

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 11-8011 AND NO. 12-8001

IN RE R. EDWARD BATES, MEMBER OF THE BAR, Practitioner Concerned

Before HAGEL, MOORMAN, and SCHOELEN, *Judges*

ORDER

Attorney R. Edward Bates, a member of this Court's bar, is the subject of two pending grievances, which were consolidated by order of the Court's Standing Panel on Admission and Discipline (Panel) on August 6, 2013. At that time, the consolidated matter was also referred to one panel of the Court's Committee on Admission and Practice (Committee) for investigation and recommendation pursuant to Rule 2(a)(1) of the Court's Rules of Admission and Practice (Rules).

On January 31, 2014, the Committee submitted its recommendations regarding the consolidated case. On February 14, 2014, Mr. Bates filed through counsel a response in which he notified the Court that he accepted the Committee's findings and recommendations. In a May 30, 2014, order, the Court notified Mr. Bates that it agreed with the Committee's conclusions regarding whether, in each instance, Mr. Bates violated the standards of professional conduct and ordered him to show cause why he should not be suspended from practice before the Court for one year. In determining the level of discipline, the Court noted that it also considered, *inter alia*, the fact that Mr. Bates has previously been the subject of discipline by this Court.¹

On June 26, 2014, the Court received through counsel Mr. Bates's response to the May 30th show cause order. In that response, Mr. Bates argues that the one-year suspension is unwarranted and that the Court should instead impose the private, unpublished admonishment recommended by the Committee. For the reasons explained herein, the Court will impose a one-year suspension.

¹As discussed further herein, Mr. Bates was previously the subject of reciprocal discipline in CAVC case no. 03-8004, based on his suspension from the practice of law in Illinois. Illinois suspended Mr. Bates for five months after that state's review board found misconduct that violated multiple professional duties. *In re Bates*, No. 03-8004 (Vet.App. August 17, 2009) (unpublished order).

I. BACKGROUND

A. Misconduct in 11-8011

Mr. Bates served as counsel for the appellant in *Pitts v. Shinseki*, case no. 09-4560, in which the Court affirmed the underlying Board decision on June 7, 2011. On July 13, 2011, Mr. Pitts filed a grievance with the Court, alleging that Mr. Bates failed to timely notify him of the Court's decision, such that he was deprived of the opportunity to file a motion for reconsideration of that decision.² In particular, Mr. Pitts alleged that Mr. Bates first notified him of the adverse Court decision by letter dated June 29, 2011, one day after the deadline to file a motion for reconsideration.

The Committee sought a response from Mr. Bates, who contended that he contacted Mr. Pitts by telephone on June 11, 2011, and that his June 29, 2011, letter was merely intended to memorialize the telephone conversation. The Committee found "inconsistencies" in Mr. Bates's responses, noted a "question of credibility," and found Mr. Bates's defense "without merit." Committee Report at 3. Ultimately, the Committee found, by clear and convincing evidence, that Mr. Bates failed to inform Mr. Pitts of the Court's adverse decision in a timely manner, which directly led to Mr. Pitts's inability to file a motion for reconsideration of that decision. *Id.* The Committee found that Mr. Bates's inaction violated Rules 1.3 ("Diligence") and 1.4 ("Communication") of the American Bar Association's Model Rules of Professional Conduct (Model Rules), by which all practitioners before the Court are bound by virtue of Rule 4(a) of the Court's Rules. Committee Report at 3; *see* U.S. VET. APP. R. ADM. & PRAC. 4(a). The Committee found no mitigating factors and recommended a private, unpublished admonishment for this violation. Committee Report at 3-4.

B. Misconduct in 12-8001

On November 15, 2011, Judge Lance filed a grievance against Mr. Bates alleging that, in an application for attorney fees under the EAJA, 28 U.S.C. § 2412(d)(1)(A), Mr. Bates billed for 26.5 hours of attorney work on a single calendar day. Memorandum from Judge Lance (Nov. 15, 2011) (on file with the Court). The Committee sought a response from Mr. Bates, who did not deny that he billed for 26.5 hours on a single calendar day and admitted that his billing practices were "errant." Committee Report at 5. He stated that he had since instituted additional auditing procedures to ensure that the error did not recur. *Id.* The Committee found Mr. Bates's billing practices to be unreasonable and "abhorrent" and concluded that Mr. Bates's actions were negligent, in violation of Model Rule 1.5. *Id.* The Committee also found by clear and convincing evidence that Mr. Bates "knew, or should have known, of his ethical responsibilities regarding billing practices" but considered Mr. Bates's pledge to correct the errant practices as a mitigating factor. *Id.* The Committee recommended a private, unpublished admonishment for this violation. *Id.*

² An appellant has 21 days from the date a memorandum decision is issued to file a motion for reconsideration. U.S. VET. APP. R. 35(d).

II. DISCUSSION

The Court concurs with the findings of the Committee regarding the facts of each grievance and their respective violations of the Model Rules. After careful deliberation, however, the Court draws a conclusion different from that of the Committee regarding the appropriate discipline for both grievances. In its Report, the Committee notes that it reviewed and treated each case as an individual matter and recommended the discipline that the members believed was justified for each individual grievance. The Court, however, has reviewed the totality of Mr. Bates's conduct in the two grievances. Moreover, in addition to the two aggravating factors that the Committee considered, the Court has considered a third aggravating factor of which the Committee was apparently unaware.

The Court begins with case no. 11-8011, concerning the duties owed to his client, Mr. Pitts, in case no. 09-4560. The Court notes that the ABA *Standards for Imposing Lawyer Sanctions* (Standards) (amended Feb. 1992) suggest that suspension from practice is generally appropriate when "(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect [that] causes injury or potential injury to a client." Standard 4.42. Reprimand, on the other hand, may be appropriate "when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client." Standard 4.43.

The Committee did not find that Mr. Bates knowingly failed to inform Mr. Pitts of the decision in his case in time to file a motion for reconsideration, as explained in Standard 4.42(a). Committee Report at 5. The Committee also made no finding of a pattern of neglect. *Id.* Instead, Mr. Bates's conduct at the heart of grievance case no. 11-8011 is presumed to be one instance of negligent conduct that caused injury to Mr. Pitts when Mr. Pitts missed his opportunity to file a motion for reconsideration. Rule 35(d) of the Court's Rules of Practice and Procedure provides in relevant part that "Any motion [for reconsideration] shall be filed not later than 21 days . . . after the date of the dispositive action for which reconsideration . . . is sought." Consequently, Mr. Bates's failure to inform Mr. Pitts of the result of the single-judge dispositive action in his case prevented Mr. Pitts from timely filing a motion to have his case reconsidered by the judge who decided his case or to have the single-judge decision reviewed by a panel of three judges. If Mr. Bates's misconduct in case no. 11-8011 was to be considered in isolation, Standard 4.43 might at first appear to be determinative for case no. 11-8011, and a less serious sanction than suspension *might* be appropriate.

Our analysis of the appropriate level of discipline in this case does not end there. The Court will also consider other instances of misconduct committed by Mr. Bates. In addition to grievance no. 11-8011, the Court will also consider his conduct in grievance case no. 12-8001. In the latter, Mr. Bates does not dispute the validity of the allegations that he engaged in unreasonable billing practices with the intent to justify fees to be paid under the EAJA by the government. By filing those false documents, Mr. Bates violated his duty to the public and the legal system. The proper accounting of fees requires that "a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended." ABA Formal Ethics Opinion 93-379 (Dec. 6, 1993). Thus, lack of diligence in accounting for time billed, which results in over billing,

is a matter of utmost concern. *See, e.g., State ex rel. Okla. Bar Ass'n v. Kinsey*, 212 P.3d 1186 (Okla. 2009) (suspending attorney for 12 months after she repeatedly billed for work she did not perform).

The Committee found by clear and convincing evidence that Mr. Bates "knew, or should have known, of his ethical responsibilities regarding billing practices." Committee Report at 5. Though he may not have intended to file false billing statements, his errant billing practices in over billing the EAJA fees violated a professional duty of which Mr. Bates knew or should have known and thereby caused harm to the public and the legal system. The Court concludes that both the public and the legal system are harmed when attorneys seek EAJA fees to which they are not entitled because public funds are at stake and Court resources are wasted in determining how to rectify the over billing. The Standards suggest that "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 to a client, the public, or the legal system." Standard 7.2.

In determining an appropriate penalty that accounts for both grievances, the Court must consider the totality of Mr. Bates's misconduct. The Court has serious concerns about the gravity of Mr. Bates's actions, which, among other things, include preventing an appellant from exercising his right to contest a decision of the Court and filing false documents with the Court. These infractions of the Model Rules demonstrate a pattern of unprofessional practice that is detrimental to those Mr. Bates represents as well as to the public's interest in the Court's fair administration of justice.

The Court notes that the Standards "do not account for multiple charges of misconduct" and instead suggest that, in instances of multiple charges of misconduct, the sanction imposed "should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations." Standards at Section II, p. 8. As explained above, Mr. Bates's conduct represents two serious instances of professional misconduct. One instance caused injury to his client and one caused harm to the legal system, which, if unnoticed, could have resulted in payment to him by the United States of fees that he did not earn.

The Court must also consider any aggravating factors. *See* Standard 9.0. First, the Committee found a "question of credibility" with Mr. Bates's version of events in which he stated that he had made timely contact with Mr. Pitts by phone, which suggests that the Committee suspected that Mr. Bates's statements to them were false. Committee Report at 3; *see* Standard 9.22(f). Second, this consolidated case contains multiple offenses, which is an aggravating factor under Standard 9.22(d). Finally, Mr. Bates's conduct is further aggravated by his prior disciplinary offenses in case no. 03-8004. *See* Standard 9.22(a). The Court's action in that case was based on reciprocal discipline as provided in Rule 7(d), but we note that the underlying conduct upon which the discipline was based was serious misconduct: Mr. Bates was suspended from the practice of law in Illinois for five months after that state's review board found misconduct related to his 1) breaching a fiduciary duty; 2) accepting an unreasonable fee; 3) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; 4) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; 5) engaging in conduct that is prejudicial

to the administration of justice; and 6) engaging in conduct that tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute. *See In re Bates*, No. 03-8004 (Vet.App. August 17, 2009) (unpublished order).

In his June 26, 2014, response, Mr. Bates takes issue with the Court's conclusion that his credibility problem, noted by the Committee, amounts to making false statements. *See* Committee Report at 3. Specifically, Mr. Bates argues that "the question of credibility arose because of the inconsistent and conflicting representations by Mr. Bates and Mr. Pitts[, but t]hese inconsistencies do not arise to the making of false statement[s]." Response at 15. The Court disagrees with this reasoning because the Committee ascribed the credibility problem directly to Mr. Bates and not to Mr. Pitts, and the Committee found his defense to be "without merit." Committee Report at 3. Mr. Bates also takes issue with the Court using his prior disciplinary offenses because, as he explains, he had no prior disciplinary record for identical charges. Mr. Bates fails, however, to cite to any authority to support the proposition that prior offenses are only considered to be aggravating when they are the same type of misconduct. Moreover, the Court finds that proposition to be contrary to common sense.

Mr. Bates also asserts in his June 26th response that mitigating factors are present in this situation. Specifically, he believes that the absence of a dishonest or selfish motive, his pledge to audit his billing practices, and the remoteness of his prior disciplinary offenses should be considered under Standard 9.32. The Court does not agree that these factors are mitigating. First, the Committee made no finding about Mr. Bates's motive with regard to his over billing nor does the Court rely on motive in drawing its conclusions. Second, although the Committee found mitigation in Mr. Bates's pledge to better track his billing, the Court notes that the Standards do not include that sort of pledge in its extensive list of mitigating factors. Therefore, a pledge to do in the future what he should have already been doing does not tip the balance in Mr. Bates's favor nor does it rectify what has already happened. *See* Standard 9.32(d).

Finally, as to the third factor that Mr. Bates maintains is mitigating, the Court notes that the prior sanctions in Illinois could be considered remote because the underlying conduct that formed the basis of that case occurred more than a decade ago. However, the disciplinary process in Illinois was not concluded until December 2008, and the reciprocal process at this Court did not conclude until August 2009, which the Court does not find to be remote. *See In re Boaten*, 78 P.3d 458, 461 (Kan. 2003) (finding that prior discipline occurring 10 years ago was "remote" in time); *In re Hickox*, 57 P.3d 403, 407 (Colo. 2002) (concluding that dispositions of disciplinary matters from seven, five, and four years ago are not "remote"); *People v. Pittam*, 889 P.2d 678, 680 (Colo. 1995) (considering previous suspension from 17 years prior as remote). Further, the Court finds that some of the conduct for which Mr. Bates was disciplined in Illinois is similar to the conduct for which the grievances were filed in CAVC case nos. 11-8011 and 12-8001. In the Illinois case, Mr. Bates was found to have engaged in conduct that breached a fiduciary duty; involved dishonesty, fraud, deceit, or misrepresentation; was prejudicial to the administration of justice; and which tended to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The subject of the two CAVC grievances involved Mr. Bates's breach of his duty to his client to ensure that the

client could seek reconsideration and filing a false application for fees under the EAJA. Both of those misdeeds tend to defeat the administration of justice or to bring the courts or the legal profession into disrepute. Consequently, given the fact that Mr. Bates has engaged in conduct similar to that for which he was previously suspended from practice, the Court will not consider the Illinois discipline and the Court's reciprocal discipline too remote in time to influence the discipline found to be appropriate in this case. Indeed, we find the similarity of the nature of the conduct in Illinois and before the CAVC, and the nature and extent of the discipline imposed by Illinois to be aggravating factors in this case.

Consequently, after considering both instances of misconduct and the appropriate aggravating and mitigating factors, the Court concludes that the proper discipline is a one-year suspension from practice before the Court. Upon fulfillment of the suspension and before resuming practice, Mr. Bates shall submit to the Court a certificate of good standing in accordance with Rule 46 (a)(1)(c) of the Court's Rules of Practice and Procedure and a signed statement addressing questions 4 and 5 from the Court's Application for Admission of an Attorney to the Court's bar.

III. CONCLUSION

Upon consideration of the foregoing, it is

ORDERED that Mr. Bates is suspended from practice before this Court for one year beginning October 10, 2014.

DATED: November 4, 2014

PER CURIAM.

Copy to:

R. Edward Bates (certified mail)

Kenneth Carpenter (certified mail)