

ORIGINAL

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE JOSEPH NELSON MAYER III

DOCKET NO. 19-DB-050

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 Joseph Mayer, III (“Respondent”), Louisiana Bar Roll Number 9124.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 8.4(b) (criminal act) and 8.4(a) (violation or attempted violation of the Rules of Professional Conduct).² The hearing committee (“committee”) assigned to the matter found that Respondent engaged in misconduct and recommended that he be suspended for one year and one day. The committee further recommended that the Respondent be charged with all costs and expenses of the disciplinary proceedings. As discussed below, the Board adopts the findings of fact, legal conclusions as to Rule violations and the sanction recommendation of the committee.

PROCEDURAL HISTORY

The formal charges were filed on August 7, 2019. Respondent filed an answer to the charges on September 16, 2019. The hearing was held on December 16, 2019. Chief

¹ Respondent's primary registration address is 1908 Dante St., New Orleans, LA 70118.

² 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 . . .

Disciplinary Counsel Charles B. Plattsmier appeared on behalf of the ODC. Respondent appeared with counsel, Robert W. Maxwell. On the morning of the hearing, Respondent and ODC stipulated to the Exhibits (ODC 1-7, which include Respondent's sworn statement, and Mayer 1-8), the factual allegations as they relate to the events of the morning of October 1, 2018 and the violation of Rule 8.4(a) and (b). The committee issued its report on January 17, 2020. The ODC did not object to the committee's report; however, on February 3, 2020, the Respondent filed a Notice of Objections, taking issue with the committee's sanction recommendation.

In light of the objections, the matter was scheduled for argument before a panel of the Board. Both the ODC and Respondent filed pre-argument memoranda for the Board's consideration. The matter was argued on September 23, 2020, before Panel "C".³

FORMAL CHARGES

The formal charges read, in pertinent part:

I.

The Respondent is Joseph N. Mayer, III, a sixty-six year old Louisiana licensed attorney who was admitted to the practice of law October 5, 1979 after graduating from Loyola University School of Law. He has no prior disciplinary record.

II.

On or about November 2, 2018, the Office of Disciplinary Counsel learned that the Respondent had been arrested and charge[d] with an October 1, 2018 DWI, Hit and Run, and Driving Under Suspension while in Jefferson Parish. On October 1, 2018 the Respondent states that he was on his way to work and stopped at a [convenience] store and purchased alcohol. He then drove to the parking garage at his office and sat there for a period of time consuming the alcohol until he became impaired and intoxicated. He attempted to leave the premises and collided with another vehicle causing damage to both cars. While he initially appeared to pull over into an adjacent parking lot in order to address the accident, he reported to the Office of Disciplinary Counsel that it dawned upon him that he was highly intoxicated and in substantial trouble. He made a

³ Panel "C" was comprised of Danna E. Schwab, Chair, Alfreda Sellers Diamond, Lawyer Member, and Susan P. DesOrmeaux, Public Member.

decision to flee the accident scene and [proceeded to] an area bar. While at the bar he ordered and consumed yet more alcohol. He attempted to stagger back to his vehicle when an off-duty police officer contacted on-duty local police to alert them to the Respondent's condition. Law enforcement [was] able to quickly identify him as having been involved in the prior accident from which he had fled the scene. A subsequent breath sample tested at .260 blood alcohol content, more than three times the legal limit.

III.

The Respondent's criminal acts reflect violations of Rule 8.4(b)—the commission of a criminal act; and Rule 8.4(a)—violate or attempt to violate the Rules of Professional Conduct.

HEARING COMMITTEE REPORT

After considering the stipulations, documentary evidence introduced by both the ODC and Respondent; the testimony of Respondent, J.E. "Buddy" Stockwell, Executive Director of the Judges and Lawyers Assistance Program ("JLAP"), and character witnesses Stephen M. Pizzo and Edmond J. Harris, the committee set forth its findings, conclusions and recommended sanction.⁴

In its report, the committee stated:

The criminal acts in question occurred on the morning of October 1, 2018, while Respondent was ostensibly on his way to work as an attorney. While heavily intoxicated (reported BAC "breath sample" of .260 g%), Respondent caused two vehicular accidents, with the second accident co-incident with his unlawfully leaving the scene of the first.

Respondent does not have a sound recollection of what occurred during the accidents, but he admits/stipulates to causing both accidents due to his serious state of intoxication, as well as to unlawfully leaving the scene of an accident. He also admits/stipulates that on the morning of the accident he was driving with a suspended license and driving without vehicle insurance. He was charged with the following by Jefferson Parish Sheriff's Office: Operating a Vehicle While Intoxicated (First Offense), "Hit and Run Driving," "Driving-License Suspended," and "Liability Security Required."

Respondent had no prior alcohol-related traffic violations or arrests, and as such was offered and entered into the Jefferson Parish Adult Diversion Program. As part of the Diversion Program, Respondent has completed multiple counseling sessions with a Licensed and Certified Social Worker, has consistently attended

⁴ The committee was composed of Michael J. Sepanik (Chair) Lena D. Giangrosso, (Lawyer Member) and Patricia A. Caperino (Public Member).

AA meetings, and has passed all random drug and alcohol tests administered by the Diversion Program. In addition, Respondent has abstained from the use of alcohol since December 2018.

The Respondent successfully completed the requirements of the Jefferson Parish Adult Diversion Program effective August 29, 2019; and the charges were refused/dropped by the Jefferson Parish District Attorney on October 17, 2019. The Committee notes that Respondent, admitted to practice law in October 1979, has no prior disciplinary record in his forty (40) years of practice in Louisiana.

The committee further found:

With respect to Respondent's pre-accident history with alcohol, in July 2011 he voluntarily stopped drinking for several years and regularly attended AA. However, in the years thereafter he faced certain personal issues, marital issues and alleged abuse, and financial pressures that impacted him heavily. At some point prior to October 1, 2018, he began drinking heavily, including consuming alcohol prior to work, morning drinking, and drinking while driving.

In December 2018, following a clinical intake and interview by the Louisiana Judges and Lawyers' Assistance Program ("JLAP"), in-patient treatment was recommended for Respondent. Although Respondent agreed he was an alcoholic during his intake with JLAP, he did not undergo inpatient treatment, nor intensive out-patient ("IOP"), nor the free/reduced cost program at Bridge House. Respondent has cited issues of cost as the primary reason for not undergoing treatment, but also testified that he felt the diversion program from Jefferson Parish was enough ("competing priorities"). During the hearing, the Director of JLAP testified that the Jefferson Parish diversion program does not satisfy JLAP requirements.

Relative to sanction, the committee stated:

By violating Rules 8.4 (a) and (b) of the Rules of Professional Conduct, the Respondent violated duties owed to the public, to the legal profession, and as a professional. Respondent's conduct involved property damage to multiple automobiles, but no injuries to persons (although the potential for serious injury to himself and others was high). Under the jurisprudence of the Louisiana Supreme Court, the baseline sanction in this matter is suspension. As the Supreme Court recently re-affirmed in *In re: Steger*, 18-1979 (La. 05/18/19), *In re: Baer*, 09-1795 (La. 11/20/09) 21 So. 3d 941, dictates the proper sanction for DWI arrests.

In *Baer*, the Louisiana Supreme Court held:

We have imposed sanctions ranging from actual periods of suspension to fully deferred suspensions in prior cases involving attorneys who drive while under the influence of alcohol. However, as a general rule, we tend to impose an actual suspension in those instances in which multiple DWI offenses are at issue, as

well as in cases in which the DWI stems from a substance abuse problem that appears to remain unresolved.

Respondent's arrest on October 1, 2018 involved two separate vehicular accidents, driving with a black-out level blood-alcohol content, as well as a hit-and-run offense. The committee finds that this separates the incident(s) from a standard DUI arrest. In addition, the recommendations of JLAP were not complied with, even though different options aside from private inpatient treatment were theoretically available. Therefore, under *Baer* and *Steger*, an actual period of suspension is warranted.

The following aggravating factors are present: the severity of the particular incident(s), unlawfully leaving the scene of an accident (indicative of a dishonest/selfish motive), and substantial experience in the practice of law (forty years of practice). The following mitigating factors are present: absence of a prior disciplinary record, personal and financial problems, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings, and good character and reputation, and remorse.

The committee recommended that Respondent be suspended for one year and one day with no deferral and that he be charged with all costs and expenses of the disciplinary proceedings.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. Rule XIX, §2(G)(2)(a) states that the Board is “to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges … and petitions for reinstatement, and prepare and forward to the Court its own findings, if any, and recommendations.” Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of “manifest error.” *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the Hearing Committee's

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

As reflected in the transcript of the hearing, Respondent stipulated to the facts. The parties are free to enter into stipulations and effect must be given to them unless they are withdrawn. *In re Webre*, 2017-1861 (La. 1/12/18), ___ So.3d ___; *In Re Torry*, 2010-837 (La. 10/19/10), 48 So. 3d 1038. The additional factual findings of the committee do not appear to be manifestly erroneous, are supported by the record, and are adopted by the Board.

B. De Novo Review

Respondent has stipulated that he violated Rules 8.4(a) and (b). Effect must also be given to these stipulations regarding rule violations. *Id.*

II. The Appropriate Sanction

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

Louisiana Supreme Court Rule XIX, §10(C) states that in imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
2. whether the lawyer acted intentionally, knowingly, or negligently;
3. the amount of actual or potential injury caused by the lawyer's misconduct; and
4. the existence of any aggravating or mitigating factors.

The Louisiana Supreme Court also considers the *ABA Standards* in determining the baseline sanction. *In re Quaid*, 94-1316 (La. 11/30/94); 646 So.2d 343, 350.

Here, Respondent knowingly violated duties owed to the public and the legal profession. His operation of a vehicle while impaired caused actual harm in the way of property damage to two other vehicles. His conduct also created the potential for serious bodily harm. By

engaging in criminal conduct, including leaving the scene of the accident, he caused damage to the reputation of all members of the profession.

The mitigating factors found by the committee are supported by the evidence and are adopted by the Board: absence of prior disciplinary record, significant personal problems, full and free disclosure to disciplinary board and cooperative attitude toward proceedings, good character and reputation, and remorse. The aggravating factors found by the committee are also adopted. As the committee found, by leaving the scene of the accident, Respondent exhibited conduct indicative of a dishonest or selfish motive. The aggravating factor of substantial experience in the practice of law is also present.

B. The ABA Standards and Case Law

The *ABA Standards for Imposing Lawyer Sanctions* suggest that suspension is the baseline sanction for Respondent's misconduct.⁵ Furthermore, the case law supports suspension as the appropriate baseline sanction. More specifically, and as set forth in *In re Baer*, 09-1795 (La. 11/20/09) 21 So. 3d 941, cited by the committee, and similar cases, the Court has typically imposed sanctions ranging from actual periods of suspension to fully deferred suspensions in cases involving attorneys who drive while under the influence of alcohol. As a general rule, the Court tends to impose an actual suspension in those instances involving multiple DWI offenses, "as well as in cases in which the DWI stems from a substance abuse problem that appears to remain unresolved." *Baer*, at 944.⁶

⁵ The following standards are instructive:

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

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.

⁶ It appears that the committee and Respondent devoted a significant amount of attention to whether "multiple DWI offenses are at issue," presumably, for the purpose of determining whether deferral of a suspension would be

Respondent admitted he was an alcoholic.⁷ Prior to his 2018 DWI arrest, he had struggled with alcohol use which led to his decision to abstain from the consumption of alcohol from 2011-2017, during which time he regularly attended AA meetings. However, in the face of real and significant personal turmoil, he resumed his alcohol use in 2017, which eventually led him to the unfortunate events of October 1, 2018. While he successfully completed the Jefferson Parish diversion program and he testified that he has refrained from alcohol use since November 20, 2018, we cannot escape the fact that the misconduct at issue arose out of a substance abuse issue that appears to remain unresolved by the standards that the Court has applied over and over again.

Respondent has not followed through with treatment as initially recommended by JLAP, nor has he sought evaluation by a JLAP-approved evaluator. Though he completed the Jefferson Parish diversion program, Mr. Stockwell testified that the requirements of the that program do not meet the criteria required of programs recommended by JLAP.⁸ Initially, Respondent cited financial concerns, as well as concerns that entering an in-patient treatment center would interfere with his completion of the Jefferson Parish diversion program. The diversion program was completed in November of 2019.⁹

According to the testimony of Mr. Stockwell, in response to Respondent's concerns regarding the cost of in-patient treatment and the relative length of time to pursue no-cost treatment at the Bridge House, Respondent was offered the option to seek an inpatient assessment, which would cost approximately \$2,500-\$3,000, to see if less onerous options could

appropriate under *Baer*. The sanction recommendation in this matter does not necessarily turn on the issue of first time vs. multiple offenses. Rather, the more relevant inquiry is whether there exists a substance abuse problem that appears to remain unresolved. See, for example, *In re Cassibry*, 2013-1923 (La. 11/1/13), 131 So.3d 22.

⁷ ODC Exh. 7, p. 17.

⁸ Hearing transcript, pp. 112-113.

⁹ Mayer Exh. 4.

be available.¹⁰ At the hearing in December of 2019, when asked whether he had taken steps to look into an evaluation at a JLAP-approved facility, he responded that he had not and explained:

Q.: Have you taken any steps to look into any of those evaluations - -
A.: No.
Q.: Why not?
A.: I feel that, A, financial, [\$]2,500 to 3,000 for an evaluation. I feel that I'm in control of my situation. A lot of the stressors that I had are no longer there. And I felt that the diversion program adequately satisfied what needed to be done.
Q.: Do you have any objection to continued monitoring, whether through JLAP or any other program?
A.: I am not sure.¹¹

This colloquy, along with the entirety of the record, establishes that Respondent has a substance abuse problem that appears to remain unresolved. There is no evidence in the record that establishes what the Respondent's current diagnosis may be, or whether treatment and monitoring is indicated. Completion of the Jefferson Parish diversion program does not accomplish that. The first step toward resolving the issue is obtaining a JLAP-approved evaluation.

In arguing that a lesser discipline is appropriate, Respondent cites a number of cases involving DWI arrests in which fully or partially deferred suspensions were imposed. Some involved first offenses. All of the cases are distinguishable in that all of the respondents were evaluated and/or complied with JLAP recommendations for treatment and monitoring. In addition, many of the cited cases are based on the filing of Joint Petitions for Consent Discipline.¹²

¹⁰ ODC Exh. 6; Hearing transcript, pp. 109-110, 118-121.

¹¹ Hearing Transcript, pp. 153-154.

¹² *In re Bradshaw*, 2019-1513 (La. 11/05/2019), --So3d-- (suspension for one year and one day, fully deferred, subject to successful completion of five-year period of probation to coincide with JLAP recovery agreement); *In re Bowman*, 2019-2026 (La. 02/18/2020), -- So3d – (suspension for one year and one day, fully deferred, subject to continued compliance with JLAP diagnostic monitoring agreement); *In re Bopp*, 2020-0070 (02/26/20), -- So3d— (suspension for one year and one day, all but ninety days deferred; following active suspension, probation for a period to coincide with term of JLAP recovery agreement); *In re Moore*, 2020-0079 (La. 02/26/2020), -- So3d – (suspension for one year and one day, fully deferred, subject to compliance with a five-year JLAP recovery

Respondent also cites *In re Stadler*, 2018-1212 (La. 11/05/2018), 255 So.3d 1017, in which a fully-deferred six-month suspension was imposed. In that case, the respondent was arrested for DWI in 2014. She had previously been arrested twelve years earlier, in 2002, for DWI. The evidence indicated that after the 2002 arrest, the respondent consumed no alcohol until the day of her 2014 arrest. The record further indicated that she did not consume alcohol after the 2014 arrest. She described herself as a non-drinker who, according to the hearing committee, had consumed alcohol while celebrating with colleagues on the day of the 2014 arrest, and on the way home, realized she should not be driving. She pulled over and called someone to pick her up. At some point, police arrived. She was tested. Her blood alcohol level was .104 and she was charged with DWI.

Following her 2014 arrest, the respondent was evaluated by a JLAP-approved evaluator, who diagnosed her with mild alcohol use disorder, in early remission, and recommended six weekly individual therapy sessions addressing substance use and abuse, which the respondent successfully completed. JLAP did not recommend a recovery agreement nor did it recommend that the respondent be subject to supervision or screening. In reviewing the matter, the Court found that the record adequately demonstrated that the respondent sought treatment for her mild alcohol abuse, demonstrated a meaningful period of recovery, and recurrence of misconduct was unlikely. The Court adopted the Board's recommendation of a six-month fully-deferred suspension, which took into account the unique circumstances in the case and the heavy mitigating factors. The Court further ordered that the respondent be placed on probation for a period of two years.

agreement); *In re McCullough*, 2020-0461 (La 05/26/20), -- So3d – (suspension for eighteen months with all but one year deferred, retroactive to date of interim suspension; following active suspension, probation for a period to coincide with JLAP recovery agreement).

In addition, Respondent cites *In re Lamb*, 2019-1460 (La. 11/19/2019) –So3d --. There are many similarities in the mitigating circumstances found in the instant matter and the *Lamb* case. In *Lamb*, an attorney was involved in an automobile accident and was booked with DWI, reckless operation of a motor vehicle, failure to maintain control, and simple possession of marijuana. The respondent's blood alcohol level was .144g%. Similar to the instant matter, the respondent maintained that the incident was a one-time occurrence resulting from an "accumulation of personal matters that overwhelmed her." *Lamb* at p. 2. The record showed that the respondent lost her home in Zachary as a result of extensive flooding in 2016 in East Baton Rouge Parish. She also lost her car in the flood. Several years prior, she had left a difficult marriage, losing all of her savings and her home. After that, she was able to find her home in Zachary and lived there until it was flooded. After the flood, she lived with her sister for a while and then a friend took her in until she was able to move back into her home. During this period, she continued to work every day, as she had to make a living and she had an employee who depended on her for her livelihood.

On the day of the accident, in 2017, with her home still in disarray, feeling stressed and overwhelmed, she decided to take a day off to visit her family home in Mayfair where she had grown up. While there, she admitted that she smoked marijuana with her nephew and consumed alcohol. On her way home, as she drove west on Perkins Road in Baton Rouge, the respondent's vehicle crossed the center line, veered into on-coming traffic, drove onto private property, struck a parked, unoccupied vehicle and came to rest in a ditch.

After the accident, relative to the criminal charges, the respondent was allowed to enroll in a one-year pretrial diversion program. She also consulted with JLAP. An evaluation was conducted which indicated that the respondent did not suffer from a substance use disorder.

Accordingly, JLAP made no recommendations for further testing or treatment. Given the misconduct, the Court found the appropriate sanction to be suspension for one year and one day. Citing *Baer*, and finding neither multiple DWI offenses nor, after evaluation by a JLAP evaluator, the existence of a substance use disorder, the Court fully deferred the suspension.

As in the *Lamb* case, the Respondent was charged with first offense DWI. Also similar to Ms. Lamb, he was charged with other criminal violations. In Respondent's case, those charges included hit and run, driving with a suspended license and driving without vehicle liability insurance. Both Respondent and Ms. Lamb were allowed to enter pre-trial diversion programs. In addition, both Respondent and Ms. Lamb were involved in accidents that caused actual harm in the form of property damage; potential harm by risking personal injury to themselves and others; and, by engaging in criminal conduct, caused damage to the reputation of all lawyers. Both Respondent and Ms. Lamb were facing difficult personal challenges at the time of their misconduct. However, where the Respondent's case and the *Lamb* case differ relates to whether their DWI arrests stemmed from substance abuse problems that appeared to remain unresolved. In Ms. Lamb's case, the respondent consulted with JLAP and obtained an evaluation. As it turned out, the evaluation indicated that Ms. Lamb did not suffer from a substance use disorder. Considering the misconduct at issue, the mitigating and aggravating factors, and the jurisprudence, the Court determined the appropriate sanction to be suspension for a year and a day. Because the case involved a first offense and it did not appear that Ms. Lamb had an unaddressed substance use issue, the Court determined that deferral of the suspension was appropriate.

Here, Respondent's DWI arrest stemmed from an admitted substance use problem. The record lacks sufficient evidence to show his alcohol abuse issue has been resolved, inasmuch as

Respondent has not sought or obtained a proper JLAP-approved evaluation and treatment if so indicated, therefore, deferral of the suspension is not warranted. Accordingly, the committee's recommendation of suspension for one year and one day with no deferral is appropriate and is adopted by the Board.

Should Respondent wish to resume the practice of law in the future, he will be required to make a formal application for reinstatement under Supreme Court Rule XIX, § 24 and demonstrate that he meets all of the reinstatement criteria set forth therein. We understand that the Court has held that if a sanction will require a respondent to petition for reinstatement pursuant to Rule XIX, §24, the imposition of conditions on the reinstatement should be reserved for when and if the respondent applies for reinstatement. *In re Hansen*, 2004-1988 (La. 11/19/04); 888 So.2d 172. We nevertheless encourage Respondent to seek the assistance of JLAP to obtain evaluation and treatment, if indicated.

CONCLUSION

Considering the foregoing, the Board adopts the factual findings and legal conclusions of the committee, finding that Respondent has violated Rules 8.4(b) (criminal act) and 8.4(a) (violation or attempted violation of the Rules of Professional Conduct) of the Louisiana Rules of Professional Conduct. In addition, the Board adopts the committee's sanction recommendation that Respondent be suspended for a period of one year and one day. Further, as did the committee, the Board recommends that Respondent be assessed with the costs and expenses of this matter.

RECOMMENDATION

The Disciplinary Board recommends that Respondent, J. Nelson Mayer III, be suspended from the practice of law for one year and one day. It further recommends that all costs and expenses in this matter be assessed against Respondent, in accordance with Supreme Court Rule XIX, Section §10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Linda G. Bizzarro

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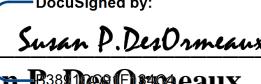
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By 

Susan P. DesOrmeaux

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FOR THE ADJUDICATIVE COMMITTEE