Court found as aggravating factors the lawyer's prior disciplinary record, a dishonest or selfish motive, and substantial experience in the practice of law.

In *In re Nguyen*, Mr. Nguyen was admitted pro hac vice in the United States Court for the Western District of Louisiana to defend a client in a criminal matter.

2017-B-0214 (4/13/17), 215 So.3d 668. During the course of the representation, Mr. Nguyen contacted a co-defendant without his counsel's consent. He was sanctioned by the presiding judge for his conduct. Mr. Nguyen was also charged with misconduct by ODC. He allowed the charges to become and remain deemed admitted. The Court found Mr. Nguyen's conduct to be knowing and recognized the following aggravating factor: bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency. In mitigation, the Court noted the following: absence of a prior disciplinary record and the imposition of other penalties or sanctions. Given that Mr. Nguyen did not hold a Louisiana law license, the Court enjoined him from seeking admission in Louisiana for a period of one year.

In *In re Alex*, the Court suspended Ms. Alex for one year for communicating with an opposing party who was represented by counsel. 2020-B-0916 (12/11/20), 314 So.3d 818. The circumstances were clear to Ms. Alex that the opposing party was represented by counsel: opposing counsel's name appeared on several pleadings and opposing counsel was present with her client at his deposition scheduled by Ms. Alex. Nonetheless, without contacting opposing counsel, Ms. Alex directly communicated with the opposing party and obtained his signature on an affidavit that she then used to oppose a motion for summary judgment filed by opposing counsel. The Court found Ms. Alex's conduct was knowing, if not intentional. The following aggravating factors were present: prior disciplinary record and substantial experience in the practice of law. There were two mitigating factors present: timely good faith effort to rectify the consequences of the misconduct and remorse.

With respect to the Committee's concerns regarding the Respondent's mental capacity to practice law, the Court in *In re LaMartina*, 2010-0093 (7/2/10), 38 So.3d 266, ordered a mental health evaluation under similar circumstances to this matter. Ms. LaMartina's behavior prior to and during the disciplinary process raised questions regarding her ability to practice law.

CONCLUSION

Based on the testimony presented and documentary evidence admitted, the Committee finds the Respondent's actions violated Rules 4.2 (unauthorized communication with a person represented by counsel) and 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter) and recommends that David Band, Jr. be suspended for a period of six months.

In addition, although the record contains no evidence that Respondent is mentally ill, in our view, because his apparent inability to understand or accept the fact that his belief that his client was "wronged" by the Complainant did not justify or excuse his actions indicates a *potential* lack of mental clarity sufficient to practice law, the Committee also recommends that (1) within thirty days of the final ruling in this matter, the Respondent, at his cost, shall submit to an examination by a licensed mental health care professional, selected or approved by the ODC, to determine his mental competence to continue to practice law; and (2) that the Respondent shall advise the ODC of the results of the examination within five days of receiving the results and shall provide his medical records to the ODC upon its

request. The ODC is requested to take any further action that it deems suitable following receipt of the examination results.

The Committee also recommends that the Respondent be assessed with costs and expenses of the proceeding pursuant to Rule XIX, §10.1.

Committee Report, pp. 8-12.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. Rule XIX, §2(G)(2)(a) states that the Board is “to perform appellate review functions, consisting of review of the findings of fact, conclusions of law and recommendations of hearing committees with respect to formal charges, and petitions for reinstatement and readmission, and prepare and forward to the court its own findings, if any, and recommendations ...” Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of “manifest error.” *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee’s application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/92).

A. The Manifest Error Inquiry

The factual findings of the Committee do not appear to be manifestly erroneous, are supported by the record, and are adopted by the Board.

B. De Novo Review

The Board concludes that Respondent violated Rules 4.2(a) and 8.1(a), as charged. These conclusions are supported by the evidence for the reasons set forth in the Committee’s report quoted above.

II. The Appropriate Sanction

A. Rule XIX, §10(C) Factors

Louisiana Supreme Court Rule XIX, §10(C) states that when imposing a sanction after a finding of lawyer misconduct, the Court or Board 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 actual or potential injury caused by the lawyer's misconduct; and
4. the existence of any aggravating or mitigating factors.

As found by the Committee, Respondent breached duties to the legal system and the profession. His conduct was knowing and, in some respects, intentional and caused actual and potential harm. He caused offense to Ms. Bowers by sending her vulgar and suggestive messages. He also created the potential for harm to her in the underlying litigation by suggesting that she help his client. Further, in making false statements to ODC, Respondent created the potential need for additional investigation and expenditure of the resources of the disciplinary agency.

Aggravating factors include dishonest or selfish motive; multiple offenses; submission of false evidence, false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; and substantial experience in the practice of law (admitted in 1970). The only mitigating factor present is absence of a prior disciplinary record.

B. The ABA Standards and Case Law

The following *ABA Standards for Imposing Lawyer Sanctions* provide guidance in determining the appropriate sanction to be imposed for Respondent's misconduct:

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.⁵

⁵ Standard 5.11 provides: Disbarment is generally appropriate when:

(a) 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,

6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Considering these standards and the jurisprudence, including the decisions detailed in the Committee's report quoted above, it appears that the six-month suspension recommended by the Committee is an appropriate sanction under the circumstances presented here.

ODC argued for the first time in its objection to the Committee's report that Respondent should be suspended for one year and one day, with all but six months deferred, subject to conditions including a mental health evaluation, and a two-year period of supervised probation. In its pre-hearing and post-hearing memoranda to the Committee, ODC argued only for suspension and made no suggestion as to an appropriate length of suspension. The legal decisions relied upon by ODC in its memoranda to the Committee and its brief to the Board involved sanctions ranging from public reprimand to a one-year suspension. None of the decisions resulted in a sanction greater than a one-year suspension.⁶

The Committee has also recommended that Respondent be ordered to undergo an evaluation by a licensed mental health care professional to determine his mental competence to

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; or
(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 5.12 provides: Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice law.

⁶ Most of the decisions discussed by ODC were included in the decisions detailed by the Committee when making its sanction recommendation.

continue to practice law. In *In re LaMartina*, 2010-0093 (La. 7/2/10), 38 So.3d 266, cited by the Committee, the respondent had been convicted of unauthorized access to the public school her child attended and resisting arrest and placed on probation prior to her admission to practice law in Louisiana. In the disciplinary matter, the respondent stipulated to violating the conditions of her criminal probation after she went onto the campus of a public school on three occasions without authorization and failed to pay her \$50 monthly supervision fee. The Court found that she violated Rules 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal), 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), as charged. Although the record contained no evidence that the respondent was mentally ill, in the Court's view, the respondent's tenacious behavior called into question her mental health. The respondent was suspended for one year and one day, fully deferred, subject to a two-year period of probation and additional conditions. The conditions included the requirement that the respondent submit to an examination by a mental health care professional, selected or approved by ODC, and that she comply with any plan of treatment prescribed by that professional, at the respondent's cost.

Although the record in the present matter contains no evidence that Respondent is mentally ill, the Committee found that Respondent's apparent inability to understand or accept that Respondent's belief that his client was wronged by the Complainant in the underlying matter did not justify his misconduct indicates a potential lack of mental clarity sufficient to practice law. Thus, the Committee recommended that Respondent be required to submit to an evaluation. The record reflects that Respondent has continued to be focused on the underlying matter which has been concluded and that he still does not appear to grasp the wrongfulness of his behavior. Additionally, in his objection to the Committee's report, Respondent revealed that he has

previously undergone neuropsychological testing (by a provider who died in November 2021) ordered by the neurologist who treats him for spinal nerve problems. Respondent stated in the objection that the test results were normal for someone his age, but he has not produced the results. In light of the *LaMartina* decision and the Committee's and the Board's concerns about Respondent's mental clarity at this time, the Board recommends that Respondent be ordered to undergo a neuropsychological evaluation to determine his competency to continue to practice law.

CONCLUSION

Considering all of the above, the Board adopts the Committee's factual findings and concludes that Respondent violated Rules 4.2(a) and 8.1(a), as charged. The Board recommends that Respondent be suspended for six months. The Board further recommends that Respondent be ordered to consult with the Judges and Lawyers Assistance Program ("JLAP") and that before being reinstated from the suspension, Respondent be required to undergo, at Respondent's cost, an evaluation by a neuropsychologist or other mental health care professional designated by JLAP to determine his competency to continue to practice law and that the results of the evaluation be provided to JLAP and ODC. Finally, the Board recommends that Respondent be assessed with the costs and expenses of these proceedings in accordance with Louisiana Supreme Court Rule XIX, §10.1(A). To the extent that Respondent has objected to the amount of the costs, the objection is premature until a final ruling is made by the Court assessing costs against Respondent. *See* Rule XIX, Appendix A, Rule 7.

RECOMMENDATION

The Board recommends that Respondent, David Band, Jr., be suspended from the practice of law for six months and that before Respondent may be reinstated from suspension, in addition to the requirements prescribed by the Court's rules, the following conditions must also be met:

(1) Within ninety days of the finality of the Court's judgment imposing sanction, Respondent shall consult with JLAP and undergo, at Respondent's cost, an evaluation by a neuropsychologist or other mental health care professional designated by JLAP to determine his competency to continue to practice law; and
(2) A report of the evaluation shall be promptly submitted by the evaluator to JLAP and provided by JLAP to ODC and Respondent within five days of receipt of the report.

It is further recommended that after receipt of the evaluator's report, ODC take any further action it may deem appropriate under the circumstances. Finally, the Board recommends that Respondent be assessed with the costs and expenses of this proceeding in accordance with Louisiana Supreme Court Rule XIX, §10.1(A).

LOUISIANA ATTORNEY DISCIPLINARY BOARD

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Valerie S. Fields
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M. Todd Richard
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DocuSigned by:
By: Paula H. Clayton
26E75ECB364B42F Paula H. Clayton
FOR THE ADJUDICATIVE COMMITTEE

APPENDIX

Rule 4.2. Communication with Persons Represented by Counsel

Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order, a lawyer in representing a client shall not communicate about the subject of the representation with:

(a) a person the lawyer knows to be represented by another lawyer in the matter; or

...

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:

(a) Knowingly make a false statement of material fact;

...