

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: ROBERT WILLIAM HJORTSBERG

DOCKET NUMBER: 22-DB-038

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 Robert William Hjortsberg (“Respondent”), Louisiana Bar Roll Number 31587.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.3, 8.4(a), 8.4(b), 8.4(c), and 8.4(d).²

PROCEDURAL HISTORY

The formal charges were filed on August 24, 2022. Respondent filed an answer to the charges on September 20, 2022. The hearing of this matter was held on February 3, 2023 before Hearing Committee No. 12 (“the Committee”).³ Chief Disciplinary Counsel Charles B. Plattsmier appeared on behalf of ODC. Dane S. Ciolino appeared on behalf of Respondent, who was also present.

The Committee issued its report on March 13, 2023, finding that the evidence was clear and convincing that Respondent, with respect to Count 1 of the formal charges, violated Rules 8.4(a), 8.4(b) and 8.4 (c). The Committee further found that ODC did not carry its burden of proof with respect to Count 2 of the formal charges. As a sanction for rule violations related to Count

¹ Respondent was admitted to the practice of law in Louisiana on September 10, 2008. Respondent is currently eligible to practice law.

² See the attached Appendix for the text of these Rules.

³ Members of the Committee included John F. Olinde (Chair), Charles A. Cerise, Jr. (Lawyer Member), and Judy L. Milnar (Public Member).

1, the Committee recommended that Respondent be suspended from the practice of law for six months, with all but two months of this suspension deferred, with a one-year probationary period after the active period of suspension.

ODC filed an objection the Committee's report on March 15, 2023. ODC maintains in its objection that: (1) the Committee erred in finding that Respondent communicated to the presiding judge in the Zarius Brown criminal trial that he needed this client present because the nature of the case turned on his client's word against the police officer's word; (2) the Committee's legal conclusions regarding rule violations contained in Count 2 of the formal charges are incorrect and at odds with the Court's analysis in *In re Young*, 2003-0274 (La. 6/27/03), 849 So.2d 25; and (3) the sanction recommended by the Committee is predicated only upon a finding of misconduct as alleged in Count 1, and is, therefore, unduly lenient. Respondent did not file an objection to the Committee's report.

ODC's Pre-Argument Memorandum was filed on June 30, 2023, and Respondent's Reply Brief was filed on July 21, 2023. Oral argument before Panel "C" of the Disciplinary Board was held on August 3, 2023.⁴ Mr. Plattsmier appeared on behalf of ODC. Mr. Ciolino appeared on behalf of Respondent, who was also present.

FORMAL CHARGES

The formal charges read, in pertinent part:

COUNT 1

On or about January 27, 2021 the Office of Disciplinary Counsel opened file number 0039019 when the Respondent self-reported through his attorney that he planned to enter a guilty plea to [a] federal misdemeanor bill of information for failure to file his federal income tax return for the calendar year 2017. The underlying facts reflect that he failed to file for two (2) years—both 2017 and 2018, but obtained a negotiated plea for a single year in exchange for truthful testimony

⁴ Members of Panel "C" include Paula H. Clayton (Chair), Lori A. Waters (Lawyer Member), and Susan P. DesOrmeaux (Public Member).

and cooperation in a federal criminal trial. Inasmuch as his cooperation with federal authorities might have had an impact, there has been a delay in sentencing in his criminal case. Failure to file federal income tax returns has formed the basis for disciplinary sanctions in the past and reflects clear violations of Rule 8.4(b) -- the commission of a criminal act; 8.4(c) -- conduct involving dishonesty; and 8.4(a) -- violate or attempt to violate the Rules of Professional Conduct, or do so through the acts of another.

COUNT 2

On or about April 25, 2022 the Office of Disciplinary Counsel opened file number 0039906 after receiving a complaint from Matthew Caplan, an assistant district attorney in the office of the District Attorney for the 22nd JDC. The Respondent represented a criminal defendant identified as *Zarius Brown* in *State of Louisiana vs. Zarius Brown, Docket #18CR10-139415* in Washington Parish. Brown faced charges of attempted first-degree murder of a police officer. Reportedly the defendant/client voluntarily chose to absent himself from the trial. Respondent moved for a continuance but upon consideration of the argument advanced, the trial judge denied the motion. Respondent then advised that he would not participate in the trial but rather would simply sit at counsel table, taking no role in the defense of his client. He did not participate in jury selection, opening statements, cross examination of any witnesses, did not call any witnesses, and declined to participate in closing arguments. The jury found the defendant guilty. On appeal the Respondent's conduct was determined to be a clear case of ineffective assistance of counsel such that the defendant's conviction was reversed and the case remanded for a new trial.

The Respondent's intentional decision to refuse to participate in the criminal trial is a failure to provide reasonably diligent representation as required by Rule 1.3; and actions which were clearly prejudicial to the administration of justice in violation of Rule 8.4(d). As before, his conduct also violates 8.4(a).

THE HEARING COMMITTEE'S REPORT

In its March 13, 2023 report, the Committee noted the following information concerning the evidence admitted at the hearing and the witnesses who testified.

EVIDENCE

ODC introduced the following exhibits into evidence without objection from the Respondent.

- ODC 1. Self-report of Bill of information through Counsel (1/27/21)
- ODC 2. Guilty Plea (3/10/21)

- ODC 3. Removed and not introduced as an exhibit
- ODC 4. Judgment (8/24/22)
- ODC 4 (a). Respondent's 2017 and 2018 U.S. Individual Tax Returns and payment records (under seal by protective order)
- ODC 5. Complaint Received (4/25/22)
- ODC 6. Notice of Investigation to Respondent (5/4/22)
- ODC 7. Return Receipt (5/10/22)
- ODC 8. Notice [of] representation (5/11/22)
- ODC 9. Initial Response from Respondent (6/10/22)
- ODC 10. ODC[']s request for additional information (6/10/22)
- ODC 11. Supplemental Response from Respondent (6/17/22)
- ODC 12. First Circuit Court of Appeal record – State v. Brown (*in globo*)

Respondent did not introduce any exhibits into evidence.

The following witnesses were called to testify by ODC.

- (1) Respondent Robert William Hjortsberg, in person

Respondent graduated from Loyola Law School in New Orleans, Louisiana in 2007. He passed the Louisiana Bar Examination and was licensed in 2008. Respondent was employed by the Regan Law Firm for two years, practicing criminal defense work. He then worked for the Jason Williams Firm for ten years, leaving in the year 2020.

With respect to Count 1 of the Formal Charges, Respondent admits that he did not file income tax returns for the years 2017 and 2018. Respondent was prosecuted by the U.S. Attorney's Office in the United States District Court, Eastern District of Louisiana, and eventually pled guilty on March 21, 2021 to a misdemeanor offense of willful failure to file a return, supply information or pay tax, 26 U.S.C. §7203 (ODC Exhibits 2 and 4). Hjortsberg self-reported his federal charges on January 27, 2021 to the ODC (ODC Exhibit 1). He was sentenced on August 24, 2022 to six months home detention, 36 months' probation, restitution of \$31,651 and a fine of \$4,000 (ODC Exhibit 4). Respondent also agreed as part of his plea to provide testimony in the federal trial of Jason Williams and Nicole Burdett if needed (Respondent was not called to testify in that federal trial). Respondent was not a W-2 employee; he received 1099 forms for his work during the years 2017 and 2018. He did not withhold any taxes. Respondent has paid the restitution ordered by the court as part of his sentence. There may be more money that he owes with respect to his guilty plea, but he has not been notified of that yet. He plans to pay whatever else is owed.⁵ When questioned by Committee Member Judy Milnar as to why Respondent did not file his tax returns for 2017 and 2018, Respondent testified that it was carelessness. Respondent stated that he had a person who held himself out as a CPA who filed his taxes in previous years. After

⁵ Respondent eventually filed tax returns for 2017 and 2018 jointly with his wife. His wife was not prosecuted, and she withheld taxes as a W-2 employee in her job.

Respondent learned his taxes had not been filed, this person advised him that it was “no big deal.” However, Respondent admitted that his failure to file was willful.

Respondent further testified that he cooperated fully with the ODC. Respondent was not a public official.

Regarding Count 2 of the formal charges by the ODC, Respondent testified that he represented Zarius Brown who was charged with several felony counts, including attempted first degree murder of a police officer, in the 22nd Judicial District, Parish of Washington before the Honorable William H. Burris, presiding judge. The trial of Brown on these charges commenced on March 10, 2020, and the jury had been called for examination. After the prosecution and the judge examined the first panel of jurors on *voir dire* a restroom break was taken. Zarius Brown, after the break, did not return to the courtroom. Efforts made to locate Mr. Brown were unsuccessful. Respondent testified that he had no knowledge that Mr. Brown would skip bail. Respondent testified that the situation of the client absenting himself during the trial was a first for him, for Judge Burris, and for the prosecutor. Respondent moved for a continuance and for mistrial, and both were denied. Respondent did not request to withdraw as counsel because he believed it would be improper to do so and would result in prejudice to his client. He testified that he made the strategic decision not to participate during the trial. Respondent stated that he made these decisions “on the spot” and that he felt his actions were in the best interest of his client. He stated that the case involved a police officer’s testimony versus his client’s version of events. Consequently, Respondent felt that it was in the best interests of his client that Respondent not participate in the trial. Judge Burris did not hold Respondent in contempt for his failure to participate in the trial, stating, “That is your strategic choice.” Respondent did not request the opportunity to take writs to the court of appeal. Respondent had not received prior instructions from Zarius Brown as to whether Mr. Brown would testify and how to proceed without his presence.

The trial for Zarius Brown in his absence took two days, and the jury found Mr. Brown guilty on all counts. Respondent could not recall whether he sought advice during the two trial days from other attorneys as to how to proceed while the client was absent. Respondent was present in the courtroom during the entire trial, but did not question any witnesses, did not make any arguments, and did not enter any evidentiary objections. The verdict was appealed, and the Court of Appeal, First Circuit of Louisiana, reversed the conviction and remanded it for further proceedings for ineffective assistance of counsel that included an improper jury charge to which Respondent did not object. Respondent credibly testified that he was not trying to disrespect the court and was open with the court as to what he was doing. Neither Judge Burris nor the prosecutor in the district court reported Respondent to the ODC. The appellate attorney for the district attorney’s office reported Respondent to the ODC after the First Circuit published its opinion.

The following witnesses were called by the Respondent:

(1) William H. Burris, District Court Judge, 22nd JDC, by telephone

Judge Burris testified that he has served as a district judge since 2018. He presided over the Zarius Brown trial. Mr. Brown was on bail and not incarcerated when he left the courtroom and never returned. Voir dire of the jury had begun. Judge Burris had never experienced this before. He credibly testified that Respondent was agitated, visibly upset and was unsure what to do. Nevertheless, Respondent was punctual and respectful to the Court. Respondent moved for a continuance and a mistrial, but Judge Burris declined, relying on Code of Criminal Procedure article 832. Judge Burris was frustrated by Respondent's lack of participation, but did not hold Respondent in contempt for not participating in the trial because he believed that a criminal defendant is not required to do anything at trial except be punctual and respectful. Respondent did not request time to get ethical guidance or time to seek writs. If he had, Judge Burris testified that he probably would not have granted a stay, but even if he did, he would not have given Respondent more than a short time to file an emergency writ. Judge Burris would not have granted a motion to withdraw. Judge Burris did not report Respondent's conduct to the ODC for the same reasons that he did not hold Respondent in contempt. Judge Burris was concerned that doing so would be tantamount to telling someone he would "have to potentially breach the Fifth Amendment by speaking or by participating in trial." Judge Burris recalled having a discussion much later with the Assistant District Attorney who thought that the First Circuit Court of Appeal's decision instructed that the DA to report the matter to the ODC. Judge Burris testified that he did not know that he would agree with that interpretation, but the DA had already reported [the matter] so [it was] not necessary for him to do so. Judge Burris testified that his number one priority during a jury trial, outside of the constitutional rights of the defendant, is to value and honor the commitment that jurors make.

(2) Camille Buras, District Court Judge, Orleans Parish Criminal Court, in person

Judge Buras has served as a district judge in criminal court since 1998. She credibly testified that Respondent argued many motions before her, and Respondent has been prompt, prepared, straightforward, and that Respondent has a very good professional reputation. When asked if she has ever presided over a trial where a defendant left the court, Judge Burris responded that it was very rare and recalled two occasions where it happened in her court. Only one occasion was after the jury had been sworn, and she declared a mistrial in that one instance.

(3) Thomas Calogero, in person

Mr. Calogero testified that he has practiced as a criminal defense attorney for approximately thirty years. He credibly described Respondent, with whom he has worked, as very diligent, very prepared and a person of outstanding character. Mr. Calogero further testified that he has never had a situation where a criminal defendant absented himself after a trial commenced. Mr. Calogero testified that he had never taken a writ during a trial, but has heard of it being done during trial.

(4) Susan Lampton, in person

Ms. Lampton works with the World War II Museum in New Orleans. She is not an attorney. She has known Respondent since 2009 through his volunteer work and fundraising for the Museum. She credibly testified as to the good character of Respondent.

(5) Carl Rochet, in person

Mr. Rochet is employed as a U.S. marketing director by McDonald's and is not an attorney. He is best friends with Respondent and has known him since college. He credibly described Respondent as a person of good character.

(6) Bivian "Sonny" Lee, in person

Mr. Lee is the founder and CEO of the nonprofit organization, Son of a Saint. Respondent has volunteered with Son of a Saint. Mr. Lee credibly testified that Respondent, when he has volunteered, has done what he said he would do and more.

The Committee then issued the following findings of fact.

FINDINGS OF FACT

A. Count 1

In his Response to Formal Charges, Respondent admitted that he failed to file his federal income tax returns for the years 2017 and 2018. Respondent further admitted in his Response that his conduct in failing to file these returns violated Rules 8.4(a), 8.4(b) and 8.4(c) of The Rules of Professional Conduct. Therefore, the hearing related Count 1 was for the purpose of ultimately determining the sanction for Respondent's admitted Rules violations. During the hearing, Respondent confirmed that he admitted the Rules violations in his Response to Formal Charges. The Committee reviewed the exhibits introduced into evidence at the hearing, and those exhibits further support the Rules violations that were admitted by Respondent. The Committee accepts the admissions of Respondent and further finds that there is clear and convincing evidence to support Count 1 of the Formal Charges for violations of Rules 8.4(a), 8.4(b) and 8.4(c).

With respect to Count 1, the Committee makes further findings of facts based upon the evidence presented at the hearing on February 3, 2023:

- (1) According to Respondent's Amended U.S. Individual Income Tax Return (ODC Exhibit 4(a)), Respondent's adjusted gross income in 2017 was \$95,227.00. The amount of tax owed was \$31,651.00. According to Respondent's Amended U.S. Individual Income Tax Return for 2018 (ODC Exhibit 4(b)), Respondent had an adjusted gross income of \$58,606.00 with tax owed of \$13,160.00. Consequently, the Respondent's combined adjusted gross

income for the years 2017 and 2018 was \$153,833.00. The combined tax owed by Respondent for the years 2017 and 2018 was \$44,811.00.

- (2) In his “Stipulated Factual Basis for Guilty Plea” (ODC Exhibit 2), Respondent agreed that he failed to file a 2017 tax return until July 28, 2020, even though he knew that he was required to file by October 15, 2018. The Committee finds that the Respondent’s failure to file tax returns for the years 2017 and 2018, in light of the exhibits introduced by the ODC regarding Respondent’s federal prosecution, was dishonest in nature.
- (3) Respondent is not a current or former public official.
- (4) Respondent has paid the full amount of restitution for failing to file his 2017 tax return. Respondent has also has paid the full amount of his 2018 taxes that are due according to his filed amended return for that year.
- (5) Respondent pled guilty to failure to file his tax return in the year 2017. He was sentenced to thirty-six (36) months’ probation and was placed on home detention, with location monitoring by voice recognition, for a period of six (6) months. He was ordered to pay an assessment of \$25.00, restitution of \$31,651.00 and a fine of \$4,000.00.
- (6) Based upon the credible testimony of Judge Buras and Mr. Calogero at the hearing, Respondent has a good professional reputation. Based upon the credible testimony of Ms. Lampton, Mr. Rochet and Mr. Lee, Respondent has volunteered with charitable organizations and is considered to be a person of good character and reputation in the community.
- (7) Respondent credibly expressed remorse for his actions that led to his admitted Rules violations.
- (8) The Committee finds that Respondent had a dishonest or selfish motive in failing to file his tax returns. He admitted as part of his guilty plea that he knew that he was required to file his 2017 tax return by October 15, 2018 and failed to do so. Although Respondent testified at the hearing that his reason for not filing his tax return was carelessness, on cross examination by the ODC, Respondent admitted his failure to file in 2017 was willful and testified to such as part of his plea agreement. Further, the Committee notes that Respondent failed to file returns for two (2) years and had the educational background and previous experience to understand his obligation to pay taxes on his income and file tax returns timely. Reliance upon an advisor that it is “no big deal” to not file tax returns is not reasonable.
- (9) Respondent, after he made the decision to plead guilty, reported himself to the Office of Disciplinary Counsel and has had a cooperative attitude throughout these disciplinary proceedings.

(10) Respondent has no prior discipline.

B. Count 2

Based upon the evidence presented at the hearing, the Committee makes the further findings of fact:

- (1) Respondent credibly testified that he had no knowledge that his client, Zarius Brown, would not return to the courtroom after his trial began.
- (2) According to the credible testimony of Judge Burris, Respondent was visibly upset and agitated when his client did not return to the courtroom during the trial.
- (3) Respondent credibly testified that he made the strategic decision not to participate in the trial.
- (4) Respondent credibly testified that he believed that it was in the best interests of his client not to proceed with the trial. Respondent was prepared for the trial. Based upon the credible testimony of Respondent and Judge Burris as to what occurred after Zarius Brown left the courtroom, the Committee finds that Respondent had no selfish motive or intention when he made the decision not to participate in the trial.
- (5) Respondent, on behalf of his client, argued for a mistrial which was denied.
- (6) Respondent credibly testified that he had no intention to disrespect the court or to engage in conduct that was prejudicial to the administration of justice.

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

RULES VIOLATED

With respect to Count 1, Respondent admitted that his conduct in failing to file his tax returns for the years 2017 and 2018 violated Rules 8.4(a), 8.4(b) and 8.4 (c). Furthermore, the Committee finds that the record fully supports that by clear and convincing evidence, the Respondent's conduct violated Rules 8.4(a), 8.4(b) and 8.4 (c). Respondent entered a guilty plea in federal court to willful failure to file his 2017 U.S. individual tax return, and admitted during the hearing before the Committee that he willfully failed to file his returns.

With respect to Count 2, the Committee finds that the ODC did not carry its burden of proving by clear and convincing evidence that Rules 1.3, 8.4(a) and 8.4(d), for which Respondent was formally charged, were violated.

Rule 1.3 states that, “A lawyer shall act with reasonable diligence and promptness in representing a client.” The evidence introduced at the hearing demonstrated that Respondent appeared for and was prepared for the trial of his client Zarius Brown. During a break from the examination of jurors on voir dire, Zarius Brown left the courtroom and did not return. There was no credible evidence introduced at the Committee hearing that showed that Respondent was complicit in any way with Mr. Brown’s decision to absent himself from the trial. On the contrary, Respondent testified that he had no knowledge that Mr. Brown would skip bail, and Judge Burris credibly testified that Respondent was visibly upset and was unsure what to do. Furthermore, Respondent argued to the court that he could not proceed with the trial competently without his client because of the nature of the case which turned on his client’s word against the police officer. Respondent moved for a mistrial and remained in the courtroom during the two days of trial. Respondent made the strategic decision as Mr. Brown’s attorney to do what Respondent thought was in the best interests of his client. There was no credible evidence introduced at the Committee hearing that Respondent’s decision to not further participate in the trial was to benefit himself or was made because Respondent was not prepared for trial.

The question of whether Respondent violated Rule 8.4(d) and 8.4(a) is a closer question for the Committee. The Committee finds that there was not clear and convincing evidence of violation[s] of Rules 8.4(d) and 8.4(a). The Committee finds that Respondent acted in what he believed at the time was in the best interests of his client. He had not faced this situation of a client absenting himself during a trial and neither had the presiding judge nor prosecutor. The decision was made during the heat of the trial. Respondent was not ordered by the court to participate in the trial. Balanced against Respondent’s actions that he believed were in the best interests of his client is the potential adverse impact on the system of justice. The precedential effect of no ethical violation for an attorney’s unwillingness to actively participate on behalf of his absent client during a trial is a potential adverse impact on the administration of justice that concerns the Committee. However, there was no credible evidence presented in this specific case that Respondent was complicit in any way with his client’s absence. To the contrary, Judge Burris testified at the hearing that Respondent was agitated and visibly upset after he learned that his client left the premises. Respondent was open with the Court about why he felt he could not continue to participate in the trial without his client. Furthermore, the evidence showed that Respondent was prepared for trial, and his decision to not participate in the trial was not self-serving.

ODC cites in support the case of *In re: Young*, 2003-0274 (La. 06/27/2003), 849 So.2d 25 and argues that this decision is most nearly similar on the facts and law. However, the *Young* decision is distinguishable. *Young* was charged with two counts of ethical misconduct. The first count involved *Young*’s representation of Allan Williams in a criminal matter. *Young* became convinced that Williams was guilty and that he intended to take the stand to testify falsely. On the day of trial, *Young* filed a motion to withdraw where he insisted that the trial “as a waste

of time” because there was no possibility of the State not proving its case. Young also maintained in his motion that he “forsakes” the taking of another criminal case because conflicts are more likely to occur in criminal matters. The presiding judge denied the motion to withdraw, and Young then declined to participate in voir dire of the jury. The judge thereupon dismissed the jury, and appointed new counsel, resulting in delay. The judge later barred Young from representing another criminal defendant in her court. The Louisiana Supreme Court found that Young violated Rule 1.1(a) for failure to provide competent representation when he indicated it was “a waste of time” to proceed and refused to participate in voir dire. Respondent Hjortsberg was not formally charged with a violation of Rule 1.1(a). However, even if he had been so charged, the circumstances were different. Respondent Hjortsberg’s non-participation at trial was not based on his belief that it was a “waste of time,” but that he could not properly defend his client against the criminal charges without his client’s presence due to the nature of the case.

The second count addressed by the Louisiana Supreme Court in *Young* involved Young’s actions in his representation of Vincent, another criminal defendant. Four days before Vincent’s trial began, Young filed for a motion for continuance and admitted he failed to prepare for trial. Respondent further stated that Vincent had not paid him for collect calls, and Young was adamant about not doing any more work until Vincent paid his bill. The judge granted the continuance and rescheduled the trial. As the new trial date approached, Young advised Vincent, who had been incarcerated for approximately one year, that he was unprepared for trial because he was still investigating. Young then assisted Vincent in filing a *pro se* motion to terminate Young as his attorney, for continuance and for time to appoint a new attorney to protect his right to consent defense. The judge granted the motion and shortly thereafter sent a letter to the ODC expressing her concerns about Young’s mishandling of the Williams and Vincent matters. In its decision, the Louisiana Supreme Court found a violation of Rule 8.4(d), but it was based on the court’s determination that Young, through the artifice of a *pro se* motion, forced the trial court to grant a continuance. The Supreme Court held that Young had a duty to present the facts to the trial court and allow the trial court to make an informed ruling on the continuance issue. In contrast, the alleged misconduct of Respondent Hjortsberg did not involve artifice. The transcript of the trial demonstrates that Respondent was open and forthright with Judge Burris as to what he was doing and why.

In the decision of *In re: Downing*, 2005-B-1553, 930 So.2d 897, 905 n. 5 (La. 5/17/2006), the Louisiana Supreme Court recognized that the proscription against conduct that is prejudicial to the administration of justice in Rule 8.4(d) most often applied to litigation related misconduct and cited to the cases as examples listed in footnote 4 of its opinion in *Louisiana State Bar Association v. Harrington*, 585 So.2d 517, 520 (La. 1990). Those example cases listed in *Harrington* involved dishonesty, deception or concealment. There was no clear and convincing evidence that Hjortsberg’s conduct during the Zarius Brown trial involved dishonesty, deception or concealment.

As to the sanction for the rule violations found in Count 1, the Committee analyzed the Rule XIX, Section 10(C) factors and found that Respondent violated duties owed to the profession and the public by willfully not filing his tax returns. The Committee also found that Respondent acted knowingly and caused actual harm because his taxes totaling \$44,811 were not paid until well after he was required to do so by law. The one aggravating factor of dishonest or selfish motive in failing to pay taxes and file tax returns was found by the Committee. Mitigating factors found by the Committee included: (1) absence of a prior disciplinary record; (2) good faith efforts to rectify the consequences of his misconduct (Respondent paid back his taxes as well as a \$4,000 fine imposed by the federal court); (3) imposition of other penalties and sanctions (the federal court-ordered fine); (4) good character and reputation; (5) remorse; and (6) full and free disclosure to ODC (Respondent self-reported his actions after his federal charges, provided a sworn statement to ODC, and has otherwise cooperated in the disciplinary proceeding).

Relying on Standard 5.12 of the ABA's *Standards for Imposing Lawyer Sanctions*, the Committee determined that the baseline sanction in this matter is suspension. After discussing the case of *In re Cook*, 2010-0092 (La. 4/16/10), 33 So.3d 155, and comparing it to the instant matter, the Committee recommended that a six-month suspension, with all but two months deferred, be imposed upon Respondent. The Committee also recommended that after serving the active portion of the suspension, Respondent be placed on probation for a period of one year, subject to the condition that any misconduct during the period of probation will result in the deferred portion of the suspension becoming executory. The Committee further recommended that Respondent be assessed with all costs and expenses of this proceeding in accordance with Rule XIX, Section 10.1.

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. One finding warrants clarification, however. The Committee’s finding that Respondent asked for a mistrial after Mr. Brown absented himself from his criminal trial is correct and supported by the record. ODC Exhibit 5, Bates p. 078-79. However, the Board makes the additional finding that after Mr. Brown absented himself from his criminal trial, Respondent also asked for a continuance of the trial. Hrg. Tr., pp. 61, 127.

The Board must also address ODC’s objection to one of the Committee’s findings of fact. Specifically, ODC objects to the Committee’s factual finding that “Respondent argued to the court that he could not proceed with the trial competently without his client because of the nature of the case which turned on his [Mr. Brown’s] word against the police officer.” Hrg. Comm. Rpt., p. 10.

Presumably, ODC's objection is that Respondent did not make such a statement to Judge Burris during Mr. Brown's criminal trial.⁶ However, the transcript from the trial reveals that such a statement was made by Respondent to Judge Burris.⁷ ODC's objection is, therefore, without merit.

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, as to Count 1, Respondent violated Rules 8.4(a), 8.4(b), and 8.4(c). As noted by the Committee, the Respondent admitted that his conduct in failing to file his tax returns for the years 2017 and 2018 violated these rules. Further, the record supports findings that these rules were violated. Each rule violation is discussed below:

Rule 8.4(b): Rule 8.4(b) provides that it is professional misconduct for a lawyer to "[c]ommit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Respondent has admitted that he did not file income tax returns for the years 2017 and 2018. He was prosecuted by the U.S. Attorney's Office for the Eastern District of Louisiana and eventually pled guilty on March 21, 2021 to a misdemeanor offense (concerning the year 2017 only) of willful failure to file a return, supply information or pay tax, in violation of 26 U.S.C. Section 7203. Respondent's conduct constitutes a criminal act pursuant to Section 7203. His actions are in violation of this Rule.

Rule 8.4(c): Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Respondent has

⁶ Objection by the Office of Disciplinary Counsel to Hearing Committee Report, filed March 15, 2023, p. 1.

⁷ Respondent stated to Judge Burris:

... I cannot proceed competently without him [Mr. Brown] here. Not only because he's not present, but because of the nature of this case. Because this case is about his word against the police officer's word.

ODC Exhibit 5, attached Exhibit 2, p. 079, ll. 26-31.

admitted that his failure to file his tax returns was “willing” or intentional. This conduct was also dishonest and in violation of this Rule.

Rule 8.4(a): Rule 8.4(a) provides that it is professional misconduct for a lawyer to “[v]iolate 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 8.4(b) and 8.4(c), Respondent has also violated this Rule.

As to Count 2, the Committee also correctly found that ODC had not proven, by clear and convincing evidence, that Respondent violated Rule 8.4(d). However, the Board finds that the Committee erred in failing to find a violation of Rules 1.3 and 8.4(a). These rule violations are also discussed below:

Rule 1.3: Rule 1.3 provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” The evidence introduced at the hearing demonstrated that Respondent appeared for and was prepared for the trial of his client, Mr. Brown. However, after Mr. Brown left the courthouse and the court denied Respondent’s motions to continue and for a mistrial, Respondent failed to participate in the proceedings as follows: he failed to participate in voir dire, gave no opening statement, made no objections, conducted no cross-examination of any witness, and refused to make a closing argument. Even though Respondent acted in what he believed was in the best interest of his client, his conduct violated Rule 1.3 in that he did not act with reasonable diligence in representing Mr. Brown. A violation of Rule 1.3 has been proven by ODC.

Rule 8.4(d): Rule 8.4(d) provides that “it is professional misconduct for a lawyer to [e]ngage in conduct that is prejudicial to the administration of justice.” The Board adopts the Committee’s analysis as to why Respondent’s actions did not violate this rule. The Board

particularly relies upon the Committee's analysis of *Young*, 2003-0274 (La. 6/27/03), 849 So.2d 25 -- and how it is distinguishable from the instant matter -- and *Downing*, 2005-1553 (La. 5/17/06), 930 So.2d 897, in finding that a Rule 8.4(d) violation has not been proven by ODC. Adding to the Committee's analysis of *Downing*, the Board also finds that Respondent's conduct was not uncivil, undignified, or unprofessional in violation in Rule 8.4(d). *Id.*, 2005-1553, p. 12, n.5, 930 So.2d at 904, n.5.

In its Pre-Argument Memorandum, ODC also cites to language in Justice Crichton's concurrence in *State v. David H. Brown*, 2018-KA-01999 (La. 9/30/21), 330 So.3d 199, 286-87, in support of its position that Respondent failed to protect the interests of his client and support the administration of justice. ODC's Pre-Argument Memorandum, pp. 15-17. However, the language ODC cites from *Brown* does not support its argument. ODC initially cites language from *Brown* which indicates that the Rules of Professional Conduct may be implicated when an attorney makes a strategic decision to wait several years until a sequestered jury trial is well underway to bring to a trial court's attention a fundamental rift with his client. Here, there is no evidence that Respondent and his client, Mr. Brown, made any type of unethical strategic decision or plan for Mr. Brown to absent himself from the trial and then wait until the jury trial was underway to execute their plan, with the hope of causing a mistrial or establishing grounds for a continuance.

Further, while ODC also points to language in *Brown* that indicates that a prosecutor (and presumably defense counsel), even though blindsided, has a duty to act when he or she believes that a court has made an erroneous ruling during a trial, Respondent did initially act. He moved for a mistrial and a continuance, but his requests were denied by Judge Burris. Although Respondent did not request a stay in order to file a writ, Judge Burris testified that had Respondent asked for a stay to seek a writ, he probably would not have granted the stay. Hrg. Tr., p. 120. He

further testified that even if he had granted a stay, it would not have been for more than a very short time period for an emergency writ. *Id.* Respondent testified that he would not have had the ability to file a writ because the time period between Mr. Brown absenting himself and the beginning of the trial was very short and he also did not have another lawyer to assist him with such a filing. *Id.* at pp. 70-71. Given the unique and difficult circumstances presented by Mr. Brown's absence, Respondent's refusal to participate in the trial after Judge Burris ordered it to proceed does not constitute conduct prejudicial the administration of justice. Respondent's conduct was not uncivil, undignified, unprofessional or disrespectful towards the court. Respondent was instead trying to act in the best interest of his client, albeit a violation of Rule 1.3 as discussed above.

All circumstances of this unique situation considered, the Committee's finding that ODC did not prove by clear and convincing evidence that Respondent violated Rule 8.4(d) is correct, and the Board adopts this finding. Accordingly, as to Count 2, ODC's objection to the Committee's analysis of the *Young* case -- and its conclusion that Rule 8.4(d) was not violated -- is without merit.

Rule 8.4(a): As a violation of Rule 1.3 has been proven by ODC as to Count 2, a violation of 8.4(a) also has been established as to this Count. ODC's objection to the Committee's legal conclusions as to Rules 1.3 and 8.4(a) has merit.

II. The Appropriate Sanction

A. The Rule XIX, Section 10(C) Factors

Louisiana Supreme Court Rule XIX, Section 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 profession and the public by willfully not filing his tax returns. He also violated a duty to his client by failing to participate in the trial. Respondent acted knowingly and intentionally. Respondent's misconduct caused actual harm because his taxes totaling \$44,811 were not paid until well after he was required to do so by law. Further, by failing to participate in the trial, Mr. Brown was denied effective assistance of counsel. As determined by the Committee, the aggravating factor of dishonest or selfish motive has been established. The Board also finds that the aggravating factors of substantial experience in the practice of law, multiple offenses, and illegal conduct are present. Mitigating factors include absence of a prior disciplinary record, good faith efforts to rectify the consequences of his misconduct, imposition of other penalties and sanctions, good character and reputation, remorse, and full and free disclosure to ODC and the Board.

B. The ABA Standards and Case Law

Standard 5.12 of the *ABA's Standards for Imposing Lawyer Sanctions* is the most applicable standard in this matter. Standard 5.12, suggests that suspension is the baseline sanction for Respondent's misconduct. This standard provides as follows:

Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11⁸ and that seriously adversely reflects on the lawyer's fitness to practice.

⁸ Standard 5.11 provides that disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

Additionally, Standard 4.42 suggests that the baseline sanction in this matter is suspension and provides, in pertinent part, as follows:

Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

Given the unique factual circumstances found in Count 2 of the formal charges, the Board will focus on Respondent's misconduct in Count 1 of the formal charges in determining the sanction in this matter. In disciplinary matters arising from convictions for misdemeanor failure to file income tax returns, the jurisprudence supports a sanction of a suspension in the range of six months to two years, all or part of which may be deferred. *In re Cook*, 2010-0092, p. 10 (La. 4/16/10), 33 So.3d 155, 160-61.

In *Cook*, the respondent failed to file tax returns for two years. His combined gross income for the two years was \$277, 243. He pleaded guilty to two counts of misdemeanor failure to file a tax return and was sentenced to five years of supervised probation on each count to run concurrently. As a special condition of his probation, Mr. Cook was placed on home detention for a period of twelve months. In the criminal proceeding, he was also ordered to pay restitution in the amount of \$121, 233, an assessment in the amount of \$50, and prosecutorial costs in the amount of \$1,704. In her statement of reasons, the federal judge commented that it appeared that Mr. Cook's actions were not motivated by greed or other selfish motives but related to a period of financial pressure and problems due to family matters. Mr. Cook was not a public official. In his disciplinary proceeding, the Court imposed a six-month suspension, with all but three months deferred, subject to a one-year period of supervised probation.

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

Cook provides guidance and sets forth four principal factors to consider in determining the appropriate sanction in this area: (1) whether there is a pattern of failure to file over a number of years; (2) the amount of money involved; (3) whether Respondent's actions were selfish or dishonest in nature; and (4) whether Respondent is held to a higher standard as a result of having a position as a public official. With respect to the first factor, Respondent failed to file his individual tax returns for two years -- 2017 and 2018. With respect to the second factor, Respondent's combined gross income for 2017 and 2018 was \$153,833, and he owed \$44,811 in taxes for these two years, along with a \$4,000 fine. With respect to the third factor, Respondent's actions were selfish or dishonest in nature. Respondent did not give a credible reason for not paying his taxes or filing his tax returns. With respect to the fourth factor, Respondent is not held to a higher standard as a result of being in a position as a public official.

Comparing *Cook* and the instant matter, Mr. Cook pled guilty to two counts of misdemeanor failure to file a tax return over a two-year period, whereas Respondent pled guilty to one misdemeanor count (although Respondent admitted he failed to file for two years). The amount of restitution in the *Cook* case (\$121,233, along with a \$50 assessment and \$1,704 in prosecutorial costs) was considerably more than Respondent's restitution and amount owed to the IRS (Respondent owed \$44,811 in taxes for these two years, along with a \$4,000 fine). The Supreme Court in *Cook* relied upon the findings of the hearing committee, disciplinary board and the federal court to find that the attorney was not motivated by greed or other selfish motives, but rather hit a period of financial pressure problems due to family matters. There was no credible proof introduced at the hearing that Respondent Hjortsberg suffered from personal or emotional problems during the time he failed to pay his taxes or file tax returns. As in *Cook*, Respondent is not a public official. As explained above, in *Cook* the Court imposed a sanction of a six-month

suspension from the practice of law, with all but three months deferred, followed by a one-year period of supervised probation. A less severe sanction than that imposed in *Cook* is appropriate in this matter, given the fact that Mr. Cook pled guilty to two misdemeanor counts and the amount of restitution he owed was significantly larger.

Further, the circumstances surrounding Respondent's misconduct are much less egregious than other cases cited by ODC in which more significant active suspension periods were imposed. As examples, in *In re Huckaby*, 96-2643 (La. 5/20/97), 694 So.2d 906 (one-year suspension, with six months deferred and two-year probationary period with conditions), the respondent failed to file tax returns for thirteen years, had substantial experience in the practice of law, held the office of district judge, and apparently had not satisfied all of his tax obligations, including penalties and interest, at the time of the Court's decision. In *In re Thomas*, 97-0881 (La. 10/10/97), 700 So.2d 490 (fifteen-month suspension, with all but nine months deferred and two-year probationary period with conditions), the respondent failed to file tax returns and pay taxes for four years (the tax liability totaled over \$100,000) and had a prior disciplinary record. The record also included evidence that the respondent served as Chairman of the Madison Parish Port Commission and counsel to the Superintendent of Education at the time of his offense.

After reviewing the above, it appears that the sanction recommended by the Committee in the instant matter -- a six-month suspension from the practice of law, with all but two months deferred, followed by a one-year period of probation -- which is slightly less severe than that imposed in *Cook*, is reasonable and is adopted by the Board. This sanction addresses Respondent's misconduct found in Count 1. Given the unique factual circumstances of Count 2, the Board is of the opinion that Respondent's violation of Rules 1.3 and 8.4(a) in this count should not add to the

severity of this sanction. Finally, for the reasons explained above, ODC's objection that this sanction is unduly lenient is without merit.

CONCLUSION

The Board adopts the Committee's findings of fact, with the one clarification noted above, and its findings that Respondent violated Rules 8.4(b), (c), and (a) in connection with Count 1. The Board also adopts the Committee's finding that Respondent did not violate Rule 8.4(d) in connection with Count 2. The Board declines to adopt the Committee's finding that Rules 1.3 and 8.4(a) were not violated as to Count 2 and find violations of these rules.

The Board further adopts the Committee's recommended sanction of a six-month suspension from the practice of law, with all but two months (60 days) deferred, as the appropriate sanction for Respondent's misconduct. After serving the active portion of the suspension, the Board recommends that Respondent be placed on probation for a period of one year. Any failure of Respondent to comply with the conditions of probation or any misconduct during the period from the date of the Court's imposition of sanction through completion of his probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. The Board also recommends that all costs and expenses of these proceedings be assessed to Respondent in accordance with Rule XIX, Section 10.1.

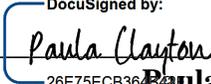
RECOMMENDATION

Based on the above, the Board recommends that Respondent, Robert William Hjortsberg, be suspended from the practice of law for six-months, with all but two months (60 days) deferred. After serving the active portion of the suspension, the Board recommends that Respondent be placed on probation for a period of a period of one year. Any failure of Respondent to comply with the conditions of probation or any misconduct during the period from the date of the Court's

imposition of sanction through completion of his probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. The Board also recommends that all costs and expenses of these proceedings be assessed to Respondent in accordance with Rule XIX, Section 10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

**R. Alan Breithaupt
Todd S. Clemons
Albert R. Dennis III
Susan P. DesOrmeaux
James B. Letten
Ronald J. Miciotto
M. Todd Richard
Lori A. Waters**

By:  _____
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Paula H. Clayton
FOR THE ADJUDICATIVE COMMITTEE

APPENDIX

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

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) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engage in conduct that is prejudicial to the administration of justice;

...