ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: GREGORY SWAFFORD

DOCKET NUMBER: 22-DB-006

RECOMMENDATION TO THE LOUISIANA SUPREME COURT

INTRODUCTION

This attorney disciplinary matter arises out of formal charges filed by the Office of Disciplinary Counsel ("ODC") against Gregory Swafford ("Respondent"), Louisiana Bar Roll Number 22165.[1] ODC alleges that Respondent violated the following Rules of Professional Conduct: 8.1(b), 8.1(c), 8.4(a), 8.4(c), and 8.4(d).[2]

PROCEDURAL HISTORY

The formal charges were filed on February 18, 2022. Respondent filed an answer to the charges on April 20, 2022. The hearing of this matter was held on September 26, 2022 before Hearing Committee No. 23 ("the Committee").[3] Deputy Disciplinary Counsel Christopher D. Kiesel appeared on behalf of ODC. Respondent appeared *pro se*.

On December 12, 2022, the Committee issued its report, finding that ODC had proven violations of Rules 8.1(b), 8.1(c), 8.4(a), and 8.4(c), but had not proven a violation of Rule 8.4(d).

[1] Respondent was admitted to the practice of law in Louisiana on April 23, 1993. Respondent is currently eligible to practice law.

[2] Rule 8.1 states, in pertinent part: "An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: … (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6; or (c) Fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege."
Rule 8.4 states, in pertinent part: "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; … (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) Engage in conduct that is prejudicial to the administration of justice; …"

[3] Members of the Committee included Elicia D. Ford (Chair), Alexis P. Joachim (Lawyer Member), and Thomas W. Mitchell (Public Member).

Thus, the Committee recommended that a one-year and one-day suspension be imposed upon Respondent. The Committee also recommended that an order be issued requiring Respondent to make restitution to Ms. Bouligny in the amount of her investment, which was $50,000, as well as repay her any funds she expended in seeking the repayment of her investment, including court costs and attorney's fees. The Committee further recommended that Respondent be cast with all costs and expenses of these proceeding in accordance with Rule XIX, Section 10.1.

ODC filed an objection to the Committee's report on December 29, 2022. Respondent also filed an objection to the report on January 6, 2023. ODC's pre-argument brief was filed on February 28, 2023. Respondent's pre-argument brief was filed on March 1, 2023. Oral argument before Panel "B" of the Disciplinary Board was held on March 30, 2023.[4] Mr. Kiesel appeared on behalf of ODC. Respondent appeared *pro se*.

FORMAL CHARGES

The formal charges read, in pertinent part:

Failure to Cooperate

> On March 25, 2021, the ODC received a complaint ("Complaint") from Suzanne R. Bouligny ("Ms. Bouligny") regarding Respondent. The Complaint was opened for investigation as ODC 39140.
>
> On April 12, 2021, the ODC sent a cover letter and the Complaint to Respondent, via certified mail (return receipt requested), to his Louisiana State Bar Association ("LSBA") primary/secondary/preferred bar registration address of 4734 Franklin Avenue, New Orleans, Louisiana 70122. On April14, 2021, delivery of the same was accepted on Respondent's behalf.
>
> On April 22, 2021, Respondent requested and received an extension of time until May 19, 2021 to provide his written response to the Complaint. Respondent failed to provide any response by that extended deadline.
>
> As a result of Respondent's failure to cooperate with the ODC in its investigation, a subpoena had to be issued to compel production of relevant records

[4] Members of Panel "B" included Aldric C. "Ric" Poirier, Jr. (Chair), Lori A. Waters (Lawyer Member), and M. Todd Richard (Public Member).

and to take Respondent's sworn statement. The subpoena ordered Respondent to produce specifically identified documents and written communications, including his response to the Complaint, by July 22, 2021. Respondent failed to do so. More than six months later, Respondent still has not complied with the subpoena's production directive.

On August 9, 2021, the ODC attempted to take Respondent's sworn statement. Therein, Respondent refused to answer any substantive questions regarding the Complaint allegations, and instead invoked his Fifth Amendment right against self-incrimination. An adverse inference should be drawn against Respondent based on his refusal to testify in response to probative evidence offered against him.

Respondent's Additional Misconduct

Ms. Bouligny first met Respondent around seven years ago through a mutual friend. Ms. Bouligny was told that Respondent purchased, remodeled and flipped houses for a profit. In December 2019, Ms. Bouligny spoke to Respondent and told him that she was interested in investing in his next project. Ms. Bouligny states that Respondent then called and informed her "about the property located at 700-702 Caffin Avenue, New Orleans, La. which he owned and would like for me to invest in."

On January 5, 2020, Respondent sent Ms. Bouligny an email which described her potential involvement in the project as an investor as follows: "The proposal is that in exchange for the $50k investment - the investor will receive the return of the investment funds advanced plus a 50% return on the amount invested. The funds advanced are returned at the completion and sale of each project."

On January 13, 2020, Respondent came to Ms. Bouligny's home to execute the Real Estate Joint Venture Agreement ("Agreement") for the project. The Agreement confirmed that Ms. Bouligny would invest $50,000.00 to renovate the property located at 700-702 Caffin Avenue, New Orleans, Louisiana 70122 ("Property"). Paragraph 9 of the Agreement stated that the anticipated listing price of the Property upon completion of the renovations would be $150,000.00. Paragraph 10 of the Agreement stated that "Distributions" for the project would be as follows:

> (A) Upon the sale of the subject property, proceeds will first be used to repay capital invested by Suzanne Bouligny in the amount of fifty thousand ($50,000.00) dollars. In addition, Suzanne Bouligny shall simultaneously receive the sum of twenty-five thousand ($25,000.00) dollars which represents the profit earned for providing the investment capital.

On that same day, Respondent texted Ms. Bouligny his routing number and Capital One Bank account number for transfer of her $50,000.00 investment capital

funds for the project. On January 14, 2020, Ms. Bouligny transferred those funds into Respondent's bank account.

After receipt of those funds, Respondent began to renovate the property and initially kept Ms. Bouligny informed of his progress regarding the same. In March 2020, Respondent informed Ms. Bouligny that the renovations had come to a halt due to the Covid-19 pandemic. On August 31, 2020, Ms. Bouligny sent Respondent a text which stated, in pertinent part: "I'm checking in with u regarding the progression of the house. Last time we spoke about the house ... things were on hold. Looking for an update." On September 1, 2020, Respondent sent Ms. Bouligny a reply text which represented, in pertinent part: "I will call you tomorrow. Everything is good." Respondent did not call Ms. Bouligny the next day as promised.

On September 17, 2020, Ms. Bouligny met with Respondent at her house. Ms. Bouligny described that meeting as follows:

> We began our conversation with a meeting update. At this point, no progress had been made since March, 2020 when I made the initial investment, a period of five (5) months. We concluded the meeting with me saying to Mr. Swafford I would like my investment ($50,000) returned to me and I would forgo the profit. He agreed to repaying my initial investment.

On September 18, 2020, Respondent sent Ms. Bouligny a text which represented: "Thank you for your consideration. I will complete our transaction on or before October 31. I appreciate your trust and my word and my name is what I value. Thanks." Respondent did not return Ms. Bouligny's investment capital by that promised date.

In late January 2021, Ms. Bouligny went to Respondent's home in an attempt to recoup her investment capital. Ms. Bouligny described that meeting as follows: "[W]e had a conversation outside his home. He informed me that he now needed to wait on a death certificate so that the title company would allow him to sell the property." For the reasons discussed below, Respondent's representation to Ms. Bouligny in this regard was false.

On February 3, 2021, Ms. Bouligny met with Respondent at her house. Prior to that meeting, suspicious of Respondent's prior representations to her, Ms. Bouligny accessed the Orleans Parish Assessor's Office website and discovered that the Property already had been sold on June 26, 2020 by Respondent's company, Holding Renaissance Property, LLC, for $100,000.00.

Ms. Bouligny confronted Respondent about his prior false representations to her during their meeting on February 3, 2021:

> At that moment I informed Mr. Swafford that I was aware the property that I invested in was sold on June 26, 2020. At that moment Mr. Swafford said he was waiting on the property he owned on General Pershing to be sold in order to return my investment which is totally separate from our initial contract. (see attached) That property did not play a part in our contract. He told me the [General Pershing] deal would close at the end of February, 2021.

Later that afternoon, Respondent sent Ms. Bouligny a text which stated: "I deal with everything head on. That's all I know and who I am." On February 4, 2021, Respondent also called Ms. Bouligny to assure her that he would return her $50,000.00 investment capital by the end of February 2021.

On February, 23, 2021, Ms. Bouligny sent Respondent a text which stated, in pertinent part:

> I trusted you with a deal that u never completed. Now I sit here and wait, wait, wait for the money u took from me and listen to all your excuses. The fact u sold the property and never mention it baffles me. At that point you could have given me the 50,000. Anyone with a decent soul and righteous heart would not have done what u did regarding this deal.

On February 24, 2021, Respondent sent Ms. Bouligny a reply text which represented: "I'm going to pay this week."

Despite numerous promises, Respondent has failed to return any portion of the $50,000.00 investment capital to Ms. Bouligny. Respondent also has not paid to Ms. Bouligny any of the profit due to her under the Agreement following Respondent's sale of the Property in June 2020.

Ms. Bouligny describes the harm that Respondent's misconduct has caused her as follows:

> I trusted Mr. Swafford due to our long-term friendship .... I relied on him and never had a doubt he would act in bad faith.
>
> Mr. Swafford informed me on multiple occasions in January and February 2021 he would return my investment. Despite this promise, Mr. Swafford has not repaid the funds as required by the contract. What really concerns me is that Mr. Swafford was seemingly untruthful with me on February 3, 2021 before I informed him I knew about the sale of the property on Caffin. In my opinion, this is an attorney who did not perform his contractual obligations in good faith and may well have been blatantly dishonest.... By not returning my investment as promised, Mr. Swafford has disgraced

the Louisiana Bar Association. It is unethical as well as criminal and he has continued to lead me on as if the investment would be paid. To this date, the money has not been returned to me.

The ODC respectfully submits that there is clear and convincing evidence that Respondent has violated Rule 8.1(b) and (c) and Rule 8.4(a), (c) and (d) of the Louisiana Rules of Professional Conduct.

THE HEARING COMMITTEE'S REPORT

In the Committee's December 12, 2022 report, it noted the following information concerning the evidence admitted at the hearing and the witness who testified.

EVIDENCE

At the hearing held Monday, October 3, 2022, the following exhibits were admitted:

On behalf of ODC: ODC 1-9, which included Respondent's LSBA registration, the original complaint, correspondence between ODC and the Respondent regarding the complaint, and selected pleadings regarding the attempted sale of other relevant properties.

On behalf of Respondent: Exhibits provided the day of the hearing labeled R1-R44, which were admitted and included print-outs from the Louisianan [sic] assessor's website and various real estate websites regarding the sale of the property at S. Johnson Street, and text messages between Respondent and Ms. Bouligny. An affidavit labeled R45-46 was also admitted under seal for the purposes of impeachment.

Witnesses:

Respondent did not testify, invoking the 5th amendment.

Ms. Bouligny, who filed the original complaint, was the one witness who testified for ODC.

***

The Committee then issued the following findings of fact.

FINDINGS OF FACT

The committee finds the following facts:

The evidence shows that Respondent and Ms. Bouligny entered into a contract on January 13, 2020, wherein she was to give him $50,000 for him to use

to purchase and renovate for sale, or "flip," a property at 700 Caffin street. The evidence also shows the Caffin property was the sole basis of their contract (ODC 21-24). They entered into the "Real Estate Joint Venture Agreement" on January 13, 2020, and the assessor's website shows Caffin sold on June 26, 2020 (ODC 35). She testified that she did not find out of [sic] the sale until she went on the assessor's website herself in February 2021; up until that time, the text messages show that they had been in communication, with her asking for a status, and there is no direct evidence of when he informed her of the sale of the Caffin property.

The committee finds his failure to inform her about the sale of the Caffin property to be egregious. On cross-examination Respondent asked Ms. Bouligny questions about a "Substitution" of the S Johnson property for the Caffin property. He asserted that there was a meeting with Ms. Bouligny wherein her [sic] informed her that one property had been substituted for another, but under questioning she said she did not recall that conversation and did not believe there was ever a substitution.

There are texts from November 2021, wherein it's clear that Ms. Bouligny was aware of an issue with the need to get a death certificate to clear title on a property for sale, but the property they are discussing is not clear. She also testified that at some point she was aware he needed to sell another property that was not the Caffin property in order to pay her back, but neither these texts nor her testimony prove that a "substitution" occurred. Significantly, there is also no document that the committee has seen – formal or informal – that supports the assertion that there was a substitution of the properties. We find that this was not adequately proven. The committee finds there was no evidence that the contract was changed by mutual agreement.

The evidence supports a finding that Respondent has not repaid Ms. Bouligny any of her money; the contract clearly established that this was not a gift to Respondent, but rather an investment by Ms. Bouligny, to be repaid at the sale of the subject property. Respondent insinuated that the Caffin property sale was not enough to be able to pay Ms. Bouligny back, but most importantly there is no evidence that she was kept informed – and Ms. Bouligny specifically denied – that he ever informed her of the sale of Caffin. The committee is not certain when Respondent claims that a substitution took place, or when he informed her that he would need to sell the S Johnson property to repay her; however, [d]ocuments provided by Respondent himself, show that the property at S Johnson sold in September 28, 2021, for $110,000 (R 20); even if there was a substitution of this property for the Caffin property, Respondent has still not repaid to Ms. Bouligny any of her investment from these or other proceeds. The committee finds this to be especially egregious.

Ms. Bouligny was the only witness to take the stand, and in cross-examination, an affidavit was admitted for the purposes of impeaching her credibility; however, the committee does not find that the information in the

affidavit entirely discredits her testimony. The documents in evidence corroborate her testimony that a contract regarding a specific property was entered into, that the subject property was sold, and she has still not been repaid her investment.

Regarding taking the fifth, Ms. Bouligny did testify that she had gone to the police station to try and get help getting her money back, and they told her that was a civil matter. While the committee is not aware of any potential criminal prosecution, we did not take a negative inference of Respondent's refusal to testify, as he may reasonably believe he could face criminal prosecution at a later date. While ODC and the committee did not get to ask Respondent questions, the committee did consider the evidence and testimony that he entered via cross-examination of Ms. Bouligny, despite his taking the fifth.

***

As to the alleged rule violations, the Committee determined as follows:

RULES VIOLATED

The committee finds the following violations:

Rule 8.1(b) and (c) - the evidence shows that Respondent did fail to cooperate with the ODC, as he never sent a substantive formal response to the initial Letter and Complaint from ODC. He clearly got the letter, as he replied asking for an extension, but never sent a subsequent response. They were forced to subpoena him for records and for a sworn statement. He never complied with a request for records, but did offer a sworn statement, wherein he took the fifth, and refused to answer the questions. His failure to cooperate is somewhat mitigated by the fact that he did participate in the hearing of the matter, where he offered documentary evidence for the first time, and some facts through his cross-examination of Ms. Bouligny.

Rule 8.4(a), (c) and (d) – regarding whether or not there is evidence of fraud, deceit, dishonesty, or misrepresentation, the committee finds:

There are many instances in the record that Respondent represented that he intended to pay Ms. Bouligny back her money, yet he has never done so; thus, he misrepresented to her when she would be repaid her investment.

The evidence also shows that the Caffin property was the subject of the contract, and he did not inform her when it sold, nor did he give her any money from the sale, which the committee finds to be both dishonest and deceitful.

We do not feel there was evidence of fraud.

> We do not feel there was evidence of conduct prejudicial to the administration of justice.
>
> ***

As to the sanction, the Committee analyzed the Rule XIX, Section 10(C) factors and found that Respondent violated duties owed to the public and the profession. It also concluded that Respondent acted knowingly and intentionally. The Committee explained that Respondent's misconduct caused actual harm to Ms. Bouligny, in that she lost the $50,000 she invested with Respondent, and is yet to be repaid. Also, Ms. Bouligny has expended additional money trying to recoup that investment. The Committee found that the aggravating factors of a prior disciplinary offense (2018 suspension),[5] refusal to acknowledge the wrongful nature of the conduct, substantial experience in the practice of law (admitted in 1993), and indifference to making restitution were present. No mitigating factors were found by the Committee.

After discussing Standards 6.12 and 7.2 of the ABA's *Standards for Imposing Lawyer Sanctions*, the Committee found that suspension was the baseline sanction for Respondent's misconduct. Under Standard 6.12, suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. Under Standard 7.2, suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

[5] In 2018, the Court suspended Respondent for six months, with three months deferred, subject to a one-year period of probation with conditions, for violations of Rules 1.3, 1.4, 1.16(d), and 8.4(a). *In re Swafford*, 2017-2154 (La. 3/23/18), 238 So.3d 957.

After considering *In re Bernstein*, 2007-1049 (La. 10/16/07), 966 So.2d 537 and *In re Sharp*, 2009-0207 (La. 6/26/09), 16 So.3d 343, two cases relied upon by ODC in support of disbarment, the Committee declined to recommend this sanction. Instead, the Committee determined that a one-year and one-day suspension should be recommended, based upon the dishonest nature of Respondent's dealings with Ms. Bouligny, his lack of remorse, and his failure to repay Ms. Bouligny her $50,000 investment. The Committee also recommended that an order be issued requiring restitution be paid to Ms. Bouligny, as well as repayment to her of any funds she expended in seeking repayment, including court costs and attorney fees she has incurred or will incur in the future.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of Louisiana Supreme Court Rule XIX. Rule XIX, Section 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 prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/92).

A. The Manifest Error Inquiry

The Committee's findings of fact are not manifestly erroneous and are adopted by the Board, with one clarification. The Committee states in its findings:

> "There are texts from November 2021, wherein it's clear that Ms. Bouligny was aware of an issue with the need to get a death certificate to clear title on a property for sale, but the property they are discussing is not clear."

Hrg. Comm. Rpt., p. 6.

The testimony of Ms. Bouligny and her complaint, *not a text message*, show that she was aware of the need to get a death certificate to clear title on a property for sale. While the property appears to be the 4236 South Johnson Street property, and not the Caffin Street property, her testimony and complaint are unclear as to the specific property. *See* Hrg. Tr., p. 52, 113-14; ODC Exhibit 1, Bates p. 007. Nevertheless, this clarification does not affect the Committee's determination that the evidence does not prove that a "substitution" of the South Johnson Street property for the Caffin Street property was ever made in connection with the Real Estate Joint Venture Agreement. Hrg. Comm. Rpt., p. 6.

Moreover, while not a factual finding, the Board also notes that Respondent did not file Exhibits 28 or 32 into the record; therefore, the Committee's finding that these exhibits were filed along with Respondent's other exhibits is corrected as a clerical matter.

B. *De Novo* Review

De novo review of the hearing committee's application of the Rules of Professional Conduct shows that the Committee correctly found that violations of Rules 8.1(b), 8.1(c), 8.4(a), and 8.4(c) were established by ODC. The Committee did not find a violation of Rule 8.4(d), and ODC states in its pre-argument brief that it does not object to this finding. The remaining alleged rule violations are discussed below.

Rules 8.1(b) and 8.1(c): Rule 8.1(b) provides, in pertinent part, that a lawyer in connection with a disciplinary matter shall not . . . knowingly fail to respond to a lawful demand for information from a disciplinary authority. Rule 8.1(c) provides that a lawyer in connection with a disciplinary matter shall not fail to cooperate with ODC in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege. Here, Respondent clearly received Ms. Bouligny's complaint and accompanying cover letter from ODC, as he contacted ODC and asked for an extension to reply. Although he received the extension, he never sent a formal response to the complaint. ODC was forced to subpoena him for the production of records and a sworn statement. He never complied with the records request, but did appear for his sworn statement, where he asserted his Fifth Amendment right against self-incrimination and refused to answer most of the questions he was asked by Deputy Disciplinary Counsel concerning issues surrounding Ms. Bouligny's complaint. Respondent also asserted his Fifth Amendment privilege at the hearing, refusing to answer questions from ODC or the Committee concerning his alleged misconduct. There was no reasonable basis for Respondent's assertion of this Fifth Amendment privilege at his sworn statement or the hearing. Although Ms. Bouligny did speak with the district attorney's office and a police officer concerning Respondent's failure to repay her the $50,000 investment, she was told this was a civil, not criminal matter. No criminal investigation was opened. Hr. Tr., pp. 74-75. *See In re Holliday*, 2009-0116 (La. 6/26/09), 15 So.3d 82 *citing Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (there must be reasonable basis for the assertion of the Fifth Amendment privilege) and *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) (the protection of the Fifth Amendment must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer). Respondent's failure to respond to the complaint, his failure to fully cooperate with ODC's

investigation, and his unreasonable assertion of his Fifth Amendment privilege at the sworn statement and the hearing are violations of Rules 8.1(b) and 8.1(c).[6]

Rule 8.4(c): Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, and misrepresentation. As determined by the Committee, there are many instances in the record where Respondent represented to Ms. Bouligny that he intended to pay her investment back to her, yet he has never done so. Accordingly, he intentionally misrepresented to her that she would be repaid and when the repayment would occur. ODC Exhibit 2; Hrg. Tr., pp. 45-50, 57, 59, 62-63. The evidence also shows that the Caffin property was the subject of the contract, and Respondent did not inform Ms. Bouligny when it sold, nor did he give her any money from the sale. ODC Exhibit 2; Hrg. Tr., pp. 40-42, 58-59.

[6] ODC maintains in its pre-argument brief that while the Committee correctly found that Respondent failed to cooperate with ODC, it erred in failing to draw a negative inference from Respondent's improper invocation of the Fifth Amendment privilege in this proceeding. Although not specifically stated, it appears that ODC's argument is that the negative inference should apply to all of the alleged misconduct in this matter, except for that pertaining to the Rule 8.4(d) violation. ODC's Pre-Argument Brief, p. 4 (citing Respondent's statement at the hearing, "I will assert the Fifth Amendment *as to everything*"). ODC notes that this issue is a matter of first impression in Louisiana.

A negative inference cannot be drawn against a defendant in a criminal matter; however, in civil matters the Fifth Amendment does not preclude a negative inference against a party who refuses to testify in response to probative evidence against him. *See, e.g.* 19 La. Civ. L. Treatise, *Evidence and Proof*, Section 8.4, fn. 3 (2d ed.) (citing cases). Attorney disciplinary proceedings, however, "are neither civil nor criminal but are *sui generis*." Rule XIX, Section 18(A); *see also Louisiana State Bar Ass'n v. Chatelain*, 513 So.2d 1178, 1182 (La. 1987) ("A bar member in a disciplinary proceeding is not entitled to all the protections that a criminal defendant enjoys.") ODC further argues that because: 1) there are more limited protections afforded to attorneys in disciplinary proceedings (*Chatelain*); 2) an improper assertion of the Fifth Amendment privilege violates Rules 8.1(b) and 8.1(c), (*Holliday*); and 3) the Louisiana Code of Civil (not Criminal) Procedure generally applies to disciplinary proceedings (Rule XIX, Section 18(B)), a negative inference should have been drawn from Respondent's improper assertion of the Fifth Amendment privilege in this matter by the Committee.

ODC cites three cases from other jurisdictions in which the courts have held that the fact finder may draw a negative inference from an attorney's invocation of the Fifth Amendment privilege in a disciplinary proceeding. However, two of these cases, *State v. Postorino*, 53 Wis.2d 412, 93 N.W.2d 1 (1972) and *In re Meier*, 256 Ga. 72, 344 S.E.2d 212 (1986), specifically indicate that in their jurisdictions, disciplinary matters are *civil* in nature, not *sui generis*. The third matter, *In re Kiss*, 152 A.D.3d 129, 54 N.Y.S.3d 859 (2017), does not address whether, in its jurisdiction, disciplinary matters are civil or criminal in nature, or *sui generis*. Given the lack of specific support for ODC's argument, the Board declines to find that the Committee erred in failing to draw a negative inference from Respondent's refusal to testify.

This conduct was intentionally dishonest and deceitful. A violation of Rule 8.4(c) has also been established by ODC.

Rule 8.4(a): Rule 8.4(a) provides that it is professional misconduct for a lawyer to 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. By violating Rules 8.1(b), 8.1(c), and 8.4(c), Respondent has also violated this Rule.

II. The Appropriate Sanction

A. The Rule XIX, Section 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 the actual or potential injury caused by the lawyer's misconduct; and

(4) the existence of any aggravating or mitigating factors.

Here, Respondent violated duties owed to the public and the legal profession. His conduct was knowing and intentional. His conduct caused serious, actual harm to Ms. Boulingy. She lost the $50,000 she invested with Respondent, and she has not been repaid. She also expended additional money in legal fees and costs trying to recoup the investment. Respondent's failure to cooperate with ODC's investigation caused actual harm to the disciplinary system in that it was forced to expend funds to subpoena Respondent's records and his appearance at the sworn statement. At the sworn statement, he answered only a few questions posed by ODC, asserted his Fifth Amendment privilege as to the other questions posed without a reasonable basis, and failed

to produce the requested records. Aggravating factors include a prior disciplinary offense, refusal to acknowledge the wrongful nature of the conduct, substantial experience it the practice of law, indifference to making restitution, dishonest or selfish motive, and bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. No mitigating factors are present.

B. The ABA Standards and Case Law

The baseline sanction in this matter ranges from suspension to disbarment under the ABA's *Standards for Imposing Lawyer Sanctions*. Under Standard 5.11(b), disbarment is generally appropriate when a lawyer engages in any . . . intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. Here, Respondent engaged in intentional conduct in his business dealing with Ms. Bouligny. As explained above, his conduct involved dishonesty, deceit, and misrepresentation. It also seriously adversely reflects on his fitness to practice law. Under Standard 7.2, suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. In this matter, Respondent knowingly, if not intentionally, failed to cooperate with ODC in its investigation of Ms. Bouligny's complaint and refused to testify at the hearing. As noted above, his actions caused injury to the disciplinary system in that ODC had to expend its limited funds to subpoena Respondent's appearance and various records for production at a sworn statement.

Further, the Board will not adopt the Committee's application of Standard 6.12. This standard applies to a lawyer's failure to take remedial action when he or she knows that false information or documents are being submitted to a court or that material information is improperly being withheld, causing injury or potential injury to a party to legal proceeding or an adverse or

potentially adverse effect on a legal proceeding. In this instance, ODC has made no allegations that false information or documents were submitted to a court in connection with an underlying legal proceeding, causing harm to a party or an adverse effect on the legal proceeding. Accordingly, the Board will instead rely on Standards 5.11 and 7.2.

Case law also supports a sanction ranging from suspension to disbarment based upon violations of Rules 8.1(b), 8.1(c), 8.4(a), or 8.4(c). The case of *In re Wittenbrink*, 2003-0425 (La. 6/27/03), 849 So.2d 18, offers guidance in that it examined an attorney's misconduct which occurred outside of the practice of law, as did Respondent's misconduct in this matter. In *Wittenbrink*, the respondent dishonestly misappropriated funds, as did Respondent in this matter. ODC brought formal charges against the respondent, alleging that he had violated Rules 1.15 (conversion), 8.4(a), and 8.4(c) when he failed to remit taxes and other sums withheld from his employees' paychecks to the appropriate governmental authorities. ODC also alleged that the respondent's failure to file and pay his personal federal and state income taxes in a timely fashion violated these rules. *Id*. at 18-20. In reviewing the matter, the Court noted that the respondent's actions did not occur in the context of the practice of law. It determined that the respondent's failure to remit the funds withheld from his employees did not constitute conversion in violation of Rule 1.15. However, the Court found that his failure to remit these funds, along with his failure to pay his personal taxes, involved elements of dishonesty, fraud, deceit, or misrepresentation, in violation of Rule 8.4(c). *Id*. at p. 9. Aggravating factors found by the Court included prior disciplinary history, dishonest or selfish motive, and a pattern of misconduct. No mitigating factors were found; however, the Court acknowledged that the respondent had taken steps to satisfy his outstanding tax obligations. *Id*. at p. 11. The Court imposed a suspension from the practice of law for a period of one year, with six months deferred, subject to a two-year period of probation

with conditions. *Id.* In its opinion, the Court did not delineate the amount of taxes which the respondent owed to the state and federal government.

In *In re Parks*, 2008-3006 (La. 4/24/09), 9 So.3d 106, the respondent was charged with violating numerous Rules of Professional Conduct, including Rules 8.1(c), 8.4(a), and 8.4(c). Again, the respondent's alleged misconduct did not involve the practice of law. As in the present matter, the respondent failed to cooperate with ODC during the disciplinary proceeding. In *Parks*, the matter came to ODC's attention by way of a complaint filed by the victim of an automobile accident caused by the respondent. The victim claimed that the respondent had failed to address her responsibility for the accident, and had failed to maintain liability insurance coverage on her vehicle on the date of the accident. The Court noted that while the victim was rightfully concerned about the respondent's conduct, it did not find that the respondent's conduct surrounding the accident rose to a level warranting discipline. *Id.* at p. 111. However, the Court did find that the respondent's failure to respond to the complaint on several occasions, and subsequent misrepresentations she made to ODC, were separate issues. Such conduct was a violation of numerous rules, including 8.1(c), 8.4(a), and 8.4(c). *Id.* Aggravating factors found by the Court included dishonest and selfish motive, pattern of misconduct, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules and orders of the disciplinary agency, submission of false evidence, false statements, or other deceptive practices during the disciplinary process, and refusal to acknowledge the wrongful nature of the conduct. Mitigating factors included absence of a prior disciplinary record and inexperience in the practice of law. *Id.* at 111-12. Given the aggravating factors present, especially the respondent's continued failure to acknowledge the wrongful nature of the conduct, the Court imposed a one-year and one-day

suspension from the practice of law, which necessitated an application for reinstatement. *Id*. at 112.

Moreover, in *In re Ray*, 2021-1439 (La. 3/25/22), 339 So.3d 596, the Court imposed a one-year and one-day suspension based upon an attorney's misconduct while serving as interim Clerk of New Orleans First City Court. Once again, the respondent's misconduct did not involve the practice of law. His conduct is similar to the matter at hand in that he misused funds belonging to another. In *Ray*, the respondent was found to have misused public funds under his control by issuing checks from a capital improvement fund checking account totaling $4,766 to a contractor, who was also his friend. The contractor did no work on a proposed shelving project other than to take some measurements. The respondent was also found to have been dishonest in his responses to the chief judge of the district court who was in charge of investigating the issuance of these checks, along with payments to another contractor. *Id.* at p. 606. The Court found that the respondent had violated Rules 8.4(a), 8.4(c), and 8.4(d). *Id.* In aggravation, the Court found that respondent acted with dishonest or selfish motive. In mitigation, the Court found that the absence of a prior disciplinary record, full and free disclosure to the disciplinary board and a cooperative attitude towards the proceedings, and inexperience in the practice of law. *Id.* at 605, 607.

In *In re Hutton*, 2009-1185 (La. 12/1/09), 25 So.3d 767, the respondent drafted an assignment of life insurance benefits for execution by his former sister-in-law and paid her $25,000 in connection with the assignment. At the time he presented the document to his former sister-in-law, the respondent knew that the value of his brother's life insurance policy was in excess of $800,000, and that neither he nor his siblings were the designated beneficiaries of the policy. Rather, the respondent was certain that his former sister-in-law was the beneficiary, but he did not believe that she should benefit from his brother's death, regardless of the legally binding election

made by his brother. The Court found that the respondent misled his former sister-in-law as to the true purpose for the assignment of rights and the $25,000 payment. Based upon this finding, the Court found a violation of Rules 8.4(a) and 8.4(c) of the Rules of Professional Conduct. *Id.* at 774. The Court also noted that ODC had charged the respondent with entering into an improper business transaction with a client, in violation of Rule 1.8., or alternatively, dealing improperly with an unrepresented person, in violation of Rule 4.3. However, noting that these charges were largely ancillary to the Rule 8.4(c) violation, which was the "heartland" of the misconduct in the matter, it made no determination as to whether these rules had been violated. *Id.* at 775, n. 11. The Court found that the following aggravating factors were present: a dishonest or selfish motive, refusal to acknowledge the wrongful nature of the conduct, vulnerability of the victim, and indifference to making restitution. In mitigation, the Court found that the respondent had no prior disciplinary record. *Id.* at 776. The Court disbarred the respondent.

ODC cites the cases of *In re Bernstein,* 2007-1049 (La. 10/16/07), 966 So.2d 537 and *In re Sharp,* 2009-0207 (La. 6/26/09), 16 So.3d 343 in support of its proposed sanction of disbarment. Both *Bernstein* and *Sharp* involved misconduct committed by the respondents inside their law practices. In *Bernstein,* the respondent misappropriated approximately $50,000 from two law firms over an extended period of time in violation of Rules 8.4(a) and (c). The respondent attempted to characterize his misconduct as "in the nature of a breach of contract" with those firms. The respondent did make full restitution to both firms. *Bernstein,* 966 So.2d at 540-542. The Court noted that "[c]andor and honesty are a lawyer's stock in trade." *Id.* at 544. The Court found that the respondent's actions "demonstrate a fundamental lack of honesty which falls far below the standards expected of attorneys admitted to the bar of this state." *Id.* Aggravating factors present were dishonest or selfish motive, a pattern of misconduct, multiple offenses, substantial experience

in the practice of law, and illegal conduct. *Id*. at 542. Mitigating factors present were absence of a prior disciplinary record, personal or emotional problems, mental disability, and remorse. *Id*. The Court found no reason to deviate from the baseline sanction of disbarment. *Id*. at 545.

In *In re Sharp*, 2009-0207 (La. 6/26/09), 16 So.3d 343, the respondent similarly "converted to his own use approximately $50,000 belonging to his law firm and … initially lied to his partners upon being confronted with his misconduct." The respondent's misconduct violated Rules 1.15(a) and 8.4(a) and (c). *Id*. at 350. Aggravating factors present were dishonest or selfish motive, a pattern of misconduct, vulnerability of the victim, and substantial experience in the practice of law. *Id*. at 350-51. Mitigating factors present were absence of a prior disciplinary record, character or reputation, and remorse. *Id*. at 350. The Court found no reason to deviate from the baseline sanction of disbarment, and ordered the respondent to make full restitution to his former law firm. *Id*. at 351.

Similar to *Wittenbrink*, *Parks*, and *Ray*, the alleged underlying misconduct in this matter occurred outside the practice of law. In these matters, violations of Rules of Rules 8.4(a) and 8.4(c) are present, as in the instant matter. All respondents engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. Moreover, as in *Parks*, a violation of Rule 8.1(c), based on Respondent's failure to cooperate with ODC, is also present.

Bernstein and *Sharp* differ from the matter at hand in that the respondents' misconduct in those matters occurred within the practice of law and showed an ongoing pattern of misconduct. However, the amounts misappropriated in *Bernstein* and *Sharp* are similar to the amount owed to Ms. Boulingy in this matter -- $50,000. Moreover, in *Bernstein* and *Sharp*, as here, violations of Rules 8.4(a) and 8.4(c), based upon the respondents' conduct involving dishonesty, fraud, deceit or misrepresentation, were established.

Similar to *Hutton,* no attorney-client relationship has been established between Respondent and Ms. Bouligny. Violations of Rules 8.4(a) and 8.4(c) are present in both matters. However, the amount misappropriated by the respondent in *Hutton*, approximately $800,000 which he divided with his siblings, is far greater that the amount owed to Ms. Bouligny.

In this matter, the Committee found that Respondent's conduct did not warrant disbarment. The Committee determined that Respondent was dishonest with Ms. Bouligny, but that there was no evidence of an ongoing pattern of misconduct in Respondent's dealings with the public as seen in *Bernstein* and *Sharp*. The committee also found that there was no evidence of an attorney-client relationship, nor did ODC allege that such a relationship was present. Nevertheless, due to the dishonest nature of Respondent's dealings with Ms. Bouligny, his lack of remorse, and his failure to repay her, the Committee determined that the sanction of a one-year and one-day suspension would be appropriate and recommended same. Such a sanction would require that Respondent petition for reinstatement and undergo a hearing pursuant to Rule XIX, Section 24.

Given the above case law and reasoning of the Committee, a sanction less severe than that imposed in *Bernstein*, *Sharp,* and *Hutton* appears to be appropriate in this matter. The Committee's recommended sanction appears to be reasonable and is supported by the sanctions imposed in *Wittenbrink*, *Parks,* and *Ray*. Numerous aggravating factors are also present which warrant the substantial suspension recommended by the Committee. Accordingly, the Board adopts the Committee's proposed sanction and recommends that Respondent be suspended for one year and one day. The Board also recommends that Respondent be ordered to make restitution to Ms. Bouligny in the amount of $50,000.[7] Finally, the Board recommends that Respondent be assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

[7] As noted by ODC in its pre-hearing brief, restitution to Ms. Bouligny of $50,000 (i.e., the amount she paid to Respondent as investment capital for the project) is appropriate here. *Sharp*, 16 So.3d at 351. Reimbursement of

CONCLUSION

The Committee's findings of fact are adopted by the Board, with the clarifications noted above. Further, the Board adopts the Committee's findings that violations of Rules 8.1(b), 8.1(c), 8.4(a), and 8.4(c) were established by ODC. The Committee's finding that ODC did not prove a violation of Rule 8.4(d), which was not objected to by ODC, is also adopted by the Board. The Board additionally adopts the Committee's proposed sanction and recommends that Respondent be suspended from the practice of law for one year and one day. This sanction will require that Respondent petition for reinstatement and undergo a hearing pursuant to Rule XIX, Section 24. The Board further recommends that Respondent be ordered to make restitution to Ms. Bouligny in the amount of $50,000. Finally, the Board recommends that Respondent be assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

RECOMMENDATION

Given the above, the Board recommends that Respondent be suspended from the practice of law for one year and one day. The Board further recommends that Respondent be ordered to make restitution to Ms. Bouligny in the amount of $50,000. Finally, the Board recommends that

attorney's fees and court costs incurred by Ms. Bouligny in her civil suit against Respondent constitute civil damages which should not be included in the recommended restitution. *See In re Lapeyrouse*, Nos. 18-DB-081 c/w 19-DB-080, Board Recommendation (4/4/22), pp. 33-34.

Respondent be assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

R. Alan Breithaupt
Paula H. Clayton
Todd S. Clemons
Albert R. Dennis III
Susan P. DesOrmeaux
James B. Letten
Aldric C. Poirier, Jr.
M. Todd Richard

By: DocuSigned by: Lori Waters 186E1EC4292B48E...

Lori A. Waters
FOR THE ADJUDICATIVE COMMITTEE