LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: SALVADOR R. PERRICONE

NUMBER: 17-DB-016

RECOMMENDATION TO THE LOUISIANA SUPREME COURT

INTRODUCTION

This is a disciplinary matter based upon the filing of formal charges by the Office of Disciplinary Counsel ("ODC") against Salvador R. Perricone ("Respondent"), Louisiana Bar Roll Number 10515.[1] The charges, which consist of three counts, allege violations of Rules of Professional Conduct 1.7(a)(2), 3.6, 3.8(f), 8.4(a), and 8.4(d).[2] Respondent stipulated to violating Rules 3.6, 3.8(f), 8.4(a), and 8.4(d). The Hearing Committee assigned to this matter concluded that Respondent violated the Rules as charged, including Rule 1.7(a)(2). The majority of the Committee recommended that Respondent be suspended from the practice of law for two years, with one year deferred. The Chair of the Committee dissented with regard to the sanction, suggesting that full deferral of the suspension is appropriate.

For the following reasons, the Board adopts the factual findings and legal conclusions of the Committee. However, the Board rejects the Committee's sanction recommendation. Rather, for the reasons stated below, the Board recommends that Respondent be disbarred.

PROCEDURAL HISTORY

ODC filed the formal charges on April 18, 2017. The charges state, in pertinent part:

> RESPONDENT AS A COMMENTER ON NOLA.COM
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> Beginning in or around November 2007 through on or about March 14, 2012, Respondent was a frequent poster of comments on a variety of subjects and topics found in articles located on NOLA.com. Many of Respondent's posted

[1] Respondent is currently eligible to practice law.
[2] The text of the Rules is contained in the attached Appendix.

comments included comments on cases to which he and/or his colleagues at the United States Attorney's Office for the Eastern District of Louisiana were assigned to prosecute, and on occasion included negative comments targeting both State and Federal judges. Respondent has acknowledged using at least the following online identities:

- Campstblue
- Legacyusa
- Dramatis Personae
- Henry L. Menken 1951
- Fed up

COUNT I.

In or around 2009, the FBI and the U.S. Attorney's Office commenced an investigation into allegations of improper and potentially criminal conduct by various Jefferson Parish officials. In particular, investigations included healthcare agreements between government entities and/or contractors and an insurance company owned by Tim Whitmer, the Jefferson Parish Chief Administrative Officer. One such contractor was River Birch Inc. owned by Fred Heebe whose company was awarded a multimillion dollar contract with Jefferson Parish. To advance efforts to secure the landfill contract, it was alleged that closing of the Old Gentilly Landfill was needed.

Henry Mouton was indicted by a federal grand jury alleging that "co-conspirator A" paid him $400,000 to use his influence as a former member of the Louisiana Wildlife and Fisheries Commission to bring about the closure of the Old Gentilly Landfill. Mouton pled guilty to conspiracy.

An additional investigation alleged embezzlement by Dominick Fazzio (the Chief Financial Officer for River Birch) and his brother-in-law Mark Titus. Titus entered a guilty plea and cooperated in the U.S. Attorney's Office's subsequent indictment of Fazzio for fraud and money laundering. Respondent was on the prosecution team in that case which was assigned to Federal Judge Ginger Berrigan in the Eastern District of Louisiana.

During the pendency of these investigations and prosecutions, Respondent began commenting on NOLA.com using the pseudonym Henry L. Menken 1951 about the subjects of the investigation.

"If Heebe had one firing synapse, he would go speak to Letten's posse and purge himself of this sordid episode and let them go after the council and public officials. Why prolong this pain....perhaps Queen Jennifer has something to say about that."
-December 18, 2011, 10:21 a.m.

"Heebe comes from a long line of corruptors."
-September 3, 2011, 10:55 a.m.
"Heebe's goose is cooked."
-September 4, 2011, 10:45 a.m.

As regards a NOLA.com story announcing the indictment of Henry Mouton, Respondent commented using his pseudonym Legacyusa:

"I read the indictment…there is no legitimate reason for this type of behavior in such a short period of time and for a limited purpose. GUILTY!!!"
-February 26, 2011, 9:16 a.m.

As regards the NOLA.com article on the indictment of Fazzio, Respondent commented using Dramatis Personae:

"Well, Mr. Fazzio, I hope you have room in your scrap book for your conviction and mug shot. London didn't too well with Archie Kaufman. You're next."
-August 5, 2011, 3:09 p.m.

Following Judge Berrigan's decision to disqualify Mr. London as Fazzio's attorney due to a conflict, Fazzio hired attorney Aurthur Lemann as reported in NOLA.com. Respondent commented using Henry L. Menken 1951:

"Looks like Fazzio got a lemon. That book you refer to Mr. Rioux is about all of his losses. The guy is a clown and Fazzio is going down."
-January 13, 2012, 10:36 p.m.

In another post following Judge Berrigan's disqualification order in the Fazzio case (where Respondent was one of the prosecutors of records), he commented as Henry L. Menken 1951:

"It's the right decision. Judges don't take this action lightly. There must be something going on we don't know about or the TP is too stupid (more likely) to understand. Please get to the bottom of this, PLEASE!!!"
-January 5, 2012, 7:36 p.m.

Radio personality Garland Robinette was featured in a Times Picayune article which reported that Heebe provided him a $250,000 interest free loan allegedly in exchange for Robinette's on-air opposition to reopening the Old Gentilly Landfill rather than honoring the $160 million dollar River Birch contract. Robinette had been notified that he was the subject of an FBI and United States Attorney Office investigation. Using Henry L. Menken 1951, Respondent wrote:

"Looks like he got another 250k to keep his mouth shut. What a show!! WWL radio is dead!!!"
-September 6, 2011, 10:13 a.m.
"TRANSLATION: Heebe's attorney's won't let me talk, lest I implicate his client. Additionally, I am New Orleans Royalty and I don't have to explain anything to anyone."
-September 7, 2011, 7:59 a.m.

Because the Respondent's client (the Department of Justice and the U.S. Attorney's Office) forbid extrajudicial statements of this nature by an Assistant United States Attorney, Respondent placed his own interests above those of his client in violation of Rule 1.7(a)(2) as well as 28 CFR 50.2. Respondent made extrajudicial statements about the guilt or innocence of defendants and/or others under investigation or prosecution that had a substantial likelihood of materially prejudicing an adjudicative proceeding in violation of Rule 3.6 and of heightening public condemnation of the accused in violation of Rule 3.8(f). Respondent's conduct was otherwise prejudicial to the administration of justice and in violation of Rule 8.4(d). Respondent violated or attempted to violate the Rules of Professional Conduct, or did so through another in violation of Rule 8.4(a).

COUNT II.

Mose Jefferson was the brother of U.S. Representative William Jefferson and Respondent prosecuted Mose Jefferson in one case where he was indicted for bribing the former Orleans Parish School Board President Ellenese Brooks-Simms. During the actual trial, Respondent posted comments about the defendant and his lawyer Mike Fawer under the pseudonym Campstblue:

"Fawer has screwed his client!!!! He revealed exactly what Mose needed on the board to get what Mose wanted. Good job Mike!!!! You're just as arrogant as Ellenese...and the jury knows it."
-August 15, 2009, 9:19 p.m.

"they got the corrupted, now they have to get the corruptor."
-August 16, 2009, 7:41 p.m.

In a second indictment not personally prosecuted by the Respondent, Mose Jefferson, Betty Jefferson and Renee Gill Pratt were charged with sending funds to a Jefferson controlled non-profit. William Jefferson was then pending a trial on corruption charges in Virginia. Using his pseudonym Lagacyusa [sic], the Respondent posted:

"The sad part of all this is that Bill is preventing his siblings from pleading guilty and cooperating, thus exposing them to more prison time. Additionally, local defense attorneys are just milking these cases for their own ego gratification and financial enrichment. Something is sick about our system."
-May 22, 2009, 9:40 p.m.

Because the Respondent's client the Department of Justice and the United States Attorney's Office forbid extrajudicial statements of this nature by an Assistant United States Attorney, Respondent placed his own interests above those of his client in violation of Rule 1.7(a)(2) and 28 CFR 50.2. Respondent made extrajudicial statements about the guilt or innocence of defendants and/or others under investigation that had a substantial likelihood of materially prejudicing an adjudicative proceeding in violation of Rule 3.6 and of heightening public

condemnation of the accused in violation of Rule 3.8(f). Respondent's conduct was otherwise prejudicial to the administration of justice and therefore in violation of Rule 8.4(d). Respondent violated or attempted to violate the Rules of Professional Conduct, or did so through another in violation of Rule 8.4(a).

COUNT III.

In the days following Hurricane Katrina, New Orleans Police Department officers shot several individuals crossing the Danziger Bridge. Two were killed while four others were injured. As none of the citizens were armed, officers in the NOPD engaged in an alleged cover-up. In 2010 several officers pled guilty to federal crimes associated with the matter and in July of 2010, six officers were indicted for their role in the shooting and/or the cover-up. United States District Court Judge Kurt Engelhardt presided over the trial which commenced June 23, 2011 and ended August 5, 2011 when the jury returned guilty verdicts against all defendants. While the Respondent was not part of the prosecution team, he nevertheless posted comments on NOLA.com prior to and during the trial, including as the jury was deliberating. Posting as Dramatis Personae the Respondent stated:

"The only police force to use deadly force throughout the city was the venerable NOPD. Perhaps we would be safer if the NOPD would leave next hurricanes and let the National Guard assume all law enforcement duties. GUILTY AS CHARGED."
-August 3, 2011, 7:06 a.m.

Even prior, in response to an article regarding a rumored plea by a police officer codefendant, posting as Legacyusa Respondent warned:

"Despite defense attorneys protestations to the contrary, it would be prudent for those involved to consider the track record of the U.S. Attorney's Office. Letten's people are not to be trifled with."
-February 23, 2010, 6:17 p.m.

As regards police officer co-defendant Archie Kaufman, Respondent wrote:

"The cover-up is always worse than the crime. Archie, your time is up."
-February 23, 2010, 10:44 p.m.

Following the plea of a police officer who was a co-defendant, Respondent as Legacyusa wrote:
"The feds never forget…..this officer is doing the right thing….wish the others would, then IT would be over."
-May 20, 2010, 10:41 p.m.

During the defendant/police officers' trial, the Respondent as Legacyusa posted:

"NONE of these guys should have been given a badge. We should research how they got on the police department, who trained them, who supervised them and why they ever been promoted. You put crap in— you get crap out!!!"
-June 22, 2011, 8:19 a.m.

Also during the trial, the Respondent as Dramatis Personae denigrated the testimony of a codefendant:

"Where is Madison's gun? Come on officer, tell us. You shot because you wanted to be part of something, you thought, was bigger than you. You let your ego control your emotions. You wanted to be viewed as a big man among the other officers. That's the creed of the NOPD and I hope the jury ignores your lame explanation and renders justice for Mr. Madison. To do less, is to sanction any cop who decides it is in his best interest to put a load of buckshot in the back of a disabled american in broad daylight."
-July 28, 2011, 8:16 a.m.

While the jury deliberated, using Dramatis Personae the Respondent stated:

"I don't think the jury will leave the dead and wounded on the bridge."
-August 4, 2011, 5:53 p.m.

When the Respondent's online commenting was discovered and reported to the presiding judge, an investigation ensued. As a result in part of Respondent's online commenting and other instances of prosecutorial misconduct by the United States Attorney's office in the Eastern District, by members of the Department of Justice, and by federal law enforcement, the convictions of the six (6) NOPD officers were reversed and their motions for a new trial were granted.

Because the Respondent's client the Department of Justice and the United States Attorney office forbid extrajudicial statements of this nature by Assistant United States Attorney, Respondent placed his own interests above those of his client in violation of Rule 1.7(a)(2) and 28 CFR 50.2. Respondent made extrajudicial statements about the guilt or innocence of defendants and/or others under investigation or prosecution that had a substantial likelihood of materially prejudicing an adjudicative proceeding in violation of Rule 3.6 and of heightening public condemnation of the accused in violation of Rule 3.8(f). Respondent's conduct was otherwise prejudicial to the administration of justice and therefore in violation of Rule 8.4(d). Respondent violated or attempted to violate the Rules of Professional Conduct, or did so through another in violation of Rule 8.4(a).

Respondent filed his answer to the charges on June 23, 2017, through his counsel, Kirk Granier.

On September 26, 2017, the parties filed a stipulation, in which Respondent stipulated to violating

Rules 3.6, 3.8(f), 8.4(a), and 8.4(d). In their pre-hearing memoranda, Respondent and ODC argued that a public reprimand and three-year suspension are the appropriate sanctions, respectively.

The hearing was held on November 7 & 8, 2017, before Hearing Committee No. 55 ("the Committee").[3] Chief Disciplinary Counsel Charles B. Plattsmier appeared on behalf of ODC. Respondent was represented by Kirk R. Granier. The Committee heard testimony from: Respondent, Billy Gibbens (fact witness), James Letten (fact witness), Kenneth A. Polite, Jr. (fact witness), Father Stephen Bruno (character witness), Dr. Joseph A. Miceli III (expert witness), Dr. Ron B. Cambias, Jr. (expert witness), and Richard T. Simmons (character witness). The Committee also admitted into evidence ODC Exhibits 1-21 and Respondent Exhibits 1-3 (sealed), 5-9, 11-12, and 13-15 (sealed).

The Committee's report was issued on January 2, 2018. The Committee made the following findings and conclusions:

> *Statement of Facts*
>
> Respondent, Salvador R. Perricone, was admitted to the Louisiana State Bar Association on October 5, 1979. Before that date, he had served as a deputy in the Jefferson Parish Sheriff's Office and as an officer in the New Orleans Police Department. Following his admission to the bar, Respondent was engaged in private law practice for several years and then served as a special agent with the Federal Bureau of Investigation until 1991, when he became an assistant United States Attorney for the Eastern District of Louisiana. He resigned from the position of Chief Litigation Counsel for that office on March 20, 2012 after the revelation of the matters leading to these proceedings.
>
> His service as a police officer, deputy sheriff and Assistant U.S. Attorney had been exemplary up to that time. He had never been disciplined and had received numerous awards and commendations for his meritorious service.
>
> Beginning around 2007, Respondent began posting anonymous comments on the New Orleans Times-Picayune's website, www.nola.com. The ODC and Respondent could not agree on the number of comments Respondent posted, but none of them identified Respondent by name or as an employee of the U.S. Attorney's office. Some of the comments dealt with ongoing federal criminal prosecutions, in only some of which Respondent was involved. Of the several

[3] The Committee was composed of James K. Irvin (Chair), Bobby J. Delise (Lawyer Member), and Francinia M. Henry (Public Member).

thousand comments posted by Respondent, less than 1% involved criminal matters being prosecuted in the Eastern District of Louisiana.

The following postings are not all of those cited by the ODC, but they are representative. In an early posting about the *River Birch Land-Fill* case, and its principal, Fredrick Heebe, Respondent, who was a member of the prosecution team, posted, "Heebe comes from a long line of corruptors," and "Heebe's goose is cooked."

Some later postings cited by the ODC were as follows. Commenting on the post-Hurricane Katrina police shooting at the Danziger Bridge, and its later cover-up, which were the subjects of a federal court prosecution in which Respondent was not involved, Respondent noted,

> The only police force to use deadly force throughout the city was the venerable NOPD. Perhaps we would be safer if the NOPD would leave the next hurricanes and let the National Guard assume all law enforcement duties. GUILTY AS CHARGED.

Respecting a rumored plea by one of the police officers charged in the *Danziger* case, Respondent warned:

> Despite defense attorney's protestations to the contrary, it would be prudent for those involved to consider the track record of the U.S. Attorney's office. Letten's people are not to be trifled with.

Regarding another police officer, Archie Kaufman, Respondent anonymously commented, "The cover-up is always worse than the crime. Archie, your time is up." Respecting still another NOPD officer defendant, Respondent stated, "The feds never forget .... This officer's doing the right thing [in reaching a plea deal] .... wish the others would, then IT would be over."

Then, respecting the NOPD defendants, generally, Respondent posted,

> NONE of these guys should have been given a badge. We should research how they got on the police department, who trained them, who supervised them, and why they ever been [sic] promoted. You put crap in - you get crap out!!!

During the *Danziger Bridge* trial, Respondent, writing as "Dramatis Personae," denigrated the testimony of one of the defendants:

> Where is [victim] Madison's gun? Come on, officer, tell us. You shot because you wanted to be part of something, you thought, was bigger than you. You let your ego control your emotions. You wanted to be viewed as a big man among the other officers. That's the creed of the NOPD and I hope the jury ignores your lame explanation and renders justice for Mr. Madison. To do less, is to

> sanction any cop who decides it is in his best interest to put a load of buckshot in the back of a disabled American in broad daylight.

Even while the jury was deliberating, Respondent anonymously observed, "I don't think the jury will leave the dead and wounded on the bridge."

As noted above, one of the matters in which Respondent was involved and about which he posted comments was the investigation of the River Birch Land-Fill and Federick Heebe. Lawyers representing River Birch became concerned about these anonymous posts and hired a linguistics expert to identify the posts' author. The expert noted some unusual words *(e.g.,* "dubiety") that appeared in both the anonymous postings and in briefs filed by the U.S. Attorney's office and bearing Respondent's name. While Respondent denied being the author of the briefs that were compared to his postings, the expert's association was eventually brought to the attention of U.S. Attorney Jim Letten, who asked Respondent (among others) if he had been the author of the anonymous postings. Respondent immediately admitted that he had been.

After a lengthy trial in the *Danziger Bridge* case, several New Orleans Police Department officers were convicted of shooting individuals in the vicinity of the bridge and then colluding to cover up their crime. When he learned about the source of Respondent's internet postings, U.S. District Judge Kurt Engelhardt granted the defendants a new trial in an order comprising over 100 pages. Respondent's postings were cited as one of several instances of prosecutorial misconduct justifying the grant of a new trial.

What motivated Respondent to engage in these postings? He testified that he thought it would help him deal with the stress of his work as a U.S. Attorney, although he acknowledged that it actually exacerbated his stress and anxiety. Respondent offered the expert testimony of psychologist, Dr. Ron Cambias, who stated that Respondent's postings were caused by his suffering from post-traumatic stress disorder. Dr. Cambias said that the PTSD was triggered by numerous situations in which Respondent, as a police officer and FBI agent, had witnessed the gruesome deaths of others and had, himself, been threatened with physical harm, including gunfire. Dr. Cambias based his opinion entirely on what Respondent had told him, but, while he had administered some psychological testing of Respondent, he had administered no tests for Respondent's credibility, such as the Minnesota Multi-Phasic Personality Inventory. The Committee found credible Respondent's testimony that he was under a great deal of stress at work, especially in the period following Hurricane Katrina, when public corruption being investigated by the U.S. Attorney's office was rampant. The Committee was skeptical of Dr. Cambias's diagnosis of PTSD and its causative role in Respondent's blogging, but no counterveiling opinion testimony was offered.

Discussion

Although numerous Justice Department regulations, directives and guidelines, as well as the Rules of Professional Conduct, addressed public comments by prosecuting attorneys, during the time Respondent made his anonymous internet comments, there was no Justice Department regulation or

guideline addressing such postings. While Respondent's comments strongly suggested his belief that the defendants in the *River Birch* case, in which he was a prosecuting attorney, and in the *Danziger Bridge* case, in which he was not a prosecuting attorney, were guilty, if those comments had been made in other media with attribution to Respondent, they clearly would have been in violation of the Justice Department guidelines and of Louisiana Rule of Professional Conduct 3.6(a) ("A lawyer who is participating or who has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"). Respondent also would … have violated Rule 3.8(f) prohibiting prosecutors' extrajudicial statements tending to heighten public condemnation of the accused.

The ODC has not contended that Respondent's extrajudicial statements were made with the intent to prejudice the adjudicative proceedings, instead contending that the communications were made knowingly. The question is close. Although made anonymously, Respondent's online statements sought to persuade other participants in the on-line discussions that the defendants were guilty, and it could not have been totally outside of Respondent's consciousness that some of the persons reading those comments might know prospective jurors or end up in the jury pool, themselves. If that possibility were a reality (which was not explored during the examination or cross-examination of Respondent), it would bring his state of mind close to the border separating knowledge from intent.

Another issue arose during the hearing that caused some of the committee members to be concerned about whether Respondent's conduct was intentional. Dr. Cambias, the clinical psychologist who diagnosed Respondent as suffering from PTSD and opined that the affliction had caused Respondent to make his offending internet postings, noted that, at the time of his internet activity, Respondent been [sic] concerned about disclosure of his being treated for a psychological disorder, which he would have been required to report on a standard Form 86, initiating the process by which government agencies periodically investigate persons respecting their ability to secure or maintain a top secret security clearance.

These investigations were generally conducted every five years. Respondent produced copies of the Form 86 he had in his files, from 1991, 1997 and 2002. Section 21 of the 2002 questionnaire asks, "In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with *another health care provider* about a mental health related condition?" (Emphasis added.) In 2002, Respondent answered, "No." At the close of the hearing, the ODC stated its intent to subpoena any Form 86 questionnaire that Respondent had filled out between 2002 and his resignation from the U.S. Attorney's Office in 2012. ODC's subpoena to the federal government turned up nothing, as any responsive documents had been destroyed in compliance with document retention policies.

From 2005 through the present time, Respondent had been seeing Dr. Joseph Miceli, III, a specialist in internal medicine at the Ochsner Medical Center. Beginning in November of 2005, on Respondent's initial visit, Dr. Miceli reported

> that Respondent's "main problem" was "regarding some very stressful circumstances," specifically mentioning Hurricane Katrina. Dr. Miceli recorded an impression of a "situational anxiety state." In December of 2006, Dr. Miceli recorded an impression of situational stress and insomnia and prescribed Xanax and Ambien for anxiety and insomnia.
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> On March 15, 2012, Dr. Miceli noted that Respondent "has been internally anxious, stressed and agitated." He recorded an impression of "adjustment disorder with mixed features." He prescribed Wellbutrin XL and Lorazepam for Respondent's depression and anxiety. Dr. Miceli noted, "An appointment will be made with psychiatry." On April 26, 2012, shortly after Respondent had resigned from the U.S. Attorney's office, Dr. Miceli noted the same impression of an adjustment disorder and ordered that Ambien be replaced with Restoril as an anti-insomnia medication.
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> On May 29, 2012, Respondent requested a refill for the panic disorder drug Clonazepam, which was called in. On June 11, 2012, Respondent requested Temazepam, another anti-insomnia drug, which was ordered for him. On January 22, 2013, Clonazepam was again prescribed for Respondent.
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> Dr. Miceli referred Respondent to a psychiatrist at Ochsner, but not until May of 2016. Respondent saw Dr. Cambias for the first time the same month.
>
> *Violations*
>
> Respondent has admitted the truth of the factual allegations respecting his conduct, and he has stipulated that his actions constituted violations of Louisiana Ru1es of Professional Conduct 3.6 (extrajudicial statements having a likelihood of prejudicing an adjudicative proceeding), 3.8(f) (extrajudicial comments by prosecutor likely to heighten public condemnation of the accused), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(a) (violation of the Rules of Professional Conduct). The stipulation did not include admission of a violation of Rule 1.7(a)(2) (conflicts of interest), but the Committee finds by clear and convincing evidence that Respondent violated Rule 1.7(a)(2) by placing his own interests, *i.e.*, his need to "vent" about the criminal cases being pursued by the U. S. Attorney's office, above the interests of that office, his client, in having those cases proceed unimpeded. The only issue before the Committee is whether the imposition of sanctions is in order and what those sanctions, if any, should be.

Hearing Committee Report, pp. 1-8. The Committee found that Respondent knowingly violated duties owed to his client (the United States Attorney's Office), the public, the legal system, and the profession. The Committee found that Respondent caused actual, serious harm, referencing the mistrial in the *Danziger Bridge* to which Respondent's conduct contributed. As aggravating factors, the Committee found the following: a selfish motive (but not dishonest), a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. As mitigating

factors, the Committee recognized the following: absence of a prior disciplinary record, absence of a dishonest motive, personal or emotional problems, full and free disclosure and a cooperative attitude toward the disciplinary proceedings, character and reputation, imposition of other penalties or sanctions, and remorse. Also as a mitigating circumstance, the Committee noted "the fact that at the time of Respondent's misconduct there were no regulations, rules or guidelines respecting anonymous internet postings." Hearing Committee Report, p. 10. The majority of the Committee recommended a two-year suspension with one year deferred. In concluding the majority noted,

> An aggravating factor weighing heavily with the committee was the harm done by Respondent to the Post-Katrina Recovery in New Orleans as documented via the testimony of ex-United States Attorneys Jim Letten and Kenneth Polite. During the actions of Respondent the U.S. Attorney's Office was viewed as a beacon of hope and comfort for the citizens of the Greater New Orleans Area. This beacon of hope and comfort was heavily damaged by Respondent, a harm that will be longstanding.

Hearing Committee Report, pp. 13-14. The Chair of the Committee dissented in favor of a fully-deferred suspension, offering the following reasoning: "[I recommend] that the suspension be fully deferred, in view of the novelty of the charges against Respondent and the fact that Respondent is serving a voluntary suspension for a period that has now exceeded five-and-a-half years." *Id*. at 14.

On January 4, 2018, ODC filed an objection to the sanction recommended by the Committee, stating that it is unduly lenient. This argument is further detailed in ODC's brief filed on March 5, 2018. On January 16, 2018, Respondent made several objections to the Committee's report, which are further detailed in his brief filed on March 2, 2018. First, Respondent argues that the Committee's finding that his mental state was "knowing" is manifestly erroneous. Second, Respondent argues that the Committee erred in failing to recognize Respondent's PTSD as a mitigating factor pursuant to the Court's holding in *In re Stoller*, 2004-B-2758 (5/24/2005), 902 So.2d 981. Third, the Respondent argues that the Committee prematurely issued its report before

the deadline for post-hearing memoranda had expired.[4] Finally, Respondent argues that the sanction recommended by the Committee is too harsh, suggesting that a public reprimand or fully deferred suspension is appropriate.

Oral argument of this matter was heard on April 5, 2018, before Board Panel "B."[5] Chief Disciplinary Counsel Charles B. Plattsmier appeared on behalf of ODC. Kirk Granier appeared on behalf of Respondent. Respondent was also present.

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 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

[4] At the conclusion of the hearing, the Committee left the record open to receive additional evidence ODC intended to subpoena from the government. The Chair also gave the parties thirty days from the return on the subpoena to file post-hearing briefs. Transcript (11/8/17), pp. 137-142. On December 7, 2017, in opposition to a motion to reopen the record filed by Respondent, ODC informed the Committee that the subpoena returned no documents. ODC does not state in its opposition when the subpoena was returned, but it can be assumed that it was on or before December 7, 2017. Thus, the deadline for post-hearing memoranda would have been January 7, 2018, or earlier. The Committee signed its report on December 19, 2017. However, the Committee instructed the Board Staff to issue the report after the holidays. The report was issued on January 2, 2018. Thus, it appears that the time for post-hearing memoranda was cut short. However, it is within the Committee's discretion to grant the opportunity to make closing arguments or file post-hearing memoranda. Accordingly, the premature issuance of the Committee's report is not an error that warrants action by the Board.

[5] The Panel was composed of Pamela W. Carter (Chair), Dominick Scandurro, Jr. (Lawyer Member), and Sheila E. O'Leary (Public Member).

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 and are supported by the record. Respondent argues that the following finding of the Committee is manifestly erroneous: "Nevertheless, knowing violations of RPC 3.6, 3.8(f), 8.4(a) and 8.4(d) have been stipulated, and the ODC proved by clear and convincing evidence that Respondent violated RPC 1.7(a)(2)." Hearing Committee Report, p. 9. Respondent contends that he did not stipulate to *knowing* violations. This contention is correct. However, the Committee's report demonstrates the finding of "knowing" violations was not based on a stipulation that did not occur. In the Committee's report, the sentences immediately following the one quoted above state:

> The ODC contends, and the Committee finds by clear and convincing evidence, that Respondent committed these violations knowingly, *i.e.*, he did not commit the violations intentionally or negligently. Respondent did not intend the consequences of his actions, thinking his anonymity made his postings harmless, but, otherwise, he knew what he was doing.

Id. at pp. 9-10. Additionally, earlier in its report, the Committee discussed Respondent's mental state when engaging in the misconduct:

> The ODC has not contended that Respondent's extrajudicial statements were made with the intent to prejudice the adjudicative proceedings, instead contending that the communications were made knowingly. The question is close. Although made anonymously, Respondent's online statements sought to persuade other participants in the on-line discussions that the defendants were guilty, and it could not have been totally outside of Respondent's consciousness that some of the persons reading those comments might know prospective jurors or end up in the jury pool, themselves. If that possibility were a reality (which was not explored during the examination or cross-examination of Respondent), it would bring his state of mind close to the border separating knowledge from intent.

Id. at pp. 5-6. Based on the foregoing findings and discussion by the Committee, the report indicates that the Committee's finding that Respondent's misconduct was "knowing" is based upon its analysis of the evidence presented and not upon a perceived stipulation.

Respondent also argues that the Committee's finding that he knowingly engaged in the misconduct is manifestly erroneous because of the lack of a policy or rule on "anonymous commenting by prosecutors on [an] Internet Digital Platform" at the time he engaged in online anonymous commenting. Respondent's Memorandum to the Adjudicative Committee, pp. 4-5. The findings and discussion of the Committee above clearly indicate the Committee found Respondent knew what he was doing when he commented online and the potential ramifications of that conduct. The absence of a policy or rule prohibiting Respondent's specific conduct does not change the Committee's finding.

Additionally, Respondent argues that the Committee's finding regarding his mental state is manifestly erroneous based upon his diagnosis with complex post-traumatic stress disorder ("PTSD"). Dr. Cambias testified that he saw a direct causation between Respondent's PTSD and his online commenting. Transcript (11/7/17), p. 300. However, he also testified that individuals with PTSD can operate at a high level and that Respondent knew right from wrong. *Id*. at pp. 308-313. Furthermore, there is no evidence in the record suggesting that Respondent's PTSD caused him to act without knowing what he was doing.[6] Accordingly, the Board adopts the Committee's finding that Respondent's misconduct was knowing.

[6] It is also noted that the Committee did not recognize Respondent's mental disability (*i.e.* PTSD) as a mitigating factor. This is discussed in greater detail below.

B. *De Novo* Review

Respondent stipulated to violating Rules 3.6, 3.8(f), 8.4(a), and 8.4(d). The Board must accept these stipulations. *See In re Torry*, 2010-0837 (La. 10/19/10), 48 So.3d 1038.[7] Additionally, the Committee found that Respondent violated Rule 1.7(a)(2) as charged. This conclusion is supported by the record and is not contested by either party.

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.

Here, as the Committee found, Respondent violated duties owed to his client (the United States Attorney's Office), the public, the legal system, and the profession. Respondent's misconduct was knowing and intentional. The Board agrees with the Committee's finding that Respondent's conduct was knowing with regard to Rule 3.6(a), which states:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

The ABA Standards define knowledge as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a

[7] In *Torry*, the Court rejected the Board's conclusion that the Board was not required to accept the stipulations of the parties. The Court held that "effect must be given to [the stipulations of the parties] unless they are withdrawn." *Torry* at 1041.

particular result." Although the record clearly demonstrates that Respondent's online comments materially prejudiced the *Danziger* proceeding, he did not intend for that particular outcome. Thus, his conduct with regard to Rule 3.6(a) was knowing.

However, the Board finds that Respondent's conduct with regard to Rule 3.8(f) was intentional. The Committee did not make a finding or consider Respondent's mental state within the context of this Rule. Rule 3.8(f) states, in pertinent part:

> A prosecutor in a criminal case shall … except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused …

The ABA Standards define intent as "the conscious objective or purpose to accomplish a particular result." The Board finds that there is clear evidence that Respondent intended to heighten public condemnation of various individuals being investigated or prosecuted by the USA's office in the Eastern District of Louisiana. As recounted in the formal charges, Respondent's comments speculated on the guilt of various individuals subject to prosecution or investigation and, otherwise, cast these individuals in a very negative light. Respondent claims that he only did this to relieve the stress he was under caused by his undiagnosed PTSD. However, Respondent also testified that he engaged in "arguments" with other online commenters on topics that were not related to matters being investigated or prosecuted by the USA's office, such as LSU football. Transcript (11/7/17), p. 100. The Board does not find it credible that while Respondent was attempting to influence other commenters regarding benign topics, like LSU football, he was not attempting to influence others with his comments about the guilt of various individuals subject to the investigation or prosecution. Rather, the Board finds that Respondent intended to heighten public condemnation of the individuals referenced in the formal charges with his online comments.

The actual harm and potential for harm caused by Respondent's misconduct is significant. First, Respondent's misconduct was a significant factor that led to the granting of a new trial in the *Danziger Bridge* case. Respondent argues that his conduct was only one of many reasons why Judge Engelhardt granted the defendants' motion for new trial. While it is true that the granting of a new trial was not solely because of Respondent's online commenting, a fair reading of Judge Engelhardt's order demonstrates that Respondent's misconduct was a significant factor in his decision. *See* ODC Exhibit 7 (Judge Engelhardt's 9/17/13 order granting a new trial; pp. 50-55 and 65-86 are related to Respondent's online commenting); *see also* ODC Exhibit 5 (Judge Engelhardt's 11/26/12 order directing, among other things, that Respondent's conduct be reported to ODC). The *Danziger Bridge* trial was a lengthy, complex, and widely publicized matter to which several attorneys, court staff, jurors, and others contributed a significant amount of time and effort. Respondent's conduct was a causative factor in this monumental undertaking starting over. This constitutes significant harm to his client, the public, and the legal system.

Second, once discovered, Respondent's online commenting received significant media attention. *See* ODC Exhibit 21 (new articles regarding Respondent's conduct). This harmed the perception of the profession.

Third, Respondent's conduct tarnished the reputation of the United States Attorney's Office for the Eastern District of Louisiana, causing a significant burden on that office. In addition to the burden of the negative media attention, the office was the subject of an investigation by the Department of Justice. Transcript (11/7/17), pp. 187-188 (testimony of former USA James Letten). Mr. Letten testified that Respondent's conduct and that of former AUSA Jan Mann contributed to his retirement. Transcript (11/7/17), pp. 191-192. Former USA Kenneth Polite, who succeed Mr. Letten, testified that a large portion of his tenure as US Attorney (three and a

half years) was spent dealing with the aftermath of the scandal caused by the online commenting of Respondent and Ms. Mann. This constitutes significant harm to a public agency. Additionally, given the publicity that Respondent's misconduct received, it diminished the public's faith in the legal system.

Fourth, once it was revealed, Respondent's online commenting prompted the recusal of the USA's Office for the Eastern District from certain matters. *See* ODC Exhibit 13, Bates 298. This undoubtedly caused delay to several proceedings.

Fifth, Respondent's online comments regarding the "River Birch" investigations and prosecutions caused financial harm to Mr. Heebe. The online comments caused enough concern for Mr. Heebe's attorneys that they went through the expense of hiring a linguistics expert to analyze the comments and to file pre-suit discovery. Transcript (11/7/17), p. 118-121, 152.

Finally, while the record does not demonstrate actual harm to the prosecutions of Mose Jefferson, Betty Jefferson, and Renee Gill-Pratt, Respondent's online comments had the potential to cause significant harm in those prosecutions.

The Board adopts the aggravating factors recognized by the Committee: a selfish motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law.[8] The Board also adopts the following mitigating factors recognized by the Committee: absence of a prior disciplinary record, absence of a dishonest motive, personal or emotional problems, full and free disclosure and a cooperative attitude toward the disciplinary proceedings, character and reputation, imposition of other penalties or sanctions,[9] and remorse. The Committee also considered as a mitigating factor "the fact that at the time of Respondent's misconduct there were

[8] Respondent was admitted to the practice of law in Louisiana on October 5, 1979.
[9] Respondent permanently resigned from the bar in the Eastern and Middle Districts of Louisiana in lieu of discipline and received reciprocal discipline from the United States Court of Appeals for the Fifth Circuit. ODC Exhibits 11 and 12.

no regulations, rules or guidelines respecting anonymous internet postings." Hearing Committee Report, p. 10. The Board declines to adopt this fact as mitigating evidence. First, this is not a recognized mitigating factor in the *ABA Standards for Imposing Lawyer Sanctions*. Second, Respondent should not benefit from the lack of a specific policy or rule prohibiting otherwise unethical conduct.

Respondent argues that the Committee should have also recognized the mitigating factor of mental disability due to his PTSD diagnosis. The Board rejects this argument. ABA Standard 9.32(i) states mental disability or chemical dependency should be considered in mitigation when the following factors are present:

> (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
> (2) the chemical dependency or mental disability caused the misconduct;
> (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
> (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

The Court has held that each element must be demonstrated by clear and convincing evidence in order for a mental disability or chemical dependency to be considered in mitigation. *In re Stoller*, 2004-B-2758 (La. 5/24/2005), 902 So.2d 981. With regard to the first element, Dr. Cambias diagnosed Respondent with PTSD in 2016, which was confirmed by Dr. Dean A. Hickman. Transcript (11/7/17), pp. 281-282; *see also* Respondent Exhibits 2 & 3 (medical records from Dr. Cambias and Dr. Hickman). This diagnosis was not contested by ODC. Thus, there is evidence that Respondent was suffering from a mental disability – PTSD. With regard to the third and fourth elements, Dr. Cambias also testified that Respondent's prognosis was good, his continued treatment was successful, and that recurrence of the offending behavior is unlikely. Transcript (11/7/17), p. 301, 329-330.

However, Respondent fails to meet the second element of the test. Dr. Cambias testified that Respondent's PTSD, or his attempts to seek relief from the PTSD, caused him to engage in the online commenting. The Committee declined to find causation, specifically stating that it was skeptical of the PTSD diagnosis and its causative role in the misconduct. Hearing Committee Report, p. 4. Additionally, Dr. Cambias testified that someone with PTSD can operate at a high level and that Respondent knew right from wrong. Transcript (11/7/17), pp. 308-313. Furthermore, while this issue was not discussed at length at the hearing or in pleadings, the question remains as to whether Respondent and former AUSA Jan Mann were aware of each other's online commenting as it was occurring. Respondent testified at the hearing that former USA Letten and former AUSA Mann did not know about his anonymous online commenting. Hearing Transcript (11/7/17), pp. 102-103. In his November 26, 2012 order, Judge Engelhardt expressed significant skepticism regarding the claim that Respondent and Ms. Mann were unaware of the other's online commentary.

> Quite simply, no one, especially this Court, could reasonably find it credible that Perricone and former First AUSA Mann, while posting under the same nola.com articles, and responding to and echoing each other's posts, were unaware of the identity of the other. Any assertion to the contrary belies the fact that both Perricone and then-First AUSA Mann are highly intelligent, experienced investigators and very capable prosecutors; and it is truly hard to believe that such seasoned, savvy and keenly insightful individuals, charged with unraveling the most complex white collar crimes in this District, would completely and totally overlook such an obvious thing, especially considering the information set forth in the posts of each. To even think as much strains credulity well beyond the breaking point. Surely, the particular posts of "eweman" and "legacyusa", et al., stood out quite dramatically amongst the quotidian posts of many others.

ODC Exhibit 5, p. 27. Any collusion between Respondent and Ms. Mann, or simply awareness that the other was posting online commentary, undermines Respondent's claim that his online

commentary was something he did to relieve the stress caused by his undiagnosed PTSD.[10] Thus, there does not appear to be clear and convincing evidence supporting the causation element.

Based on the foregoing, the Committee's failure to find mental disability as a mitigating factor appears to be reasonable and not erroneous.

B. The ABA Standards and Case Law

The *ABA Standards for Imposing Lawyer Sanctions* suggests that either suspension or disbarment is the baseline sanction in this matter. Standard 5.21 states, in pertinent part: "Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to … cause serious or potentially serious injury to a party or to the integrity of the legal process." Standard 5.22 states, "Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." Here, Respondent's conduct falls within the scope of both Standards. While serving as an AUSA, Respondent knowingly violated Rule 3.6(a) by posting anonymous comments online regarding cases being handled by the office for which he worked, which had the substantial likelihood of materially prejudicing the proceedings. Respondent intentionally violated Rule 3.8(f) by making public comments with the intent to heighten public condemnation of various individuals subject to investigation or prosecution by his office. Some of Respondent's comments were regarding cases he was assigned as a prosecutor. As discussed above, this conduct caused actual,

[10] The December 20, 2013 report completed by the Department of Justice Office of Professional Responsibility ("OPR") concluded that there was insufficient evidence to establish by a preponderance of the evidence that Respondent and AUSA Mann were contemporaneously aware of commenting by the other. ODC Exhibit 13, Bates 302. However, Judge Engelhardt's review of the evidence suggests otherwise. Furthermore, Respondent refused to be interviewed by the OPR during its investigation. *Id*. at Bates 303-304. Thus, the OPR did not have the benefit of analyzing that evidence. Accordingly, the Board is of the opinion that questions remain as to whether Respondent and former AUSA Mann were contemporaneously aware of the other's commenting.

significant harm to the legal process. Given the totality of the circumstances, especially Respondent's intentional conduct and the serious harm, the Board finds that disbarment is the baseline sanction.

There is no disciplinary case law in Louisiana regarding inappropriate extrajudicial statements by a prosecutor. Respondent and the Committee referenced three cases from other jurisdictions that resulted in discipline for inappropriate extrajudicial statements made by prosecutors. *See Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn. 1/23/1989); *Attorney Grievance Commission Maryland v. Gansler*, 377 Md. 656 (11/12/2003); and *In the Matter of Brizzi*, 962 N.E.2d 1240 (Ind. 3/12/2012). Discipline was also imposed in a fourth matter. *See Board of Professional Responsibility, Wyoming State Bar v. Murray*, 143 P.3d 353 (9/27/2006). In each of these four cases, the discipline was based upon isolated statements made in criminal matters by prosecutors. In all of the cases, except *Zimmerman*, the misconduct was related to extrajudicial statements made in a single criminal matter. *Zimmerman* involved extrajudicial statements in three criminal matters. All four of the cases resulted in lenient discipline – reprimand or censure. Here, Respondent's conduct is more egregious than that in the cases referenced above. Respondent made hundreds of comments over the course of several years, which led to significant harm and potential harm to various matters, tarnishing the reputation of the United States Attorney's Office, and diminishing the public's faith in the legal system.

While it does not involve actions by a prosecutor, the Court's decision in *In re McCool* is relevant to the determination of sanction in this matter. 2015-B-0284 (La. 6/30/15), 172 So.3d 1058. The Court disbarred Ms. McCool for launching a lengthy social media campaign, related to her representation of a client, in which she used social media to discredit two judges. 2015-B-0284 (La. 6/30/15), 172 So. 3d 1058. Through the use of social media and the internet, Ms.

McCool encouraged the public to contact two judges handling related matters in an attempt to influence the judges' future rulings in the matters. The Court noted that because Ms. McCool posted her statements on the internet, the postings still have the potential to reach a large number of people and remain present. The Court found that Ms. McCool's actions caused actual and potential harm to the independence and integrity of the judicial system as well as causing the judges to be concerned for their well-being.[11] The Court also found that Ms. McCool disseminated false and misleading information and engaged in conduct prejudicial to the administration of justice. The following aggravating factors were present: dishonest and selfish motive, pattern of misconduct, multiple offenses, substantial experience in the practice of law, and refusal to acknowledge the wrongful nature of her conduct or show any remorse for her actions. The only mitigating factor recognized by the Court was Ms. McCool's lack of a disciplinary record.

Here, Respondent's misconduct is similar to that in *McCool* in that his public, online statements had the potential to improperly influence the judicial process. While Respondent's misconduct did not target a particular judge as did Ms. McCool's, Respondent's comments targeted particular individuals who were subject to investigation or prosecution by Respondent's office. Furthermore, Respondent's misconduct was more widespread than that in *McCool*. Ms. McCool's online campaign was focused on a particular matter, while Respondent's online comments concerned several matters being handling in the Eastern District of Louisiana. Given that Respondent's online commentary concerned several matters, the Board finds that the actual and potential harm caused by his conduct is just as egregious as the harm in *McCool,* if not more so. Also, as in *McCool*, Respondent's statements were made on the internet, which allowed them to reach a large number of people. Thus, the Board finds that the extensive scope of Respondent's

[11] Ms. McCool also exposed the identities of minors involved in the litigation on the internet, which the Court found to be extremely harmful.

misconduct and the significant actual and potential for harm it caused justifies a sanction on par with that imposed in *McCool*.

The Board recognizes that there are several mitigating factors present in this matter, which was not the case in *McCool*. However, as discussed above, the Board finds that Respondent's intentional misconduct and the significant harm it caused warrants a significant sanction. Thus, a downward deviation from disbarment is not warranted in this matter. Further justifying disbarment is the Court's holding that public officials, which include prosecutors, are held to a higher standard than ordinary attorneys. *See In re Bankston*, 2001-2780 (La. 3/8/02), 810 So.2d 1113; and *In re Griffing*, 2017-0874 (La. 10/18/17), 2017 WL 4682017. This particular factor was not present in *McCool* as Ms. McCool was not a public official. As a senior federal prosecutor with significant experience, Respondent should have known his actions had the potential to wreak havoc, which is exactly what happened. The fact that Respondent's online commentary continued for a significant period of time demonstrates the poorest of judgment. Considering all of the factors discussed above, the Board finds that disbarment is the appropriate sanction in this matter.

Respondent argues that he should be given credit for his "voluntary suspension" from the practice of law. This argument is without merit. Respondent claims he is serving a "voluntary suspension," having not practiced law since leaving the USA's office in March of 2012. However, he has remained eligible to practice law during that time and could do so at any moment without restriction. Thus, Respondent did not relinquish the privilege of practicing law because of his "voluntary suspension." In order to receive "credit for time served," a lawyer must be placed on interim suspension pursuant to Rule XIX, §19.2 or §19.3. When a lawyer is placed on interim suspension and subsequently suspended, the Court may make the suspension retroactive to the date

of the interim suspension, which it does in most cases.[12] Rule XIX, §24(A). Accordingly, the Board declines to give Respondent any "credit for time served" by recommending that his sanction be made retroactive to March of 2012. Furthermore, the Board declines to consider Respondent's "voluntary suspension" as a mitigating factor. ODC made it clear to Respondent during the investigation of this matter that he would not be given credit for his "voluntary suspension" unless he was, in fact, suspended pursuant to the interim suspension provisions of Louisiana Supreme Court Rule XIX. *See* Rule XIX, §§19.2 & 19.3. *See also* ODC Exhibits 17 & 19. Respondent declined to pursue this option.

CONCLUSION

The Board adopts the factual findings and legal conclusions of the Committee. The Board further finds that Respondent's misconduct with regard to Rule 3.8(f) was intentional. The Board recommends that Respondent be disbarred. The Board also recommends that Respondent be assessed with the costs and expenses of this matter.

[12] If a lawyer is on interim suspension and subsequently disbarred, the effective date of the disbarment is automatically retroactive to the date of interim suspension. Rule XIX, §24(A).

RECOMMENDATION

The Board recommends that Respondent, Salvador R. Perricone, be disbarred. The Board also recommends that Respondent be assessed with the costs and expenses of this matter.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Pamela W. Carter
Dominick Scandurro, Jr.
Danna E. Schwab
Evans C. Spiceland, Jr.
Melissa L. Theriot
Charles H. Williamson, Jr.

BY: Sheila E. O'Leary
Sheila E. O'Leary
FOR THE ADJUDICATIVE COMMITTEE

Brian D. Landry - Dissents with reason.
Linda G. Bizzarro - Recused.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

In re: Salvador R. Perricone
Docket No.: 17-DB-016

CONCURRING IN PART, AND DISSENTING IN PART

I agree the Board should adopt the factual findings and legal conclusions of the Hearing Committee. The Respondent clearly violated the Rules as set forth in the majority's recommendation. However, with regard to the sanction, a two to three-year suspension, with the possibility of deferral, would be the more appropriate sanction. Disbarment does not appear to be warranted under the facts of this case.

The Court has previously stated, "The most serious penalty, disbarment, is reserved for cases where the attorney acts in bad faith and causes great damage or risk of damage to his or her client." *In re Pinkston*, 98-1926, *9 (La. 12/11/1998), 728 So.2d 381, 383. The ABA's Standards for Imposing Lawyer (amended 1992) provides as follows:

> 5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

I do not see that Respondent "misused [his] position" as an Assistant United States Attorney to "obtain a significant benefit or advantage for himself." Respondent did not use the power of his office in making his anonymous on-line statements. The benefit or advantage gained personally, if any, could not be considered significant. The Hearing Committee's recommendation of suspension was appropriate.

The case the majority relies upon for the sanction of disbarment is *In re McCool* 2015-0284 (La. 6/30/15), 172 So.3d 1058. The question I believe the majority gets wrong is whether

the Respondent's violations were more or less severe than the actions of Ms. McCool. Ms. McCool's internet posting specifically solicited the public to contact judges in an effort to influence their opinions, as well as publishing the names of minors' involved in the case. The judges' expressed safety concerns due to Ms. McCool's postings, and the Court noted the additional safety risk in posting the minors' names to the public.

Here, Respondent's misconduct is less egregious because Respondent did not intend to influence a proceeding, or cause safety concerns for the judiciary or minors. By contrast, his conduct had the potential influence public opinion regarding multiple matter, but not the safety of judges or children. His conduct did cause haram as discussed by the majority, but not to the same level as the harm caused by Ms. McCool's conduct.

While Respondent's misconduct may not warrant disbarment, it certainly warrants a lengthy suspension, as recommended by the Hearing Committee (two years) and the Office of Disciplinary Counsel (three years). I would vote to recommend such suspension, but cannot agree with the majority's recommendation of disbarment.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

By: _____

Brian D. Landry,
Adjudicative Committee Member

APPENDIX

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. …

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
(b) Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall: … (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:
(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) …
(c) …
(d) Engage in conduct that is prejudicial to the administration of justice; …