ORIGINAL

FILED
DISCIPLINARY BOARD
Date 12/13/2012
Clerk: R. Carmato

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: MARK LANE JAMES, II

NUMBER: 11-DB-069

RECOMMENDATION TO THE LOUISIANA SUPREME COURT

This is a disciplinary proceeding based upon the filing of formal charges against Mark Lane James, II ("Respondent") by the Office of Disciplinary Counsel ("ODC"). Respondent is currently eligible to practice law in Louisiana.

The charges allege that Respondent violated Rule 8.4(b)[1] of the Rules of Professional Conduct as evidenced by his plea of *nolo contendere* to the charge of driving while intoxicated (DWI) on May 11, 2010[2] and his subsequent guilty plea to DWI on October 14, 2010.[3] Prior to the formal hearing, the parties entered into a joint stipulation as to the facts and the Rule 8.4(b) violation contained in the formal charges. Thus, the hearing was held solely on the issue of sanction. Before Hearing Committee No. 15 ("Committee") issued its report, ODC filed a motion to reopen the record in order to introduce newly-obtained evidence. Over Respondent's opposition, the record was reopened to admit one additional exhibit,[4] and the hearing was continued to allow testimony regarding same. After carefully considering Respondent's admissions and the complete record, the Committee determined that Respondent violated Rule 8.4(b) as charged and recommended that he be suspended from the practice of law for one year and one day for his misconduct. Based on the new evidence introduced by ODC, the Committee recommended that no portion of his suspension be deferred. For the reasons set forth below, the

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[1] Rule 8.4 (b) provides that it is professional misconduct for a lawyer "to commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness, and fitness as a lawyer in other respects."
[2] *See State of Louisiana v. Mark L. James,* No. 466,222, 22nd Judicial District Court, St. Tammany Parish.
[3] *See State of Louisiana v. Mark Lane James,* No. 10-CR-107073, 22nd Judicial District Court, Washington Parish.
[4] Exhibit ODC-4 was introduced and admitted into the record at the continuation of the hearing on April 17, 2012.

Board adopts the factual findings and legal conclusions of the Committee as well as the Committee's sanction recommendation. Accordingly, the Board recommends that Respondent be suspended from the practice of law for a period of one year and a day.

PROCEDURAL HISTORY

Formal charges were filed by ODC against Respondent on June 23, 2011. The charges allege that Respondent violated Rule 8.4(b) (commit a crime, especially one that reflects adversely on the lawyer's fitness to practice law) as evidenced by his May 11, 2010 plea of *nolo contendere* to the charge of driving while intoxicated in St. Tammany Parish and his subsequent guilty plea on October 14, 2010 to DWI in Washington Parish. The formal charges were served upon Respondent via certified mail at his primary registration address on June 30, 2011.

Respondent filed an answer to the formal charges on July 19, 2011, through his counsel, James S. Knight, in which he admitted engaging in conduct in violation of Rule 8.4(b) of the Rules of Professional Conduct and requested a hearing in order to present evidence in mitigation.

The formal hearing in the matter was scheduled for October 18, 2011. ODC filed a Pre-hearing Memorandum on September 28, 2011 in which it recommended a one year and one day suspension, either partially or fully deferred, and a period of probation with the requirement that Respondent enter into and successfully complete a recovery agreement with the Lawyer's Assistance Program ("LAP"). Respondent filed his pre-hearing memorandum on October 3, 2011.

On September 30, 2011, the parties entered into a joint stipulation in which they agreed to the facts and the Rule 8.4(d) violation as alleged in the formal charges.

The initial hearing in the matter was held on October 18, 2011 before Hearing Committee No. 15. Deputy Disciplinary Counsel, James W. Standley, IV, appeared on behalf of ODC.

Respondent appeared and was represented by his counsel, Mr. Knight. Since Respondent and ODC had already stipulated to the facts and the Rule 8.4(b) violation contained in the formal charges, the hearing was held for purposes of presenting evidence in mitigation and discussing the appropriate sanction. ODC submitted three exhibits, which were entered into the record as ODC-1 through ODC-3. Respondent submitted various exhibits which were entered into the record as Respondent-1 through Respondent-7.

On June 13, 2011, Respondent entered into a five-year recovery contract with LAP wherein he agreed to remain abstinent from alcohol; attend two Alcoholics Anonymous ("AA") meeting and one lawyers' support group meeting per week or attend three AA meetings per week; meet with a LAP monitor once a month; diligently work the Twelve Steps of AA; and enter into a 90-day inpatient treatment program at Palmetto Addiction Recover Center should he fail to comply with the term of the contract.[5]

On February 10, 2012, prior to the Committee issuing a report of its findings and recommendation, ODC filed a Motion to Reopen the Record on the basis that new evidence had been received which was significantly relevant to the issue of sanction. Respondent filed an Opposition to Motion to Reopen Record on February 22, 2012. That same day, Committee Chair Harry J. Philips, Jr. granted ODC's motion, ordering the record reopened and setting a telephone conference among the parties to determine how the matter should proceed.

Following the telephone conference on February 24, 2012, the hearing was re-opened and continued to April 17, 2012. The new evidence was introduced and entered into the record as exhibit ODC-4, and the Committee heard testimony regarding same. On July 27, 2012, the Committee issued its report and recommendation. Based on the stipulations, the Committee concluded that Respondent violated the Rules of Professional Conduct as charged. In light of the

[5] *See* Exhibit R-1.

newly admitted evidence that Respondent was no longer compliant with the terms of his LAP contract, the Committee recommended that he be suspended from the practice of law for one year and one day.

This matter was set for oral argument on September 27, 2012 before Panel "A" of the Disciplinary Board. On August 22, 2012, ODC filed its pre-argument brief in which it concurred with the Committee's findings and sanction recommendation. Mr. Knight filed a motion to withdraw as counsel for Respondent on September 12, 2012.

Respondent appeared and signed-in for oral argument on September 27, 2012. When his case was called, Respondent requested a continuance on the basis that he was unable to participate in oral argument. His request was denied by Panel Chair R. Steven Tew, and the matter was ordered to proceed as scheduled.[6] For reasons that were not clearly articulated, Respondent chose to forgo argument and stipulated to the Committee's findings and recommendation. ODC raised no objection. Consequently, no argument was presented, and the Board immediately undertook its review of the matter pursuant to Rule XIX, §2(G)(2)(a).

FORMAL CHARGES

The formal charges in the matter read as follows:

> On May 11, 2010, Respondent pled *nolo contendre* [sic] to driving while intoxicated in St. Tammany Parish in *State of Louisiana v. Mark L. James,* (No. 466,222, 22nd Judicial District Court, St. Tammany Parish), for which he was placed on probation for two years.
>
> On October 14, 2010, Respondent entered a guilty plea to DWI in Washington Parish in the matter of *State of Louisiana v. Mark Lane James,* (No. 10-CR-107073, 22nd Judicial District Court, Washington Parish), for which he was placed on one year of supervised probation.
>
> As there are two convictions (one arising from a guilty plea and the other arising from a *nolo contendre* [sic] plea), there is clear and convincing evidence

[6]Respondent was assured that he would be allowed to excuse himself from the courtroom if needed and the proceeding would be recessed until he was able to resume oral argument.

that Respondent has violated Rule 8.4(b) of the Louisiana Rules of Professional Conduct.

THE PARTIES' STIPULATION OF FACTS

Prior to the formal hearing, ODC and Respondent stipulated to various facts as well as the Rule 8.4(b) violation contained in the formal charges. The stipulations are as follows:

1. Respondent herein is Mark Lane James, II, born September 24, 1974, and admitted to practice law in the State of Louisiana on October 10, 2003;

2. On May 11, 2010, Respondent pled *nolo contendre* [sic] to driving while intoxicated in St. Tammany Parish in *State of Louisiana v. Mark L. James,* (No. 466,222, 22nd Judicial District Court, St. Tammany Parish), for which he was placed on probation for two years;

3. Respondent admits that, on or about February 20, 2009, he operated a vehicle while intoxicated in the Parish of St. Tammany and, in so doing, violated Rule 8.4(b) of the Louisiana Rules of Professional Conduct. This incident forms the basis of the conviction referenced in Paragraph II herein;

4. On October 14, 2010, Respondent entered a guilty plea to DWI in Washington Parish in the matter of *State of Louisiana v. Mark Lane James,* (No. 10-CR-107073, 22nd Judicial District Court, Washington Parish), for which he was placed on one year of supervised probation;

5. Respondent admits that, on or about October 10, 2009, he operated a vehicle while intoxicated in the Parish of Washington and, in so doing, violated Rule 8.4(b) of the Louisiana Rules of Professional Conduct. This incident forms the basis of the conviction referenced in Paragraph IV herein; and

6. As there are two convictions (one arising from a guilty plea and the other arising from a *nolo contendre* [sic] plea), there is clear and convincing evidence that Respondent has violated Rule 8.4(b) of the Louisiana Rules of Professional Conduct.

THE HEARING COMMITTEE'S REPORT

As noted above, the Committee issued its report on July 27, 2012. Based on the stipulations of the parties and the complete record, the Committee made the following findings of fact:

FINDINGS OF FACT

> The parties entered into a joint stipulation of fact which was filed into the record on September 29, 2011. The stipulation reflects that the parties agree that the facts incorporated into the stipulation would be proven by clear and convincing evidence at an evidentiary hearing in this matter, thus relieving ODC from any further proof of those facts.
>
> By virtue of this stipulation the Respondent agrees that he was born on September 24, 1974 and admitted to practice law in the State of Louisiana on October 10, 2003. Respondent further admitted that on May 11, 2010 he entered a plea of *nolo contendere* to the charge of driving while intoxicated in St. Tammany Parish for which he was placed on probation for two years. This charge arose out of an incident which occurred on or about February 20, 2009 when he operated a vehicle while intoxicated in St. Tammany Parish and, additionally admits that this conduct constitutes a violation of Rule 8.4(b) of the Rules of Professional Conduct.
>
> In addition, the Respondent stipulated that he pled guilty on October 14, 2010 to DWI in Washington Parish and was placed on one year of unsupervised probation. He further admits that this charge arises out of an incident on or about October 10, 2009 when he operated a vehicle while intoxicated in Washington Parish and further that this conduct constitutes a violation of Rule 8.4(b) of the Rules of Professional Conduct.
>
> Mr. James has agreed that the Minute Entries (ODC Exhibits 2 and 3) accurately reflect the disposition of criminal charges filed against him in St. Tammany and Washington Parishes, respectively. He admits the underlying conduct with respect to each charge and, admits that this conduct constitutes a violation of Rule 8.4(b) of the Rules of Professional Conduct.
>
> Based upon this joint stipulation and the evidentiary record in this case, the Hearing Committee finds that there is a factual basis for concluding that the formal charges have been proven by clear and convincing evidence and that the conduct alleged by ODC and admitted by the Respondent constitutes a violation of Rule 8.4(b) of the Rules of Professional Conduct. The Committee also concludes that the Respondent's conduct adversely reflects on the Respondent's fitness to practice law. The Committee must now consider the appropriate sanction, taking into account any aggravating or mitigating factors reflected in the record.

Once the Committee determined that Respondent had engaged in professional misconduct, it undertook consideration of the factors set forth in Rule XIX, Section 10(c). While the Committee did not fully address each of these factors, it did consider the existence of aggravating or mitigating factors under Standards 9.22 and 9.32 of the *ABA Standards for Imposing Lawyer Sanctions*. With respect to aggravating factors, the Committee found the

following: 1) a pattern of misconduct; 2) multiple offenses; 3) substantial experience in the practice of law (admitted in 2003), particularly in the area of criminal law by virtue of his position as a Public Defender in Washington Parish; and 4) illegal conduct. The Committee found it particularly significant that Respondent's offenses occurred in such a short period of time, with his first arrest in February 2009 and his second only eight months later in October 2009.

In mitigation, the Committee found the following factors were supported by the record: 1) absence of a prior disciplinary record; 2) significant personal or emotional problems; 3) full and free disclosure to the Disciplinary Board by self reporting his offenses; 4) excellent reputation as a capable lawyer; and 5) imposition of other penalties or sanctions as ordered by the 22nd Judicial District Court. Although not an enumerated mitigating factor under Standard 9.32, the Committee considered that Respondent's misconduct did not directly relate to his representation of clients or the practice of law. The Committee further noted that the misconduct did not cause any *actual* harm to clients or to the public. The Committee recognized that Respondent was going through a difficult divorce with contested child custody issues at the time of his offenses, and it was a significantly emotional time in his life. Additionally, the Committee noted that, at or about the time of one or both of the offenses, Respondent's law partners essentially took control and cut Respondent out of their law practice. He testified that he was left without any clients and without an active law practice to help supplement his income as a Public Defender.

In determining the appropriate sanction, the Committee relied upon ABA Standard 5.12, which states, "Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct . . . that seriously adversely reflects on the lawyer's fitness to practice." Based upon

Standard 5.12, the Committee determined that the baseline sanction for Respondent's misconduct is suspension.

After applying the aggravating and mitigating factors and applicable jurisprudence, the Committee recommended an actual suspension for one year and one day as the appropriate sanction for Respondent's misconduct. The Committee based its recommendation largely on the new evidence that Respondent was no longer compliant with his LAP recovery agreement.[7]

ANALYSIS

I. The Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (G)(2)(a) states that the Board is "to perform appellate review functions, consisting of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges...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.

Here, the Committee was correct in accepting the facts as stipulated by the parties. Moreover, the Committee's additional findings of fact do not appear to be manifestly erroneous.

De novo review indicates that the Committee correctly concluded that Respondent violated Rule 8.4(b) as charged, since Respondent's stipulation to the alleged misconduct and the Rule violation must be deemed conclusive. The Court has held that parties in disciplinary proceedings can freely enter into stipulations regarding rule violations, and that effect must be

[7] Report and Recommendations of Hearing Committee No. 15, pp. 16-18.

given to such stipulations unless they are withdrawn. *In re: Gerard N. Torry*, 2010-B-0837 (10/19/10), 48 So.3d 1038.

Therefore, the only issue left for the Board to consider is the sanction most appropriate for Respondent's misconduct.

II. THE APPROPRIATE SANCTION

A. Application of Rule XIX, §10(C) Factors

Louisiana Supreme Court Rule XIX, §10(C) states that in 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.

Here, Respondent violated a duty owed to the public and the profession by failing to maintain the high standards of personal integrity upon which the public relies. When lawyers engage in illegal conduct it serves to undermine the public's confidence in the integrity of officers of the court. Fortunately, Respondent's offenses did not result in actual injury to anyone; however, the potential for injury was very great.

The record supports the aggravating factors found by the Committee: 1) a pattern of misconduct; 2) multiple offenses; 3) substantial experience in the practice of law (admitted in 2003); and 4) illegal conduct. The record also supports the Committee's findings in mitigation: 1) absence of a prior disciplinary record; 2) significant personal or emotional problems; 3) full and free disclosure to the Disciplinary Board by self reporting his offenses; 4) character and reputation; and 5) imposition of other penalties or sanctions.

B. The ABA Standards and Case Law

As mentioned above, Standard 5.12 of the *ABA Standards for Imposing Lawyer Sanctions* is relied upon in determining the appropriate sanction. Standard 5.12 states that "[s]uspension is generally appropriate when a lawyer knowingly engages in criminal conduct . . . that seriously adversely reflects on the lawyer's fitness to practice." The ABA Standards indicate that suspension is the baseline sanction for the misconduct at issue here. The aggravating and mitigating factors are fairly evenly weighted.

A review of prior jurisprudence indicates that the Court has imposed sanctions ranging from fully deferred suspensions to actual periods of suspension in cases involving similar misconduct. For example, in *In re: Baer,* 21 So.3d 941 (La. 11/20/2009), the Court suspended the respondent for one year and a day based on the deemed admitted facts which established that he had twice been arrested and charged with driving under the influence of alcohol. The Court noted that, as a general rule, it imposes actual suspensions in cases in which multiple offenses are at issue, as well as in cases in which the offense stems from a substance abuse problem that appears to remain unresolved, both of which were present in the case of Ms. Baer. *Id* at 944.

More recently, in *In re: Guidry,* 71 So.3d 256 (La. 2011), the Court suspended a lawyer for one year and a day based upon his having twice been arrested and criminally charged—first in Louisiana for DWI, possession of marijuana, and possession of cocaine; and, subsequently, in Illinois for driving under the influence of alcohol, speeding, and improper lane usage. Although the respondent claimed that he was not currently practicing law and had been "clean" for three years since completing a residential treatment and pre-trial diversion program, the Court found that he failed to provide any evidence to support his testimony that he had refrained from

alcohol. Moreover, the Court observed that the respondent was not active in AA and did not participate in LAP.

Also worth mentioning are the cases *In re: Marcello,* 18 So.3d 1271 (La. 10/9/2009), and *In re: Tallon,* 974 So.2d 1290 (La. 2/22/08). In each of these cases, the Court accepted a petition for consent discipline and imposed a one year and a day suspension, fully deferred, subject to the respondent's successful completion of a five-year period of probation which coincided with the LAP recovery agreement. Notably, the respondent in each of these cases was arrested and charged with two offenses of DWI.

Based on the cases highlighted above, the Committee's recommendation of an actual suspension for one year and one day is indeed appropriate. Here, as in *In re: Baer*, *In re: Guidry*, *In re: Marcello*, and *In re: Tallon*, Respondent was twice arrested and charged with DWI. Like *In re: Baer*, the misconduct at issue here stems from a substance abuse problem that remains unresolved.

Respondent entered into his recovery agreement with LAP on June 13, 2011[8] and was initially compliant with its terms and conditions,[9] even though he strongly disagreed with the diagnosis that he was alcohol dependent. At the first formal hearing, Respondent testified that he found it difficult to comply with the Twelve Step AA component of the contract, since he was an atheist and did not believe in God or in a "higher power" controlling his recovery. Nevertheless, Respondent testified that he would comply with the terms of his LAP contract for the duration:

> A: I am skeptical about the program, very skeptical . . . [but] if that's what's required of me[,] I'll do what's required of me.
>
> * * *

[8] Although Respondent submitted to a three-day evaluation at Palmetto Addiction Recovery Center from February 27–March 2, 2011, he did not actually enter into a recovery contract with LAP until June 13, 2011. *See* Exhibit R-1.

[9] As of the formal hearing on October 18, 2011, Respondent was in compliance with the terms and conditions of his LAP contract.

Q: Even if . . . you don't feel like it's beneficial . . . and it becomes mundane and burdensome, you think you'll be able to do it for four and a half more years?

A: Yes, sir.

Q: You don't sound . . . you've got to persuade me.

A: Well . . . I can tell you this. . . . I know I can do it.

Hr. Tr. No. 1 (October 18, 2011), pp. 73-75. In February of 2012, ODC received information from LAP's Director, Buddy Stockwell, that Respondent was no longer compliant.[10] He repudiated the AA component and had no intention of submitting to inpatient treatment, which was a condition/consequence of his failure to comply with the terms of the contract. Respondent's testimony at the second hearing provided some insight into his current position:

A: . . . I am being coerced at the possibility of losing my license into a -- into submitting to a religious program. [p. 69]

* * *

A: . . . it's not an effective program either. There's only been two double-blinded studies that have ever been done. And both of them have shown that the -- actually, maybe three, but that the effectiveness is just as -- you're better off doing nothing. It has about a five percent recovery rate, the program of Alcoholics Anonymous, which is the same as natural remission, without doing anything. So, you know, I'd rather do nothing than 20 hours of something that gets you to the same place. . . . [p.78]

* * *

Q: As we sit here today, is it your intention to enter into another LAP contract?

A: . . . if the LAP contract forces the person who hasn't had a drink since 2010 [to] go to 90 more days of -- of what Buddy termed "recalibration" when I spoke to him, I'm not interested in any way, shape or form in being recalibrated in that manner. I've -- I've got no interest in -- in 90 days of forced fed religion. And that's all that it is. [p. 85]

[10] See Exhibit ODC-4

Hr. Tr. No. 2 (April 17, 2012), pp. 69, 78, and 85. This was of particular concern to the Committee and formed the basis for its recommendation that no portion of Respondent's suspension be deferred.

Had Respondent remained compliant with the terms and conditions of his LAP contract or agreed to undergo inpatient treatment, a more lenient sanction, such as the fully-deferred suspension in *In re: Marcello* and *In re: Tallon*, would have been appropriate. Under the existing circumstances, the Board must agree with the Committee that an actual suspension of a year and one day is necessary. This sanction will require Respondent to clearly and convincingly prove that he is fit to return to the practice of law.[11]

As was previously noted, Respondent stipulated to the findings and recommendation of Hearing Committee No. 15 in lieu of presenting oral argument before the Board. Additionally, ODC has concurred with the findings and recommendation of the Committee.[12]

CONCLUSION

For the reasons stated above, the Board adopts the factual findings of the Committee as well as the Committee's conclusion that Respondent violated Rule 8.4(b) as was stipulated by the parties. The Board further adopts the Committee's recommendation that Respondent be suspended from the practice of law for a period of one year and one day. Additionally, the Board recommends that Respondent be assessed with all costs and expenses of these proceedings.

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[11] Pursuant to Rule XIX, §24(E), where alcohol or other drug abuse was a causative factor in the lawyer's misconduct, the lawyer shall not be reinstated or readmitted unless:

(a) the lawyer has pursued appropriate rehabilitative treatment;
(b) the lawyer has abstained from the use of alcohol or other drugs for at least one year; and
(c) the lawyer is likely to continue to abstain from alcohol or other drugs.

[12] *See* ODC's Pre-Hearing Memorandum.

RECOMMENDATION

The Board recommends that Respondent, Mark Lane James, II, be suspended from the practice of law for one year and a day. The Board further recommends that Mr. James be assessed with the costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1(A).

LOUISIANA ATTORNEY DISCIPLINARY BOARD

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