

The Supreme Court of the State of Louisiana

IN RE: FLYNN KEMPF SMITH

No. 2023-B-00596

IN RE: Office of Disciplinary Counsel - Applicant Other; Findings and
Recommendations (Formal Charges);

June 21, 2023

Suspension imposed. See per curiam.

PDG

JLW

JDH

SJC

JTG

WJC

JBM

Crichton, J., additionally concurs and assigns reasons.

Supreme Court of Louisiana

June 21, 2023



Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO. 2023-B-0596

IN RE: FLYNN KEMPF SMITH

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Flynn K. Smith, an attorney licensed to practice law in Louisiana, but currently ineligible to practice.

FORMAL CHARGES

Counts I & II

On October 20, 2020, respondent was declared ineligible to practice law for failure to pay his bar dues and the disciplinary assessment. On October 1, 2021, he was declared ineligible to practice for failure to file his trust account registration statement. Finally, between July 1, 2020 and February 17, 2022, respondent was ineligible to practice for failure to comply with the mandatory continuing legal education requirements.

Notwithstanding respondent’s ineligibility during these periods, on January 27, 2022 he appeared in Section “G” of Orleans Criminal District Court representing a defendant during arraignment. Respondent enrolled as counsel and entered a not guilty plea on the defendant’s behalf. In February 2022, the clerk in Section “G” and the victim in the criminal case filed complaints against respondent with the ODC.

Count III

In 2022, the ODC learned that respondent was involved in a motor vehicle accident in 2020 and was found to have been highly intoxicated. Respondent's vehicle collided with another vehicle parked near the intersection of Cherokee Street and Dominican Street in New Orleans. Respondent's vehicle was still running and he was asleep at the wheel when the investigating officer arrived. The officer noted that there was a very strong odor of alcohol on respondent's breath and in his vehicle, where an open container of alcohol was found to be present. Respondent was awakened and upon exiting the vehicle was unsteady on his feet. He also slurred his speech and had bloodshot eyes. A breath test revealed that respondent's blood alcohol level was .235g%.

The officer conducted a search of respondent incident to his arrest. A small baggie containing a white powder-like substance fell from respondent's pocket during the search. Field testing confirmed that the substance was cocaine.

DISCIPLINARY PROCEEDINGS

In September 2022, the ODC filed formal charges against respondent, alleging that his conduct as set forth above violated the following provisions of the Rules of Professional Conduct: Rules 1.1(c) (a lawyer is required to comply with all requirements of the Supreme Court's rules regarding annual registration, including payment of bar dues and the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information), 5.5(a) (engaging in the unauthorized practice of law), 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer).

Respondent was personally served with the formal charges but failed to answer. Accordingly, the factual allegations contained therein were deemed

admitted and proven by clear and convincing evidence pursuant to Supreme Court Rule XIX, § 11(E)(3). No formal hearing was held, but the parties were given an opportunity to file with the hearing committee written arguments and documentary evidence on the issue of sanctions. Respondent filed nothing for the hearing committee's consideration.

Hearing Committee Report

After considering the ODC's deemed admitted submission, the hearing committee determined that the factual allegations of the formal charges were deemed admitted and, thus, proven by clear and convincing evidence. Based on those facts, the committee determined that respondent violated Rules 1.1(c), 5.5(a), 8.4(a), and 8.4(b) of the Rules of Professional Conduct.

The committee found that 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. His criminal conduct caused actual and potential harm to the public and actual harm to the profession. Considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined that the applicable baseline sanction is suspension.

The committee found the following aggravating factors are present: multiple offenses, substantial experience in the practice of law (admitted 2006), and illegal conduct. In mitigation, the committee found the absence of a prior disciplinary record.

After further considering this court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for two years. The committee also recommended that respondent be assessed with all costs associated with this proceeding.

Neither respondent nor the ODC filed an objection to the hearing committee's report. Therefore, pursuant to Supreme Court Rule XIX, § 11(G), the disciplinary board submitted the committee's report to the court for review.

DISCUSSION

Bar disciplinary matters fall within the original jurisdiction of this court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. *In re: Banks*, 09-1212 (La. 10/2/09), 18 So. 3d 57.

In cases in which the lawyer does not answer the formal charges, the factual allegations of those charges are deemed admitted. Supreme Court Rule XIX, § 11(E)(3). Thus, the ODC bears no additional burden to prove the factual allegations contained in the formal charges after those charges have been deemed admitted. However, the language of § 11(E)(3) does not encompass legal conclusions that flow from the factual allegations. If the legal conclusion the ODC seeks to prove (i.e., a violation of a specific rule) is not readily apparent from the deemed admitted facts, additional evidence may need to be submitted in order to prove the legal conclusions that flow from the admitted factual allegations. *In re: Donnan*, 01-3058 (La. 1/10/03), 838 So. 2d 715.

The evidence in the record of this deemed admitted matter supports a finding that respondent practiced law while ineligible to do so and was arrested for DWI and possession of cocaine. Based on these facts, respondent has violated the Rules of Professional Conduct as charged by the ODC.

Having found evidence of professional misconduct, we now turn to a determination of the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain

high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis*, 513 So. 2d 1173 (La. 1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington*, 459 So. 2d 520 (La. 1984).

Respondent knowingly, if not intentionally, violated duties owed to his client, the public, the legal system, and the legal profession. Both actual and potential harm are present. We agree with the hearing committee that the applicable baseline sanction is suspension. The aggravating and mitigating factors found by the committee are supported by the record.

With regard to the issue of an appropriate sanction, we agree with the committee that respondent's misconduct, taken as a whole, warrants a two-year suspension from the practice of law. Respondent has practiced law after becoming ineligible to do so, which itself generally warrants a one year and one day suspension. *See In re: Hardy*, 03-0443 (La. 5/2/03), 848 So. 2d 511. Furthermore, respondent has engaged in criminal conduct involving DWI and possession of cocaine, and there is no evidence in the record that respondent has addressed his apparent substance use disorder. This conduct would warrant a period of suspension with no deferral under *In re: Baer*, 09-1795 (La. 11/20/09), 21 So. 2d 941. Therefore, when all of the misconduct is taken into consideration, a two-year suspension is appropriate

Based on this reasoning, we will adopt the committee's recommendation and suspend respondent from the practice of law for two years.

DECREE

Upon review of the findings and recommendations of the hearing committee, and considering the record, it is ordered that Flynn Kempff Smith, Louisiana Bar Roll number 30302, be and he hereby is suspended from the practice of law for two years. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

SUPREME COURT OF LOUISIANA

No. 2023-B-00596

IN RE: FLYNN KEMPF SMITH

Attorney Disciplinary Proceeding

CRICHTON, J., additionally concurs and assigns reasons:

I agree with the Court's imposition of a two-year suspension in this matter. However, I write separately to again note my continued astonishment at lawyers who, facing serious sanctions resulting from their own grave misconduct, fail to answer the charges against them or file anything in mitigation for their own defense. Such an awesome display of stunning indifference to the disciplinary process is not only disheartening but also worthy of suspension under these circumstances. *See In re: Harvey*, 19-1829 (La. 2/18/20), 289 So. 3d 1000 (Crichton, J., concurring, noting respondent's lack of concern for his law license warranted suspension) (citing *In re: Quiana Marie Hunt*, 19-1412 (La. 11/12/19), 282 So.3d 213 (Crichton, J., dissenting, finding that because respondent failed to cooperate in disciplinary proceedings, a period of actual suspension should be imposed); *In Re: Jennifer Gaubert*, 18-1980 (La. 2/11/19), 263 So.3d 408 (Crichton, J., additionally concurring, noting the troublesome nature of an attorney refusing to participate meaningfully in disciplinary proceedings); *In re: Reid*, 18-0849 (La. 12/5/18), — So.3d —, 2018 WL 6382109 (Crichton, J., dissenting, noting that "lack of cooperation with ODC, the Hearing Committee, the Disciplinary Board, and this Court demonstrates (a) stunning indifference to this noble profession"); *In Re: Neil Dennis William Montgomery*, 18-0637 (La. 8/31/18), 251 So.3d 401 (Crichton, J., dissenting, finding disbarment appropriate where respondent made "zero effort" to respond to any of the accusations against him); and *In re: Klaila*, 18-0093 (La.

3/23/18), 238 So.3d 949 (Crichton, J., additionally concurring, emphasizing respondent's failure to cooperate warranted the suspension imposed)).

Respondent herein, personally served with the formal charges, failed to answer them. Moreover, although respondent was given an opportunity to file a response with the hearing committee, he filed nothing. Given that this respondent clearly is either unable or unwilling, or both, to represent and defend himself, this Court can safely assume he is not able, willing, or competent to represent a client. It is well settled that the attorney disciplinary process is designed to protect the public and preserve the integrity of the profession. *See In re: Miles*, 23-0028, p. 8 (La. 4/25/23), 359 So. 3d 960 (mem.); *In re Giraud*, 18-1646, p. 7 (La. 6/26/16), 284 So. 3d 1186, 1191. Our ruling today accomplishes that objective. Unless and until respondent has proven that he is worthy of a seat at this table, I concur in the Court's finding that his misconduct warrants a substantial period of suspension.