

ORIGINAL

Louisiana Attorney Disciplinary Board

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22-DB-045

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LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: FLYNN KEMPF SMITH

DOCKET NO. 22-DB-045

REPORT OF HEARING COMMITTEE # 55

INTRODUCTION

This attorney disciplinary matter arises out of formal charges filed by the Office of Disciplinary Counsel (“ODC”) against Flynn Kempff Smith (“Respondent”), Louisiana Bar Roll Number 30302.¹ ODC alleges that Respondent violated the following Rules of Professional Conduct: 1.1(c), 5.5(a), and 8.4(a) & (b).²

PROCEDURAL HISTORY

The formal charges were filed on September 23, 2022. By letter dated September 26, 2022, the formal charges were mailed via certified mail to Respondent’s primary registration address.³ Additionally, Respondent was personally served with the formal charges on October 26, 2022. Respondent failed to file an answer to the charges. Accordingly, on December 13, 2022, ODC filed a motion to deem the factual allegations admitted pursuant to Louisiana Supreme Court Rule XIX, §11(E)(3).⁴ By order signed December 20, 2022, the factual allegations contained in the

¹ Respondent was admitted to the practice of law in Louisiana on April 13, 2006. Respondent is currently ineligible to practice law. He has been ineligible since October 20, 2020 for failure to fulfill his annual professional obligations.

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

³ 1507 Dante Street, New Orleans, LA 70118.

⁴ This rule states:

The respondent shall file a written answer with the Board and serve a copy on disciplinary counsel within twenty (20) days after service of the formal charges, unless the time is extended by the chair of the hearing committee. In the event, Respondent fails to answer within the prescribed time, or the time as extended, the factual allegations contained within the formal charges shall be deemed admitted and proven by clear and convincing evidence. Disciplinary Counsel shall file a motion with the chair of the hearing committee to which the matter is assigned requesting that the factual allegations be deemed proven with proof of service of the formal charges upon the respondent. The

formal charges were deemed admitted. On February 16, 2023, ODC filed its submission on sanction.

For the following reasons, the Committee finds Respondent violated the Rules as charged and recommends that he be suspended from the practice of law for two years.

FORMAL CHARGES

The formal charges read, in pertinent part:

The Respondent is Flynn Kempff Smith, a forty-three-year-old Louisiana licensed attorney admitted to practice on April 13, 2006 after graduating from the Loyola College of Law in New Orleans. Respondent has no prior disciplinary record but has been ineligible to practice law for failure to maintain his mandatory continuing legal education requirements from July 1, 2020 until February 17, 2022. He remains ineligible to practice law for failure to file his registration statement, pay his bar dues, or pay his disciplinary assessment, and he has not filed his trust account registration statement form October 20, 2020 through the date of these formal charges.

COUNT I.

On February 10, 2022 the Office of Disciplinary Counsel received a written complaint against the Respondent from Bianca N. Moore who is employed by the Orleans Parish Criminal District Court in Section 'G'. Ms. Moore reported to the Office of Disciplinary Counsel that on January 27, 2022 the Respondent appeared before the Judge in Section G representing John A. Melton during arraignment in case bearing docket number 553-101, he enrolled on the defendant's behalf, and entered a not guilty plea on behalf of his client. The following week the judge became aware that the Respondent was and has been ineligible to practice law when he appeared in court as counsel for Mr. Melton. Respondent practiced law while ineligible in violation of Rule 5.5(a). Additionally, because he failed to maintain his eligibility for a period of over two years Respondent has violated Rule 1.1(c) and therefor violated Rule 8.4(a).

COUNT II.

On February 1, 2022 the ODC received a written complaint against Respondent from Jessica LiRocchi who alleged that she was the victim of domestic violence. Respondent was defending the accused and made an appearance in court on his behalf at a point in time when he was (and has been) ineligible to practice law in violation of Rule 5.5(a). Additionally, because he failed to maintain his

order signed by the hearing committee chair shall be served upon respondent as provided by Section 13C. Within twenty (20) days of the mailing of the order of the hearing committee chair deeming the factual allegations contained in the formal charges proven, the respondent may move the hearing committee chair to recall the order thus issued upon demonstration of good cause why imposition of the order would be improper or would result in a miscarriage of justice.

eligibility for a period of over two years Respondent has violated Rule 1.1(c) and Rule 8.4(a).

COUNT III.

On or about February 16, 2022 the Office of Disciplinary Counsel learned that on February 11, 2020 Respondent had been involved in a motor vehicle accident and was found to have been highly intoxicated. Respondent's vehicle had come to rest on the bumper of another vehicle parked near the intersection of Cherokee Street and Dominican Street in New Orleans. The two vehicles had collided and Respondent's vehicle was still running while he was asleep at the wheel when the investigating officer arrived. The officer made contact with the Respondent who evidenced a very strong odor of alcohol both on his breath and in his vehicle where an open container of alcohol was found to be present. The Respondent was awakened and upon exiting the vehicle was unsteady on his feet, had slurred speech, and bloodshot eyes. While the officer was conducting a search of the Respondent a small packet containing a white powdery substance fell from Respondent's pocket. Field testing confirmed the officer's initial belief that the substance was in fact cocaine. A later blood alcohol test was administered and Respondent's alcohol level was found to be at the .235% level, nearly three times the legal limit. The Respondent's conduct involving driving while impaired, maintaining an open container of alcoholic beverages in his vehicle, and his possession of cocaine reflect clear violations of Rule 8.4(b)—the commission of a criminal act and Rule 8.4(a)—violating or attempt to violate the Rules of Professional Conduct.

EVIDENCE

The Committee reviewed the exhibits submitted by ODC, which are Exhibits ODC 1-15. Respondent did not submit evidence or argument for the Committee's consideration, nor did he request to be heard in mitigation pursuant to Rule XIX, §11(E)(4).

FINDINGS OF FACT

The factual allegations in the formal charges are deemed admitted. The Committee finds that the allegations that were deemed admitted are fully supported by the evidence submitted by ODC.

RULES VIOLATED

Counts I and II: Respondent has been ineligible to practice law since October 20, 2020 for failing to file his annual registration statement, pay his bar dues, and pay his disciplinary assessment.⁵ The factual allegations and evidence underlying Counts I and II indicate that on January 27, 2022, while he was ineligible to practice law, Respondent appeared in court on behalf of a client. This conduct constitutes violations of Rules 1.1(c), 5.5(a), and 8.4(a).

Count III: The factual allegations and the evidence, which includes police bodycam footage, indicate that Respondent drove his car while under the influence of alcohol and was in possession of cocaine. This criminal conduct constitutes violations of Rules 8.4(a) and (b).

SANCTION

Louisiana Supreme Court Rule XIX, §10(C), states that when imposing a sanction after a finding of lawyer misconduct, a committee 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 his client, the legal system, the profession, and the public. He acted at least knowingly, if not intentionally. Respondent's unauthorized practice of law caused potential harm to his client and the legal system. Respondent's criminal conduct caused actual and potential harm to the public and the actual harm to the profession.

The *ABA Standards for Imposing Lawyer Sanctions* suggest that suspension is the baseline sanction for Respondent's misconduct. Standard 5.12 states, "Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed

⁵ He was certified ineligible again on October 1, 2021, for failing to complete his annual MCLE requirements.

in Standard 5.11⁶ and that seriously adversely reflects on the lawyer's fitness to practice." By driving while intoxicated, Respondent caused actual and potential harm to the public. Standard 7.2 states, "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." By practicing law while ineligible, Respondent caused potential harm to his client and the legal system. Accordingly, suspension is the baseline sanction.

The following aggravating factors are supported by the record: multiple offenses, substantial experience in the practice of law, and illegal conduct. The only mitigating factor supported by the record is Respondent's lack of a disciplinary history.

The case law of the Court indicates that at least a suspension of one year and one day is warranted in this matter. In *In re Hardy*, the Court observed that the baseline sanction for practicing law while ineligible is a one year and one day suspension. 2003-B-0443 (La. 5/2/03), 848 So.2d 511, 515. In *In re Baer*, the 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. [Internal footnote omitted.]

2009-1795 (La. 11/20/09); 21 So.3d 941, 944.⁷

⁶ Standard 5.11 states:

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 (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.

⁷ In *Baer*, the Court suspended the respondent ("Ms. Baer") for one year and one day for two instances of driving while intoxicated that occurred within two months. In the first incident, Ms. Baer was involved in a minor car accident in her office parking lot. After investigation by the police, Ms. Baer was arrested and charged with driving while

Here, Respondent has practiced law while ineligible which, the absence of any mitigators, calls for a baseline suspension of one year and one day. Furthermore, Respondent has engaged in the criminal conduct involving DWI and drug possession. While there is only one instance of DWI present, the record is absent of any factors that would mitigate that conduct. Rather, the level of Respondent's impairment (blood alcohol level of .235%) and the bodycam footage of Respondent's arrest, tend to suggest that Respondent, at the very least, should be assessed for a potential substance use problem. The record does not contain evidence that Respondent has done so. Accordingly, with regard to just the criminal conduct, Respondent is facing a period of suspension with no deferral. Viewing that misconduct as a whole, the Committee agrees with the sanction recommended by ODC, which is a two-year suspension from the practice of law.

CONCLUSION

The Committee finds that Respondent violated the Rules as charged and recommends that he be suspended from the practice of law for two years. The Committee also recommends that Respondent be assessed with the costs and expenses of the proceeding pursuant to Rule XIX, §10.1.


intoxicated. In the second incident, Ms. Baer was involved in an accident in a casino parking lot. After investigation by the police, she was arrested and charged with driving while intoxicated and driving with a suspended license. Ms. Baer allowed the formal charges to become and remain deemed admitted. The Court concluded that Ms. Baer violated Rules 8.4(a) and 8.4(b). The following aggravating factors were present: pattern of misconduct and substantial experience in the practice of law. The following mitigating factors were present: absence of a prior disciplinary record, absence of a dishonest or selfish motive, and chemical dependency.

This opinion is unanimous and has been reviewed by each committee member, who fully concur and who have authorized Donald C. Massey to sign on their behalf.

New Orleans, Louisiana, this 27th day of March, 2023.

**Louisiana Attorney Disciplinary Board
Hearing Committee # 55**

**Donald C. Massey, Committee Chair
Donald F. deBoisblanc, Jr., Lawyer Member
Desire P. Dupre, Public Member**

BY: 

**Donald C. Massey, Committee Chair
For the Committee**

APPENDIX

Rule 1.1. Competence

...

(c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

...

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;

...