

The Supreme Court of the State of Louisiana

IN RE: KEMIC ALAN SMOTHERS

No.2020-B-01412

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

March 16, 2021

Suspension imposed. See per curiam.

SJC

JLW

JDH

JTG

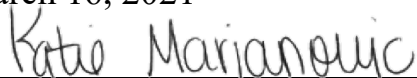
WJC

JBM

PDG

Crichton, J., additionally concurs and assigns reasons.
Genovese, J., would impose a greater sanction.

Supreme Court of Louisiana
March 16, 2021



Chief Deputy Clerk of Court
For the Court

03/16/21

SUPREME COURT OF LOUISIANA

NO. 2020-B-1412

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

PRIOR DISCIPLINARY HISTORY

Before we address the current charges, we find it helpful to review respondent’s prior disciplinary history. Respondent was admitted to the practice of law in Louisiana in 2002. On June 22, 2020, we suspended respondent from the practice of law for six months, with all but thirty days deferred, subject to two years of probation with conditions, for practicing law while he was ineligible to do so. *In re: Smothers*, 20-0244 (La. 6/22/20), 297 So. 3d 743 (“*Smothers I*”).

Against this backdrop, we now turn to a consideration of the misconduct at issue in the present proceeding.

FORMAL CHARGES

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.

From May 31, 2014 to January 28, 2019, respondent was ineligible to practice law for failure to comply with his annual professional obligations. During this period of ineligibility, he provided legal services to Smothers Academy Preparatory School (“the Academy”). He submitted numerous invoices to the Academy for “legal services,” and the services set forth in the invoices include: “Compliance Review; Employment Contracts, Service Contract Negotiation/Review; Board of Directors Legal Advisor; In-House Counsel; and Procurement Policy Oversight.”

In a January 5, 2017 letter to a new board member, respondent identified himself as “Board Legal Advisor.” In an April 3, 2018 email to the board members, respondent identified himself as the attorney for the Academy, and he also stated:

As you know, one of my primary responsibilities at Smothers Academy is providing legal counsel to the Board of Directors. As such, it is my responsibility to ensure that all federal and state law, as well as local ordinance, is adhered to in regards to Board action and duties.

In the email, respondent also indicated that a violation of the Louisiana Open Meetings Law had occurred, and he advised that corrective action was necessary.

On July 12, 2018, respondent filed suit against the Academy and others, alleging breach of contract. In the petition, respondent is referred to as “Legal Counsel to the Board” as well as “legal counsel.”

In his response to the associated disciplinary complaint, respondent stated:

In regards to any legal duties, the extent of my responsibilities was to advise the Smothers Academy Board of Directors on all legal matters affecting Smothers Academy to determine whether an attorney needed to be retained. ... The Legal Advisor responsibilities centered on averting the necessity of retaining legal counsel for disputes that could not be negotiated by the Smothers Academy Administration.

Respondent also provided a sworn statement to the ODC in which he reiterated his belief that he did not engage in the practice of law on behalf of the Academy.

The ODC alleged that respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.1(b)(c) (failure to comply with annual professional obligations), 5.5(a) (engaging in the unauthorized practice of law), 5.5(e)(3) (regarding employment of a suspended attorney),² and 8.4(a) (violation of the Rules of Professional Conduct).

DISCIPLINARY PROCEEDINGS

The ODC filed formal charges against respondent in February 2020. 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 acknowledged that the factual allegations in the formal charges were deemed admitted and proven by clear and convincing evidence. The committee concluded that respondent violated the Rules of Professional Conduct as alleged in the formal charges. The committee then noted that the documentary evidence in this matter provides direct evidence that respondent violated the above-referenced rules despite giving a sworn statement to the contrary.

² Rule 5.5(e)(3) defines the practice of law to include the following activities: rendering legal consultation or advice to a client; appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings; and appearing as a representative of the client at a deposition or other discovery matter.

The committee then determined that respondent violated duties owed to his client/employer, the public, the legal system, and the legal profession. He acted negligently, if not knowingly and intentionally, causing potential and actual harm. The committee noted that collecting legal fees for services that one is ineligible to perform causes harm to the client and that practicing law while ineligible to do so harms the public by eroding public confidence and trust in the legal profession and the legal system. The committee then considered respondent's prior misconduct in *Smothers I* as it relates to the misconduct at issue in this matter:

In *Smothers I, supra*, the court concluded that Respondent knowingly charged and collected legal fees from his client for legal services rendered in 2014, while ineligible to practice law. Formal charges in *Smothers I* were filed in December of 2017. Despite facing a disciplinary investigation, and, later, formal charges in [*Smothers I*], Respondent continued holding himself out as a lawyer and submitting invoices for legal services provided in [this matter], while (still) ineligible to practice law. In fact, on January 28, 2019, while formal charges were pending in *Smothers I*, Respondent wrote to the LSBA to "attest" that "I did not practice law during the years 2013-2018." This statement to the LSBA is in direct conflict with the evidence collected by the ODC during its investigation.

After considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the baseline sanction is suspension.

The committee found the following aggravating factors are present: a pattern of misconduct, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, and substantial experience in the practice of law (admitted 2002). The committee did not mention the presence of any mitigating factors.

After further considering the court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for one year and one day. The committee also recommended respondent be assessed with the costs and expenses of this proceeding.

Neither respondent nor the ODC filed an objection to the committee's report or recommendation. Therefore, pursuant to Supreme Court Rule XIX, § 11(G), the disciplinary board submitted the committee's report directly to the court for review.³

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.

³ As amended effective May 15, 2019, Supreme Court Rule XIX, § 11(G) provides that “[i]f the parties do not file objections to the hearing committee report, the board shall promptly submit the hearing committee's report to the court.”

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 supports a finding that respondent knowingly violated duties owed to his client, the public, the legal system, and the legal profession, causing potential and actual harm. In prior cases involving the practice of law by attorneys who are ineligible to do so, we have generally set a baseline sanction of a one year and one day suspension. *See In re: Hardy*, 03-0443 (La. 5/02/03), 848 So. 2d 511.

In addition to the aggravating factors found by the hearing committee, the record supports the aggravating factor of refusal to acknowledge the wrongful nature of the conduct. The record does not support any mitigating factors.

With respect to the issue of discipline, we see no reason to deviate from the baseline sanction established in *Hardy*. The misconduct at issue in this matter is identical to the misconduct at issue in *Smothers I*, and respondent continued to engage in this type of misconduct well after formal charges were filed *Smothers I*. Considering that prior disciplinary action has been ineffective at stopping this pattern of misconduct, we agree that a one year and one day suspension is necessary. Under this sanction, respondent will have to file a formal application in order to be reinstated to the practice of law. At that time, we will have the opportunity to assess whether respondent has met the reinstatement criteria set forth in Supreme Court Rule XIX, § 24(E) and fulfilled his professional obligations.

Accordingly, we will adopt the hearing committee's recommendation and suspend respondent from the practice of law for one year and one day.

DECREE

Upon review of the findings and recommendations of the hearing committee, 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 one year and one day. 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.