

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: BARRY W. BOLTON

NUMBER: 06-DB-013

RULING OF THE DISCIPLINARY BOARD

This is a disciplinary proceeding based on the filing of formal charges against the Respondent, Barry W. Bolton, by the Office of Disciplinary Counsel (“ODC”). For reasons stated below, the Disciplinary Board orders that the Respondent receive a public reprimand. The Disciplinary Board also orders that the Respondent be assessed with all costs and expenses of these proceedings.

PROCEDURAL HISTORY

Formal charges, consisting of two counts, were filed by ODC against the Respondent on March 1, 2006. In the charges, ODC alleges that the Respondent violated Rule of Professional Conduct 8.2(a)¹ in connection with a Motion for Recusation of Judge, Postponement, and Reassignment of Proceedings filed in two domestic matters, *Howard Joseph Bernard, III v. Amanda Mitchell Bernard*, Docket No. 2003-11944, 22nd JDC, St. Tammany Parish, Judge Larry Green presiding, and *Elena Odom v. Toxie Odom*, Docket No. 82617, 22nd JDC, Washington Parish, Judge Larry Green presiding. The charges were served on the Respondent, via certified mail, on March 8, 2006. The Respondent filed an answer to the formal charges on April 6, 2006, in which he denied violating Rule 8.2(a). A hearing in this matter was then set for June 27, 2006 in Covington, Louisiana.

¹ Rule 8.2(a) provides, in pertinent part, that:

“A lawyer shall not make a statement that the lawyer knows to be false, or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge . . .”.

The Respondent filed his Pre-Hearing Memorandum on June 7, 2006. Disciplinary Counsel's Pre-Hearing Memorandum was filed on June 14, 2006. On June 26, 2006, Disciplinary Counsel filed a Motion to Continue Hearing Without Date. The matter was continued and later reset for July 25, 2006 in Covington, Louisiana.

On July 24, 2006, the Respondent filed a Motion to Recuse the then-hearing committee chair, Deborah C. Foshee, from the panel hearing this matter. On July 25, 2006, the Respondent filed a Motion to Amend his Pre-Trial Order to add another witness to his witness list. Ms. Foshee denied the Respondent's Motion to Recuse on July 25, 2006 and granted his Motion to Amend his Pre-Trial Order on the same date. The hearing was held as scheduled on July 25, 2006, and the parties were given thirty days to file post-hearing memoranda and submit additional witnesses' depositions or exhibits. On August 22, 2006, the Respondent requested an additional time to file his post-hearing memorandum. ODC filed a response to this request on August 29, 2006 in which it stated that it was amenable to extending the deadline for Respondent's brief to be filed until August 31, 2006. ODC opposed any extension of time to hold the record open for discovery purposes. On August 24, 2006, Ms. Foshee signed an order giving the Respondent a one week extension of time to file his post-hearing memorandum. ODC filed its Post-Hearing Brief on August 29, 2006. The Respondent's Post-Hearing Brief was filed on September 6, 2006.

On December 11, 2008, the then-chair of the Disciplinary Board, Billy R. Pesnell, signed an order dismissing Ms. Foshee for cause due to her unwillingness, at that time, to sign the hearing committee's report. On December 30, 2008, Donald C. Massey was assigned by the Board Administrator to serve as the new chair of Hearing Committee

Number 49 and to issue a report in this matter. On January 29th, 2009, Hearing Committee Number 49 issued its report, finding that the Respondent had violated Rule 8.2(a) and recommending that the Respondent receive a suspension of six months, with one month active suspension, and five months deferred, along with other conditions. ODC filed its Pre-Argument Brief on March 19, 2009 in which it concurred with the findings and recommended sanction of the hearing committee. The Respondent filed his Pre-Argument Brief on April 20, 2009 in which he argued that the recommendations of the hearing committee were not appropriate under the circumstances.

Oral argument before Panel “A” of the Disciplinary Board was held on April 23, 2008. Deputy Disciplinary Counsel Damon S. Manning appeared on behalf of ODC. The Respondent and his counsel, Allen J. Myles, also appeared.

THE FORMAL CHARGES

The formal charges in this matter read, in pertinent part, as follows:

COUNT I

On or about October 28, 2003, the Office of Disciplinary Counsel received information regarding Respondent's conduct and which resulted in the opening of a disciplinary complaint. The matter was assigned investigative file number 0017842. The relevant facts of this complaint are as follows.

Respondent represented the defendant, Amanda Bernard, in the domestic matter of *Howard Joseph Bernard, III versus Amanda Mitchell Bernard*, Docket No. 2003-11944, filed in the 22nd Judicial District Court, St. Tammany Parish, Judge Larry Green presiding.

A hearing in the matter was set for May 2003. On May 28, 2003, Respondent filed a Motion to Continue the hearing. Judge Green granted the motion and the hearing was subsequently reset for September 8, 2003.

On July 1, 2003, Respondent filed a Rule to Show Cause to rule the plaintiff, Howard Bernard, III, into court to show cause why he should not be made to allow Respondent's client, Amanda Bernard, visitation

with the couple's minor child. The Rule was also set for September 8, 2003.

On September 2, 2003, Respondent filed a Motion to Continue the September 8, 2003 hearing. Opposing counsel objected to the continuance. On September 3, 2003, Judge Green denied Respondent's Motion to Continue.

The next day, on September 4, 2003, Respondent filed the following pleadings in the *Bernard* matter before the 22nd Judicial District Court: (1) Respondent filed a Motion to Reconsider wherein he asked the Court to reconsider his Motion to Continue the September 8, 2003 hearing; and (2) Respondent filed, both personally and on behalf of his client, defendant Amanda Bernard, a Motion for Recusation of Judge, Postponement, and Reassignment of Proceedings. Respondent's Motion for Recusation of Judge Green contained the following allegations:

"I.

Judge Larry Green exhibits personal biases and prejudices against attorney herein.

"II.

The Judge Larry Green exhibits rude and unprofessional tendencies toward attorney herein while attorney is practicing before Judge's court.

"III.

That Judge has been known to make uninviting comments, raise his voice, and openly and embarrassingly imply that attorney herein is deficient in some manner.

"IV.

That Judge Larry Green is very cordial and friendly with Caucasian (sic.) attorneys.

"V.

That Judge Larry Green's behavior and demeanor toward attorney herein in open court is very suggestive to attorney's clients and spectators who may be potential clients.

"VI.

That Judge Larry Green's behavior and demeanor potentially undermines attorney's ability to practice law and earn a living.

"VII.

That Judge Larry Green's supporting staff is also extremely rude to attorney herein, to the point of hanging up the telephone in the face of attorney when attorney calls on important matters.

"VIII.

That Judge Larry Green has communicated verbally in the past that he never want (sic.) Attorney Barry W. Bolton to practice in his courtroom ever again.

"IX.

That Judge Larry Green has actively taken steps and made false accusations for the purpose of having Attorney Barry W. Bolton terminated from his prior position as Assistant District Attorney.

"X.

That attorney herein has matters pending before Judge Larry Green and fears that because of Judge Green's personal biases, prejudices, and his inability to separate them from his public and professional position as relating to, the party's attorney, he will not be able to conduct a fair and impartial proceeding."

On September 8, 2003, Judge Elaine DiMiceli granted Respondent's Motion for Continuance in the *Bernard* matter, and the hearing in that matter was to be reset sometime after Respondent's Motion to Recuse Judge Green was heard.

On September 23, 2003, opposing counsel filed a Memorandum in Opposition to Motion for Recusation, Postponement and Reassignment of Proceedings and Rule for Sanctions, Court Costs, and Attorney Fees.

On October 14, 2003, Respondent filed a Motion to Amend the Motion for Recusation of Judge Green, wherein he clarified that, "recusal was filed because of judge's relationship with attorney; attorney feels that reference judge may be influenced in his rulings because of biases against attorney and not because of who the client is... [Respondent's client] has not instituted this motion."

On October 15, 2003, the Rule to Recuse Judge Green was to be heard by Judge DiMiceli. Prior to the hearing, discussions were had in Judge DiMiceli's chambers with both counsel and Judge DiMiceli present. Following these discussion, Respondent moved to dismiss his motion. In exchange, opposing counsel dismissed her Rule for Sanctions with

Respondent to pay \$250.00 in attorney's fees to opposing counsel by December 15, 2003.

The allegations contained in Respondent's Motion to Recuse Judge Green were knowingly false and/or were made with reckless disregard as to their truth or falsity and pertained to Judge Green's qualifications and/or integrity. Having publicly lodged such allegations against Judge Green, Respondent clearly violated Rule 8.2(a).

Respondent originally filed the Motion to Recuse Judge Green on September 4, 2003. He dismissed his motion on October 15, 2003. However, because of the public nature of the proceedings and record in the *Bernard* matter, the harm was already done.

COUNT II

Respondent represented the defendant, Toxie Odom, in the domestic matter of *Elena Odom versus Toxie Odom*, Docket No. 82617, filed in the 22nd Judicial District Court, Washington Parish, Judge Larry Green presiding.

On October 3, 2001, Judgment was rendered awarding sole custody to plaintiff Elena Odom; ordering Respondent's client, Toxie Odom, to pay child support; a permanent restraining order was issued against Respondent's client; and the plaintiff was awarded exclusive use of the family home and specific vehicles pending community property partition.

On February 25, 2002, a Judgment of Divorce was rendered by Judge Green in the *Odom* matter.

On July 17, 2003, Respondent filed on behalf of his client, defendant Toxie Odom, a Motion to Partition Community Property. As petitioner in reconvention, Respondent's client also sought: (1) a temporary restraining order prohibiting Elena Odom from encumbering or disposing of community property and from harassing Respondent's client during the pendency of these proceedings; (2) exclusive use of the family home; and (3) a rule nisi ordering Elena Odom to show cause why the relief sought by Respondent's client should not be granted.

On July 17, 2003, an Order was signed issuing temporary restraining orders and a rule nisi against Elena Odom, as prayed for by Respondent's client. Elena Odom was further ordered to appear for a show cause hearing on August 18, 2003.

For unknown reasons, on August 20, 2003, Respondent filed a second Motion to Partition Community Property and Reconventional Demand in the *Odom* matter. A second Order was signed on August 21, 2003, ordering Elena Odom to appear for a show cause hearing on September 22, 2003.

On September 10, 2003, Respondent filed personally and on behalf of his client, Toxie Odom, a Motion for Recusation of Judge, Postponement, and Reassignment of Proceedings. Respondent's motion contained the following allegations:

"I.

Judge Larry Green exhibits personal biases and prejudices against attorney herein.

"II.

The Judge Larry Green exhibits rude and unprofessional tendencies toward attorney herein while attorney is practicing before Judge's court.

"III.

That Judge has been known to make uninviting comments, raise his voice, and openly and embarrassingly imply that attorney herein is deficient in some manner.

"IV.

That Judge Larry Green is very cordial and friendly with Caucasian (sic.) attorneys.

"V.

That Judge Larry Green's behavior and demeanor toward attorney herein in open court is very suggestive to attorney's clients and spectators who may be potential clients.

"VI.

That Judge Larry Green's behavior and demeanor potentially undermines attorney's ability to practice law and earn a living.

"VII.

That Judge Larry Green's supporting staff is also extremely rude to attorney herein, to the point of hanging up the telephone in the face of attorney when attorney calls on important matters.

"VIII.

That Judge Larry Green has communicated verbally in the past that he never want (sic.) Attorney Barry W. Bolton to practice in his courtroom ever again.

"IX.

That Judge Larry Green has actively taken steps and made false accusations for the purpose of having Attorney Barry W. Bolton terminated from his prior position as Assistant District Attorney.

"X.

That attorney herein has matters pending before Judge Larry Green and fears that because of Judge Green's personal biases, prejudices, and his inability to separate them from his public and professional position as relating to, the party's attorney, he will not be able to conduct a fair and impartial proceeding."

This motion was filed six days after Respondent made these same allegations against Judge Green in a Motion for Recusation of Judge, filed by Respondent in the previously discussed *Bernard* matter.

On November 7, 2003, Respondent filed a Motion to Dismiss Recusal and Set for Trial, in the *Odom* matter. This came 23 days after Respondent dismissed his Motion to Recuse Judge Green in the *Bernard* matter.

The allegations contained in Respondent's Motion to Recuse Judge Green were knowingly false and/or were made with reckless disregard as to their truth or falsity and pertained to Judge Green's qualifications and/or integrity. Having publicly lodged such allegations against Judge Green, Respondent clearly violated Rule 8.2(a).

Respondent originally filed the Motion to Recuse Judge Green on September 10, 2003. He moved to dismiss his motion on November 7, 2003, and his motion was granted on November 20, 2003. However, because of the public nature of the proceedings and record in the *Odom* matter, the harm was already done.

THE HEARING COMMITTEE'S REPORT

As noted above, the hearing committee issued its report on January 29, 2009. In the report, the committee made extensive factual findings concerning the testimony presented at the hearing. *See* Hearing Committee Rpt., pp. 5-16. In analyzing whether a Rule 8.2(a) violation was present, the committee explained the directive given by the

Court in *Louisiana State Bar Assoc. v. Karst*, 428 So.2d 406 (La. 1983). In that matter, the Court addressed DR 8-102(B), the predecessor of Rule 8.2(a) and stated:

This provision clearly illustrates that it is not the genuineness of an attorney's belief in the truth of his allegation, but the reasonableness of that belief and the good faith of the attorney in asserting it that determines whether or not one has "knowingly" made false accusations against a judge within the meaning of DR 8-102(B). Consequently, where it is shown that an attorney knew, or in good faith should have known, of the falsity of his accusations, that attorney's unsubstantiated, subjective belief in the truth of those accusations, however genuine, will not excuse his violation of DR 8-102(B).

Id. at 428 So.2d 409.

The committee then explained that in order to establish a Rule 8.2(a) violation, ODC must prove either that Mr. Bolton actually knew the falsity of the statements he made in the *Bernard* and *Odom* recusal motions, or if in good faith, he should have known they were false. If violations of Rule 8.2(a) are shown by clear and convincing evidence, Mr. Bolton's unsubstantiated, subjective beliefs, no matter how genuine, would not excuse the violations.

In finding that Mr. Bolton filed the motion to recuse in a reckless manner in the *Bernard* matter, the committee cited to the fact that the Respondent eventually dismissed the motion to recuse and also agreed to the payment of his opponent's attorney's fee.² The committee described this as Respondent "tacitly acknowledging a violation of CCP Article 863."³

² Respondent's opponent in the *Bernard* matter had filed an opposition to the motion to recuse, as well as a rule for sanctions, court costs and attorney's fees.

³ CCP Article 863 is entitled "Signing of Pleadings, effect" and provides for sanctions in matters in which pleadings are filed which are not well grounded in fact, not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

The committee also noted that a review of the pleadings in the *Odom* matter further buttressed the argument that the recusal filing in *Bernard* was tactical, and that the later filing in the *Odom* case was made to appear consistent. The committee indicated that the motions to recuse were actually filed because Respondent's motion to continue in *Bernard* was denied. Hrg. Comm. Rpt. p. 19. The committee further pointed out that had the Respondent actually had the serious concerns that he stated in his motions to recuse, he should have raised them at the earliest opportunity and not only after an unfavorable ruling on an opposed motion to continue in *Bernard*. The committee noted that some of the actions of which Respondent complained in his motions to recuse occurred as early as 1998, when Judge Green allegedly communicated with Mr. Reed about his dissatisfaction with Respondent's demeanor in his section of court. Judge Green was assigned to the *Bernard* case on May 28, 2003, and Respondent appeared before Judge Green in the *Odom* case as early as September 12, 2001. The motion to recuse in *Bernard* was not filed until September 4, 2003.

The committee also found the testimony of Judge Green and Mr. Reed to be credible surrounding the circumstances of Respondent's several dismissals from the District Attorney's office. The committee cited to the fact that Mr. Reed was adamant that Judge Green would not have dictated hiring or firing decisions within Mr. Reed's office and that Judge Green did not attempt to direct Mr. Reed to fire Respondent in 1998.

The committee found that the testimony of Judge DiMiceli and Mr. Reed confirmed Judge Green's testimony that he does not harbor racial animus, prejudices or bias, and that he conducts himself in a fair and impartial way. The committee also found

that while the Respondent subjectively perceives bias or prejudice in his interactions with Judge Green, he offered no objective evidence to establish this bias or prejudice. The committee also held that despite Respondent's subjective and individualized perception, he lacked good faith. He was reckless in his allegations made against Judge Green in the recusal motions that he filed.

Based on the totality of the circumstances, the committee concluded that the Respondent's purpose in filing the recusal motion in *Bernard* was tactical, and several days later in *Odom*, he filed the recusal motion in order to appear consistent.

As to whether an 8.2(a) violation was present, the committee concluded that ODC failed to prove that Respondent actually knew that the allegations that he made in the recusal motions were false. The committee based this finding on Respondent's testimony which indicated that he had a perception of bias or prejudice, albeit subjective.

However, relying on an objective standard, the committee found that ODC had proven that Respondent recklessly disregarded the truth or falsity of the allegations he made against Judge Green and that these allegations directly concerned Judge Green's qualifications. The committee further determined that the Respondent's statements were not protected by the First Amendment. Accordingly, the committee found that a Rule 8.2(a) violation had been established by ODC.

The committee next analyzed the Rule XIX, Section 10(c) factors. Rule XIX, Section 10(c) directs the Board or Court to consider the following factors in imposing a sanction after a finding of lawyer misconduct:

- (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 committee found that the Respondent violated a duty owed to the legal system and that he acted knowingly. The committee also determined that the possible harm to the legal system and the profession was great. However, the committee held that the actual harm to the profession and the public was slight, although it noted that the recusal motions were of understandable and particular concern to Judge Green. Aggravating factors found by the committee included prior disciplinary offenses⁴, a pattern of misconduct, multiple offenses and refusal to acknowledge the wrongful nature of the conduct. As a mitigating factor, the committee cited inexperience in the practice of law and Respondent's subjective belief of the truthfulness of the statements he made in his motions to recuse Judge Green.

The committee relied on Standard 6.12 of the ABA Standards for Imposing Lawyer Sanctions⁵ in determining that the baseline sanction in this matter was suspension. The committee also relied on the cases of *In re Larvadain*, 95-2090 (La. 12/8/1995); 664 So.2d 395, *In re Simon*, 2004-2947 (La. 6/29/05); 913 So.2d 816 and *Karst*, 428 So.2d 406 (La. 1983) in reaching its proposed sanction.

⁴ See *In re Bolton*, 02-B-0257 (La. 6/25/2002); 820 So.2d 548. In that matter, Respondent was suspended for one year, with six months deferred, and required to attend ethics school for violating Rules 8.4(a) and 8.4(d) by entering into an *ex parte* communication with a judge before whom he had a pending personal injury case.

⁵ Standard 6.12 provides that 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.

In conclusion, the hearing committee recommended that the Respondent receive a suspension of six months, with one month active suspension, and five months deferred. In addition, the committee recommended that the Respondent attend the Louisiana State Bar Association's ethics school program, and that he complete continuing education courses as follows: 12 hours of Law Practice Management and 12 hours of Professionalism, all prior to the completion of the combined six month period of active and deferred suspension. Also, the committee recommended that the Respondent receive monitoring on at least a monthly basis for a period of two years, and that all costs be assessed against Respondent.

THE PARTIES' RESPONSES TO THE HEARING COMMITTEE'S REPORTS

In its Pre-Argument Brief filed with the Board, ODC urges the Board to accept the recommendation of the hearing committee. In his Pre-Argument Brief, the Respondent maintains that after considering the testimony and evidence presented in this matter, the recommendations of the hearing committee are not appropriate.

ANALYSIS

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (G)(2)(a) states that the Board is "to perform appellate review functions, consisting of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges...and prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest

error.” *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee’s application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004.

Here, the hearing committee’s extensive findings of fact are not manifestly erroneous, and the Board adopts these findings. Moreover, the committee correctly found that the Respondent had violated Rule 8.2(a). This rule violation is addressed below:

Rule 8.2(a): As explained above, Rule 8.2(a) provides that “a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. . . .”. As to the first part of this violation, the committee found that there was “insufficient proof to establish by clear and convincing evidence that Respondent actually knew that the allegations he had made in the recusal motion were false.” The committee based this finding on the Respondent’s testimony to the contrary, which indicated that he had a perception of bias or prejudice, albeit subjective.

However, as to the second element of 8.2(a), the committee stated that it “finds that ODC has carried its burden of proof, by clear and convincing evidence, that Respondent recklessly disregarded the truth or falsity of the allegations he made against Judge Green [and] that allegations Respondent made as to Judge Green in both the *Bernard* and *Odom* recusal motions directly concern Judge Green’s qualifications.”

As discussed above, in *Karst*, 428 So.2d 406, the Court interpreted DR 8-102(B), the predecessor of Rule 8.2(a). The Court adopted an objective standard, rather than a subjective standard, in analyzing whether a statement is knowingly or recklessly false,

and hence, a violation of the rule. *In re Simon*, 2004-2947 (La. 6/29/05); 913 So.2d 816, 824, *citing Karst*, 428 So.2d 406. In *Karst*, the Court stated:

In our opinion, DR 8-102(B) is violated when an attorney intentionally causes accusations to be published which he knows to be false, or which, with the exercise of ordinary care, he should know to be false.

The rationale for DR 8-102(B) appears in Ethical Consideration 8-6, the pertinent part of which provides:

Adjudicatory officials, not being wholly freed to defend themselves, are entitled to receive the support of the Bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

Id. at 409.

The Court in *Karst* continued that:

This provision clearly illustrates that it is not the genuineness of an attorney's belief in the truth of his allegations, but the reasonableness of that belief and the good faith of the attorney in asserting it that determines whether or not one has "knowingly" made false accusations against a judge within the meaning of DR 8-102(B). Consequently, where it is shown that an attorney knew, or in good faith should have known, of the falsity of his accusations, that attorney's unsubstantiated, subjective belief in the truth of those accusations, however genuine, will not excuse his violation of DR 8-102(B).

Id.

While the Board adopts the committee's conclusion that Rule 8.2(a) has been violated by the Respondent, it does not adopt the committee's finding that the Respondent did not know of the falsity of the allegations brought against Judge Green due to his subjective belief of bias or prejudice on the part of Judge Green. Instead,

based upon the objective standard mandated by *Karst*, the Board finds that the Respondent both knew, or should have known, of the falsity of the allegations which concerned Judge Green's qualifications and integrity. Given the objective standard of proof required in this matter, and the fact that the Respondent's primary motive in filing the motions was to gain a tactical advantage in the *Bernard* matter, a reasonable person could only find that Respondent knew, or should have known, that the allegations levied against Judge Green were false.

Furthermore, given the Court's directive in *Karst* and *Simon*, Respondent's unsubstantiated, subjective belief in the truth of the accusations he levied against Judge Green, however genuine, does not excuse his violation of Rule 8.2(a). This said, the Board makes clear that it specifically adopts the hearing committee's finding that:

Though not established by objective evidence in this case, to Mr. Bolton his perception was his reality. And he subjectively perceived an underlying racial motivation on Judge Green's part that, to him, was at the root of an unfavorable ruling. . . . His sensitivity was real to him, and the Committee believes that it played an important role in driving his approach to the *Bernard* and *Odom* cases.

Hrg. Comm. Rpt., p. 32.

In determining the appropriate sanction in this matter, the Board will balance the severity of the Rule 8.2(a) violation as dictated by Rule XIX, Section 10(c), with the particular circumstances surrounding the Respondent's state of mind at the time of the misconduct.

II. The Rule XIX, Section 10(c) Factors

The hearing committee correctly applied the Rule XIX, Section 10(c) factors, and the Board adopts their findings.

III. The ABA Standards and Case Law

The committee correctly relied on Standard 6.12 in finding that the baseline sanction in this matter is a suspension. However, because of the unique circumstances of this case and the mitigating factors present, including the Respondent's subjective belief of the truthfulness of the statements he made in his motions to recuse Judge Green, the Board will deviate downward from the baseline sanction of suspension.

In determining the sanction it will render in this ruling, the Board gives great weight to the incident involving Judge Green's private conversation in 1998 with Mr. Reed and one of his staff members concerning the Respondent's employment as an assistant district attorney with Mr. Reed's office.⁶ During this conversation, Judge Green advised Mr. Reed that he did not "feel like he could work with [Mr. Bolton] anymore in the juvenile matters" and asked Mr. Reed to "give him a new Assistant." Hrg. Tr., pp. 193-95. Mr. Reed recalls that Judge Green informed him that he "didn't want [Mr. Bolton] back in his courtroom," although the Judge did not suggest that Mr. Bolton be terminated as an assistant district attorney. Hrg. Tr., p. 271. Mr. Bolton later learned of this conversation. Hrg. Tr. p. 390. Mr. Bolton testified that, at the time, he was one of a few, if not the only, African American practitioners in the geographic area at issue. Hrg. Tr. pp. 72-73, 76.

The Board finds the subject and nature of this conversation to be highly unusual, given the fact that Judge Green did not have the authority to manage Mr. Reed's office. Moreover, this incident has proven to be very helpful to the Board in understanding the

⁶ Judge Green recalls this conversation occurring during a private meeting between Mr. Reed, one of Mr. Reed's staff members and himself. Mr. Reed recalls the conversation occurring during a phone call from Judge Green. Either way, the gist of the conversation is the same.

Respondent's subjective belief that Judge Green harbored a racial bias towards him as a professional.

The Board also notes that it is also troubled by the fact that the complainant in this matter has remained anonymous, and as late as the oral argument, the Respondent did not know with certainty who had filed the disciplinary complaint against him.

In determining the appropriate sanction, the Board is guided by the case of *In re Estiverne*, 1999-0949 (La. 9/24/99); 741 So.2d 649. In that matter, the Respondent, among other things, wrote a discourteous and offensive letter to a workers' compensation hearing officer which attacked the hearing officer's integrity. More specifically, the letter accused the hearing officer of disregarding "all the laws in the book to satisfy your own fantasy" and suggesting that he "refrain from continuing the kind of rape you have been perpetrating against the law." The respondent also requested that the letter be made "part of [the plaintiff's] record that was conveniently misplaced." *Id.* ODC filed formal charges, alleging that the respondent's conduct violated various Rules of Professional Conduct, including Rule 3.5(c) (engaging in conduct intended to disrupt a tribunal), 4.4 (respect for rights of third persons), and 8.2(a) (making a false statement concerning the integrity of a public legal officer). The Court, agreeing with the hearing committee's prior determination, found that the respondent's conduct violated Rule 4.4. For this misconduct, the Court imposed a public reprimand upon the respondent. *Id.* at 653.

Even though *Estiverne* involved a Rule 4.4 violation, and the matter at bar involves a Rule 8.2(a) violation, the misconduct found in the two cases is very similar. Both Mr. Estiverne and Mr. Bolton submitted an inappropriate document to the court which called into question the integrity of a public legal official. The sanction imposed

in this matter should be similar to and no greater than that imposed in *Estiverne*. Other jurisdictions have also imposed a public reprimand for comparable misconduct. See *Kentucky Bar Association v. Heleringer*, 602 S.W.2d 165 (Ky. 1980) (attorney claimed in a press conference that the trial judge acted in a manner that was “highly unethical and grossly unfair;” public reprimand imposed) and *In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (on rehearing) (brief signed by attorney included a footnote stating that the opinion of the appellate court was “so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc. and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)”). Based on the above, the Board will order that Respondent receive a public reprimand in this matter, and that he be assessed with all costs and expenses of these proceedings.

CONCLUSION

The Board adopts the findings of fact of the committee and the committee’s finding that the Respondent violated Rule 8.2(a) in this matter. The Board will order that the Respondent receive a public reprimand for his misconduct, and that he be assessed with all costs of and expenses of these proceedings.

ORDER

Based on the above, the Disciplinary Board orders that the Respondent, Barry W. Bolton, receive a public reprimand for his misconduct in this matter. The Board also orders that the Respondent be assessed with all costs and expenses of these proceedings in accordance with Rule XIX, Section 10.1.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

William D. Aaron, Jr.
John T. Cox, Jr.
George L. Crain
Lev M. Dawson
Dow M. Edwards
Ralph K. Lee, Jr.
Linda P. Spain
Michael S. Walsh

BY: _____


JOSEPH R. WARD, JR.
FOR THE ADJUDICATIVE COMMITTEE

APPENDIX

(Findings of Fact from Report of Hearing Committee 49)

EVIDENCE PRESENTED AT HEARING AND FINDINGS OF COMMITTEE

1- Evidence Presented

ODC offered exhibits ODC 1 through ODC 5, some of which contain multiple subparts. These were received without objection.¹ Respondent offered exhibits, R-1 through R-14, all of which were admitted without objection. ODC called the following witnesses: Respondent (under cross examination),² Judge Elaine DiMiceli,³ Judge Larry Green⁴ and District Attorney Walter Reed.⁵ Respondent testified on his own behalf during his case in chief.⁶

a. Barry Bolton

On direct, Respondent adamantly denied that he made any statements about Judge Green, including those in the recusal motions, that he either knew were false, or were made in reckless disregard for the truth.⁷ Also, he denied that his purpose in filing the pleadings was to obtain a continuance in the *Bernard* matter.⁸

In short, Respondent perceived that Judge Green disliked him and that he did not interact with Respondent as he did with other lawyers.⁹ He related his attempts to meet in person with Judge Green which were rebuffed. Notably, these events occurred in the 1997-98 timeframe, which was at least five years before the recusal motions were filed (*sic*).¹⁰ Moreover, Respondent complained that Judge Green's staff was rude to him, and during the timeframe of the *Bernard* second request for continuance, Judge Green's staff member hung up on him. Respondent was seeking a conference to discuss Judge Green's refusal to grant

the second continuance in the *Bernard* matter, though it was unclear whether Respondent sought to communicate *ex parte* with Judge Green. Respondent denies that he sought an *ex parte* communication.

Surprisingly, Respondent denies that his recusal motion suggests that Judge Green is a "racist."¹¹ In the Committee's view, Respondent never effectively negated the innuendo and clear implication of the language in paragraphs IV of the *Bernard* and *Odom* recusal motions. In fact, when directly asked the question: "[w]ould you characterize Judge Green as a racist, yes or no?", Respondent testified as follows:

A: I don't know.

Q. In 2003, based on your experience with Judge Green—

A. Oh, and let me - -let me - - make this statement to you, I don't know whether or not Judge Green is a racist. Would I characterize him as a racist? I don't - I only know of one incident, and that's with me, so I - -I - -I couldn't say that.

Q. And that's true for today, or in 2003, when the motion was filed, would your answer be the same if I asked you in 2003, when you filed this motion, did you believe at that time, that Judge Green was a racist?

A. Racist was not the motivating factor for me putting this statement in there, so I can't say how I was - - what I would have characterized back then because I was - -I was just basically stating the facts.¹²

Respondent's statements in paragraph IV of the recusal motions clearly suggest racial bias on Judge Green's part. However, Respondent offered no credible, objective evidence as factual support for such an allegation. What he offered was his subjective perception. Thus, the Committee finds that, in the context of Respondent's subjective state of mind or perception, Respondent proved that he *subjectively believed* that Judge Green is afflicted with racial bias, and/or individual bias as to Respondent.¹³

Another of Respondent's central allegations was that Judge Green was instrumental in having him fired from District Attorney Walter Reed's employ. According to Respondent, he was hired and fired by Mr. Reed on three separate occasions. Respondent offered his version of the history of his employment as an Assistant District Attorney with Mr. Reed's office. Essentially, he was fired as an assistant D.A. on at least three occasions, and rehired twice. The first and third firings had nothing to do with Judge Green.¹⁴

Respondent related that the second firing was prompted by a discussion that Judge Green had with Mr. Reed. During that conversation, Respondent claims that Judge Green insisted that Respondent be fired. Respondent is of the subjective belief that Judge Green directed that Mr. Reed fire Respondent. Judge Green apparently complained of Respondent's courtroom demeanor and approach. Respondent is adamant that Judge Green's comments to Mr. Reed were inaccurate and incorrect.¹⁵ As will be noted below, the Committee does not find that Judge Green either directed that Respondent be fired from the D.A.'s employ, or that Mr. Reed actually terminated Respondent at Judge Green's direction. In any event, it is clear that of the three occasions on which Respondent was fired by Mr. Reed, the first and last had nothing whatsoever to do with Judge Green.

Respondent was questioned about his prior disciplinary violation, which involved improper *ex parte* communication with another Twenty Second Judicial District Court Judge -Judge Peter Garcia.¹⁶ That the prior discipline involved improper interaction with a judge was important to the Committee.

b. Judge Larry Green

Judge Green was called during ODC's case.¹⁷ He has been a licensed attorney since 1964. Judge Green's undergraduate degree was awarded by LSU, and his law degree was earned at Tulane.¹⁸ Along with military service in the U.S. Army, Judge Green was engaged in private practice until his 1991 election as a District Judge for the Twenty-Second Judicial District Court.¹⁹ Judge Green related his experience with Respondent, including early efforts to mentor Mr. Bolton.²⁰

Judge Green was adamant that he has never harbored any racial prejudices, either generally, or as to specific litigants or lawyers in his courtroom.²¹ He explained that he was raised on a farm, and he was taught from the outset to treat everyone equally. Moreover, he estimated that during the course of his 27 years of private practice, about one third of his clients were African American or some other minority.²² Other than the recusal motions filed by Respondent, Judge Green attested that, to his knowledge, he has never been accused by lawyers or litigants of being a racist or of harboring racial prejudice.²³

Judge Green related his work experience with Respondent, including when Respondent worked as an assistant district attorney ("ADA") assigned to Judge Green's section, primarily on juvenile matters.²⁴ Judge Green recalled two separate instances where Respondent openly disagreed with his rulings, while in open court. The disagreement was beyond lawyer objections and preserving the record. Rather, it constituted a defiant outburst, where Respondent vocalized his belief that that [sic] Judge Green was wrong.²⁵ Judge Green went on to describe the third, watershed incident with Respondent where Respondent became dissatisfied with a ruling of "not guilty" in a juvenile matter that Respondent had just prosecuted.

Following the "not guilty" verdict, Respondent openly criticized Judge Green about the ruling and, while in open court, vocally complained that "[Judge Green] couldn't do that, you know, that [Judge Green] was wrong.. .and my Court people turned around and looked at me. The public defender was aghast so I got up off the bench."²⁶ This inappropriate outburst prompted a chambers conference with Respondent, opposing counsel and court personnel where Judge Green told Respondent that he would not tolerate that type of performance in his courtroom.²⁷

Following the chambers conference, Judge Green took the advice of another ADA, Kenny Gatewood, and decided to bring the matter to Mr. Reed's attention. Judge Green advised Mr. Reed of the incident, and explained that Judge Green did not feel like he could work with Respondent. Judge Green understood that, subsequent to that discussion, Respondent was transferred to another division of the District Attorney's office. And another ADA was assigned to Judge Green's section of court.

Judge Green related on cross examination that the second request for continuance in the *Bernard* matter was objected to by opposing counsel. As noted, Judge Green previously granted the first continuance. However, as is completely within his discretion, Judge Green denied the second request for a continuance.²⁸ Given the circumstances. Judge Green felt like the subsequent recusal motion and motion to reconsider were, in effect, a tactic.

c. Judge Elaine DiMiceli

Judge DiMiceli testified during ODC's case in chief.²⁹ At the time of the hearing, Judge DiMiceli had been on the Twenty-Second Judicial District Court bench for 10 years.³⁰ Judge DiMiceli was admitted to practice in 1977, and prior to taking the bench, she was in

private practice.³¹ She has known Judge Green since she was admitted to practice, and she characterizes him as "very hard working, very fair, very competent, always trying to do the right thing."³² Judge DiMiceli verified that, in her experience with Judge Green, she has never known or learned of Judge Green:

1. possessing or harboring any personal biases against any attorney or litigant;
2. exhibiting any rude or unprofessional behavior against any attorney or litigant in his courtroom;
3. demonstrating any racial prejudices against any attorney, litigant or anyone else, in his capacity as a judge.³³

Judge DiMiceli also verified that there are very few African American lawyers in St. Tammany and Washington Parishes, perhaps fewer than five percent of the overall bar in that region.

Judge DiMiceli was the Judge assigned to hear the recusal and related motions that Respondent filed. To address those motions, she recalls conducting an in chambers conference, that included Judge Green and opposing counsel. She recalls that Judge Green was upset about the allegations in the recusal motions, as she would have been if these same allegations were leveled against her.³⁴ Judge DiMiceli recalled that Mr. Bolton "did seem to be somewhat contrite and apologetic about making the accusations,"³⁵ and that he withdrew the motions.³⁶

Judge DiMiceli also testified about her interaction with Respondent as a lawyer in her courtroom. She testified that Respondent had engaged in behavior that she believed to be rude, inappropriate or unprofessional.³⁷ Specifically, Judge DiMiceli verified that Respondent

was frequently late and occasionally unprepared.³⁸ In her experience, Respondent has requested continuances that were not merited.³⁹ Judge DiMiceli suggested that Respondent would benefit from additional education and teaming on office and court management skills.⁴⁰ Despite these shortcomings, however, Judge DiMiceli believes that Respondent is a "good attorney...when he's prepared, he does a very good job."⁴¹

*d. Walter Reed*⁴²

Walter Reed, ODC's final witness, is the District Attorney for the Twenty-Second Judicial District, and as of the time of the hearing, he had served in that capacity for twenty-two years.⁴³ Before being elected to this office, Mr. Reed worked as a police officer with N.O.P.D., in the narcotics division. As a lawyer he has worked as an Assistant District Attorney, Assistant U.S. Attorney and an Assistant Louisiana Attorney General.⁴⁴ He has known Judge Green for thirty years. While the two are friendly, Mr. Reed does not consider Judge Green a close personal friend.⁴⁵

As District Attorney, Mr. Reed assigns assistants to Judge Green's section, and overall has working knowledge of Judge Green's ability and approach on the bench.⁴⁶ Mr. Reed observed:

Judge Green is - - he's - - first of all he's a gentleman. He's sort -- sort of soft spoken. He's easy to practice law in front of. He has a reputation for being a Judge that lets lawyers try their case, as opposed to some Judges are more active and - - more involved in the management of the presentation of the case. Judge Green - -he's a gentleman. He's my office is - - we - - we've really not had any problem at all and the Assistants that have been assigned to him. They've generally gotten along very well with him.⁴⁷

Mr. Reed was very direct and clear that he does not believe that Judge Green is a racist.⁴⁸

Specifically, Mr. Reed testified as follows:

- Q. And what are your findings and personal experiences being with regards to whether [Judge Green is] consistent with all races or manners of litigants and defendants?
- A. I do not think Judge Green is a racist. I've known him for 30 years. He's - - he's a fairly open minded, fair minded kind of guy and I would describe Judge Green as a fine Judge and he's a - - he's a good man and I've never known him to treat defendants differently because of race, color or creed or any other reason. He seems to be fair minded, in my experience with him.⁴⁹

When questioned regarding the specific allegations of the recusal motions, Mr. Reed was steadfast that he believed the allegations to be false, and that in his belief, Mr. Bolton knew they were, too.⁵⁰

Mr. Reed discussed his initial hiring of Mr. Bolton, and expressed the general excitement he had about hiring Mr. Bolton. Specifically, Mr. Reed explained his desire to increase the diversity of his office,⁵¹ and that he "really wanted [the employment relationship with Respondent] to work."⁵²

Despite the desire to make the relationship work, Mr. Reed testified that he felt it necessary to fire Mr. Bolton, following which he was rehired, and fired again, much as was discussed above. Mr. Reed related that he rehired Respondent following his arrest related to interfering with officers at an accident scene. Mr. Reed believed that Respondent was remorseful, and that Mr. Reed "really wanted it to work."⁵³ After rehiring Mr. Bolton, there were a series of events and problems with Mr. Bolton that were brought to a head by a complaint from Judge Green.⁵⁴

Mr. Reed was specific that Judge Green did not direct or "order" that Mr. Bolton could no longer work as an ADA in his section.⁵⁵ Rather, it was more in the nature of a

request. Importantly, though, at the time, Mr. Reed described the employment relationship with Respondent as "problematic," involving issues ranging from Mr. Bolton's competency⁵⁶ to his progression and development as an ADA.⁵⁷ Specifically, Mr. Reed testified about the combined problems he experienced with Respondent, that led to his ultimate termination:

Q. Can you sit here today and say whether or not that conversation that you had with Judge Green was the sole reason you terminated Barry Bolton?

A. That was not the sole reason. It was a combination of things. I think this was the third time that I had terminated Mr. Bolton and it was just a collection of things and it just was not going to work out in the long term so I - I finally terminated him for the third and final time.⁵⁸

The complaint from Judge Green was one among a number, and according to Mr. Reed, was "the straw that broke the camel's back."⁵⁹ Mr. Reed was adamant that Judge Green did not ask Mr. Reed to terminate Respondent.⁶⁰ Similarly, he flatly rejected any suggestion that Judge Green had the ability to dictate Mr. Reed's hiring and firing decisions.⁶¹

Based on discussions with Respondent's supervisor, Mr. Reed simply did not believe that the employment relationship would work out, and he again terminated Mr. Bolton. Overall, this firing was one of three.⁶² And, notably, this all occurred some five years or more before Mr. Bolton filed the recusal motions in the *Bernard* and *Odom* cases.

Endnotes⁷

¹ Transcript pp. 10-11.

² Transcript pp. 26-125.

³ Transcript pp. 126-154.

⁴ Transcript pp. 155-258.

⁵ Transcript pp. 259-327.

⁶ Transcript pp. 336-393.

⁷ Transcript p. 337.

⁸ *See* Transcript, pp. 337-338.

⁹ *See* Transcript pp. 109-110.

¹⁰ *See* Transcript p. 89.

¹¹ Transcript p. 339.

¹² Transcript pp. 77-78.

¹³ Again, the Committee wishes to be abundantly clear that there was no credible, objective proof that Judge Green is racially biased. Indeed, the objective evidence established that Judge Green is not racially biased.

¹⁴ According to Respondent, the first time he was fired involved Respondent's interference with an accident investigation, at the scene of an accident, and resulting arrest. Transcript pp. 340-341. The second involved a complaint D. A. Reed had received from Judge Green about Respondent Transcript pp. 342-344. According to Respondent, the third firing concerned Respondent's qualification for an elected office position. *See* Transcript pp. 33-36.

¹⁵ Indeed, Respondent contends that Judge Green actually knew that statements that he made to Mr. Reed in the 1997 timeframe regarding Respondent's courtroom behavior and performance were not true, and that Judge Green had actual knowledge that the statements he made were not true. *See* Transcript pp. 351-352; 389-399.

⁷ Footnotes 7-68 in original.

¹⁶ *In re: Bolton*, 02-B-0257 (La. 06/25/2002), 820 So.2d 548. *See* Transcript pp. 110-111; 121-124; 388-389.

¹⁷ Transcript pp. 155-258.

¹⁸ Transcript p. 158.

¹⁹ Transcript pp. 159-160.

²⁰ Transcript pp. 160-162,

²¹ *See* Transcript pp. 184-186.

²² Transcript p. 185.

²³ *Id.*

²⁴ Transcript pp. 190-191.

²⁵ Transcript, pp. 191-192.

²⁶ Transcript, p. 192.

²⁷ Transcript, p. 193.

²⁸ Transcript, pp. 214-218.

²⁹ Transcript, pp. 126-154.

³⁰ Transcript, p. 130.

³¹ Transcript, pp. 130-131.

³² Transcript, p. 131.

³³ Transcript, p. 132.

³⁴ Transcript, pp. 139-140.

³⁵ Transcript, 140.

³⁶ *Id.*

³⁷ Transcript, p. 141.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Transcript, pp. 141-142.

⁴² Transcript, pp. 259-327.

⁴³ Transcript, p. 261.

⁴⁴ Transcript, p. 262.

⁴⁵ *Id.*

⁴⁶ *See* Transcript, pp. 263, 281.

⁴⁷ Transcript, pp. 263-264.

⁴⁸ Transcript, p. 325.

⁴⁹ Transcript, pp. 281-282,

⁵⁰ Transcript, pp. 319-322; 325-326.

⁵¹ Transcript, p. 267. Of note, in the context of diversity, Mr. Reed related that Respondent was not the only African American in his employ, and he was not the only African American lawyer who worked for Reed. *See* Transcript, pp. 302-305.

⁵² *See e.g.* Transcript, pp. 265, 267.

⁵³ Transcript, p. 267.

⁵⁴ Transcript, p. 268.

⁵⁵ Transcript, pp. 267-268.

⁵⁶ Transcript, p. 269.

⁵⁷ *Id.*

⁵⁸ Mr. Bolton, as noted above, testified that the firing related to problems in Judge Green's section was the second firing. The third, according to Mr. Bolton, concerned his qualification to run for public office. Mr. Reed was candid that the events surrounding firing Respondent occurred many years before the hearing. As noted, Mr. Reed recalled three hirings and firings, which is consistent with the number to which Respondent testified.

⁵⁹ Transcript, p. 294.

⁶⁶ Transcript, p. 285.

⁶¹ Transcript, p. 306.

⁶² Transcript, pp. 269-270.