

The Supreme Court of the State of Louisiana

IN RE: KEMIC ALAN SMOTHERS

No.2020-B-00244

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

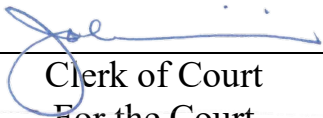
June 22, 2020

Suspension imposed. See per curiam.

SJC
BJJ
JLW
JTG
JHB

Hughes, J., dissents and would increase discipline.
Crain, J., dissents and would increase discipline.

Supreme Court of Louisiana
June 22, 2020



Clerk of Court
For the Court

06/22/20

SUPREME COURT OF LOUISIANA

NO. 2020-B-0244

IN RE: KEMIC ALAN SMOTHERS

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel (“ODC”) against respondent, Kemic Alan Smothers, an attorney licensed to practice law in Louisiana, but currently ineligible to practice.¹

FORMAL CHARGES

From May 31, 2014 to January 28, 2019, respondent was ineligible to practice law in Louisiana for failure to comply with the mandatory continuing legal education (“MCLE”) requirements. From September 9, 2014 to January 28, 2019, respondent was also ineligible for failure to comply with mandatory trust account registration requirements and failure to pay bar dues and the disciplinary assessment.

On April 10, 2014, respondent entered into a legal services agreement with De’Lisa Tate and RoTate Productions LLC (collectively referred to hereinafter as “the client”) for the purposes of providing general legal counsel and rendering general transactional legal services, contract review, contract drafting, and contract negotiation. Pursuant to the representation, respondent sent the client an invoice entitled “For Professional Services Rendered for the Period of April 4, 2014 – July 15, 2014,” which listed dates for legal services provided in June 2014 and July 2014.

¹ Respondent has a lengthy history of ineligibility to practice law for failure to comply with his professional obligations. Most recently, on September 16, 2019, respondent was declared ineligible to practice law for failing to pay his bar dues and the disciplinary assessment.

The ODC alleged that respondent's conduct violated the following provisions of the Rules of Professional Conduct: 1.1(b) (failure to comply with MCLE requirements), 1.1(c) (a lawyer is required to pay bar dues and the disciplinary assessment), 5.5(a) (engaging in the unauthorized practice of law), and 8.4(a) (violation of the Rules of Professional Conduct).

DISCIPLINARY PROCEEDINGS

The ODC filed formal charges against respondent in December 2017. Respondent failed to answer the formal charges. 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 made factual findings consistent with the deemed admitted factual allegations set forth in the formal charges. The committee added the following:

Respondent's legal services agreement with the client required a \$10,000 retainer fee, to be billed at \$250 per hour. The fee was not paid in full, but the client made four payments as follows: (1) \$1,500 on April 10, 2014; (2) \$1,500 on April 22, 2014; (3) \$2,500 on May 12, 2014; and (4) \$2,750 on June 9, 2014; totaling \$8,250. The detailed billing reflects that fees and expenses totaled \$7,542.50 for the time period prior to May 31, 2014, when respondent was eligible to practice law. Within that time frame, 29.75 hours of services were provided and a \$105 expense was paid. The detailed billing also reflects that fees and expenses totaled \$1,445 for

the time period between May 31, 2014 and July 8, 2014, when respondent was ineligible to practice law. Within that time frame, 5.7 hours were billed and a \$20 expense was paid. The client paid \$707.50 towards these fees and expenses.

Based on these facts, the committee determined that respondent violated the Rules of Professional Conduct as alleged in the formal charges. The committee stated the following with respect to each alleged violation:

Respondent failed to comply with the minimum requirements of continuing legal education in violation of Rule 1.1(b). As established by the detailed billing for legal services in June and July 2014, respondent practiced law while he was ineligible to do so, in violation of Rules 5.5(a) and 8.4(a). By failing to comply with all the requirements of this court's rules regarding annual registration, and because he has provided no response or evidence to the contrary, respondent is deemed to have admitted a violation of Rule 1.1(c).

The committee determined that respondent violated duties owed to the legal profession and acted negligently. He caused actual harm to the client by charging fees for legal services at a time when he was not authorized to practice law. He caused actual harm to the legal profession by failing to comply with the court's rules regarding the minimum requirements of continuing legal education and annual registration, including the requirement that he timely notify the Louisiana State Bar Association ("LSBA") of changes of address. His failure to do so caused the ODC to expend time and expense in its attempt to sufficiently investigate the matter. After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the baseline sanction is reprimand.

In aggravation, the committee found substantial experience in the practice of law (admitted 2002) and respondent's "failure to timely investigate the Client's

allegation that Respondent was not authorized to practice and to bring Respondent into compliance with the minimum requirements of continuing education...”²

In mitigation, the committee found the absence of a prior disciplinary record, the “lack of severity of injury to the Client, and the Respondent’s participation in the investigation through a detailed response and exhibits in November 2015.”

After considering this court’s prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for six months, fully deferred, subject to a two-year period of unsupervised probation with the condition that he attend Ethics School and that he comply with all requirements of the court’s rules regarding annual registration and the minimum requirements of continuing education.

Neither respondent nor the ODC filed an objection to the hearing committee’s report.

Disciplinary Board Recommendation

After review, the disciplinary board acknowledged that the factual allegations of the formal charges have been deemed admitted and proven. The board then noted that the committee made its findings of fact based on these deemed admitted facts and additional evidence in the record. The board determined that these findings are not manifestly erroneous and adopted same.

The board determined that the legal conclusions of the hearing committee are supported by the factual allegations asserted in the formal charges and by the evidence submitted in support of the allegations. The board adopted these findings and the reasons therefor as stated by the committee. As to Rules 1.1(c) and 8.4(a), however, the board clarified that respondent violated Rule 1.1(c) when he failed to

² Apparently, the client contacted the LSBA after she grew concerned when respondent did not respond to her communication attempts. At that time, the client discovered that respondent was ineligible to practice law. She then contacted respondent to inform him about his ineligibility.

update his primary registration statement addresses with the LSBA, thereby causing the formal charges to be sent to an outdated address and returned to the board marked “unclaimed, return to sender.” Respondent also violated Rule 1.1(c) when he failed to timely pay his bar dues and the disciplinary assessment and failed to file his trust account disclosure statement in 2014. By violating Rules 1.1(b), 1.1(c), and 5.5(a), respondent violated Rule 8.4(a).

The board determined that respondent negligently violated duties owed to his client and the legal profession. He caused actual harm to his client by charging fees for legal services rendered while he was ineligible to practice law and by collecting fees in partial payment for these services in the amount of \$707.50. He caused harm to the legal profession by failing to timely comply with the court’s rules regarding annual registration and continuing legal education requirements. By failing to update his registration statement addresses, he caused the ODC to expend time and unnecessary expense in sending the formal charges to an outdated address. After considering the ABA’s *Standards for Imposing Lawyer Sanctions*, the board determined that the baseline sanction for respondent’s misconduct is reprimand.

In aggravation, the board found substantial experience in the practice of law and refusal to acknowledge the wrongful nature of the conduct. In mitigation, the board found the absence of a prior disciplinary record.

After considering the court’s prior jurisprudence addressing similar misconduct, the board recommended respondent be suspended from the practice of law for six months, with all but thirty days deferred, subject to a two-year period of probation with the condition that he attend Ethics School and comply with all requirements of the court’s rules regarding annual registration and continuing legal education. The board also recommended respondent be ordered to make restitution to the client in the amount of \$707.50. Finally, the board recommended respondent be assessed with the costs and expenses associated with this proceeding.

Neither respondent nor the ODC filed an objection to the disciplinary board's recommendation.

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 he was ineligible to do so. As such, he has violated the Rules of Professional Conduct as charged.

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).

The record further supports a finding that respondent violated duties owed to his client and the legal profession, causing actual harm. However, we disagree with the assessment that respondent was merely negligent. After the client contacted respondent to inform him about his ineligibility, respondent replied to her with the following e-mail, dated July 18, 2014, wherein he stated, in pertinent part:

Ineligibility only refers to making appearances in court and the current situation is temporary. It’s just an annual fee that’s outstanding. I’m still your lawyer and my license hasn’t been stripped from me. I understand your concern about that ineligibility issue but I assure you it’s not as terminal as it seems. It’s happened before because I don’t actively practice in Louisiana courts since pre-Katrina.

Although respondent’s ineligibility was not brought to his attention by his client until after he had performed the work on her behalf, respondent admits that he let his professional obligations lapse in the past. In fact, respondent has a lengthy history of ineligibility, and thus, he has had to correct this ineligibility on several occasions.³ Under the circumstances, it is difficult to conclude that his misconduct in this matter was anything less than knowing.

³ Following his admission to the bar in 2002, respondent has been declared ineligible to practice law for failure to comply with his professional obligations as follows:

October 31, 2005 – August 21, 2008	Failure to pay bar dues and disciplinary assessment
July 27, 2006 – August 21, 2008	Failure to attend mandatory CLE
November 30, 2007 – February 17, 2012	Failure to file a trust account registration statement
June 19, 2010 – February 17, 2012	Failure to attend mandatory CLE
September 10, 2010 – February 17, 2012	Failure to pay bar dues and disciplinary assessment
September 19, 2012 – October 2, 2012	Failure to file a trust account registration statement
May 31, 2014 – January 28, 2019	Failure to attend mandatory CLE
September 9, 2014 – January 28, 2019	Failure to pay bar dues and disciplinary assessment
September 9, 2014 – January 28, 2019	Failure to file a trust account registration statement
September 16, 2019 – present	Failure to pay bar dues and disciplinary assessment

In prior cases involving the practice of law by attorneys who are ineligible to do so, the court has imposed sanctions ranging from suspension to disbarment, with the baseline sanction generally being a suspension of one year and one day.⁴ However, depending upon the circumstances of the lawyer's violation and the applicable aggravating and mitigating factors, a significant portion of the suspension imposed by the court is often deferred in whole or in part.⁵ The record in this case supports the aggravating and mitigating factors found by the disciplinary board.

Turning to the issue of an appropriate sanction, we find the most guidance from the case of *In re: Oldenburg*, 09-0991 (La. 10/16/09), 19 So. 3d 455. The attorney in *Oldenburg* had been declared ineligible to practice law on nine occasions since his admission to the bar. During this time, he made one court appearance on behalf of a client. Finding the attorney's conduct to be negligent, the disciplinary board recommended that he be publicly reprimanded. The ODC sought review of that ruling in this court, and we increased the sanction to an actual period of suspension:

Considering respondent's repeated past failures to comply with his professional obligations, we cannot excuse his misconduct in this matter as a simple oversight. Accordingly, we find that an actual period of suspension is warranted. We will impose a six-month period of suspension, deferring all but thirty days of the suspension on the condition that respondent successfully

⁴ See *In re: Hardy*, 03-0443 (La. 5/2/03), 848 So. 2d 511.

⁵ See, e.g., *In re: Flores*, 16-1652 (La. 10/17/16), 202 So. 3d 160 (six-month suspension, fully deferred subject to a two-year period of unsupervised probation, imposed upon an attorney who filed a responsive pleading on behalf of a client during a period of ineligibility); *In re: Lee*, 15-0490 (La. 4/10/15), 164 So. 3d 828 (one year and one day suspension, with all but ninety days deferred, followed by a one-year period of supervised probation, imposed upon an attorney who accepted numerous referrals from the LSBA's Lawyer Referral Service during a period of ineligibility and failed to place an advance fee into his client trust account until earned); *In re: Moeller*, 12-2460 (La. 3/19/13), 111 So. 3d 325 (one year and one day suspension, with all but ninety days deferred, followed by a two-year period of unsupervised probation with conditions, imposed upon an attorney who continued to practice law during multiple periods of ineligibility, including making court appearances on behalf of clients); and *In re: Fisher*, 09-1607 (La. 12/18/09), 24 So. 3d 191 (one-year suspension, with all but ninety days deferred, followed by a one-year period of supervised probation with conditions, imposed upon an attorney who represented a client in a bankruptcy matter during a period in which he was not eligible to practice law; the attorney had a long history of ineligibility but numerous mitigating factors were present).

complete a two-year period of probation. During the probationary period, respondent shall enroll in and attend one full day of Ethics School offered by the Louisiana State Bar Association's Practice Assistance and Improvement Committee. He shall also timely pay his bar dues and the disciplinary assessment and comply with all continuing legal education requirements. Any failure of respondent to comply with the conditions of probation may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. [Emphasis added.]

Given his lengthy history of ineligibility, respondent has demonstrated a pattern of failing to complete his professional obligations in a timely fashion. More problematic is that respondent showed little concern when his client advised him of his ineligibility. He then waited nearly five years to restore his eligibility status, even though a disciplinary complaint had been filed against him. Consequently, as of the date of this report, respondent is once again ineligible to practice law. Under the circumstances, it appears as though respondent is still not taking his professional obligations seriously. Therefore, we agree that an actual period of suspension is warranted in this case.

Accordingly, we will adopt the disciplinary board's recommendation and suspend respondent from the practice of law for six months, with all but thirty days deferred, subject to two years of probation with the conditions set forth in the board's report.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, it is ordered that Kemic Alan Smothers, Louisiana Bar Roll number 28236, be and he hereby is suspended from the practice of law for a period of six months. It is further ordered that all but thirty days of this suspension shall be deferred. Following the active portion of the

suspension, respondent shall be placed on probation for a period of two years, subject to the conditions set forth in this opinion. Any failure of respondent to comply with the conditions of probation, or any misconduct during the probationary period, may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. 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.