

Not for Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN THE MATTER OF THE SUSPENSION)
OF) **S. Ct. Civ. No. 2012-0013**
)
MAXWELL MCINTOSH, ESQUIRE)
)
AS A MEMBER OF THE VIRGIN)
ISLANDS BAR.)

IN THE MATTER OF THE SUSPENSION) **S. Ct. Civ. No. 2012-0025**
OF)
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MAXWELL MCINTOSH, ESQUIRE)
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AS A MEMBER OF THE VIRGIN)
ISLANDS BAR.)

Considered and Filed: March 14, 2013

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

OPINION OF THE COURT

PER CURIAM.

These matters come before the Court pursuant to the repeated failure of Maxwell McIntosh, a suspended attorney, to comply with numerous court rules and orders, as well as the failure of the Virgin Islands Bar Association (“VIBA”) to notify the public of his suspension. For the reasons that follow, we hold McIntosh in civil contempt, but decline to do so with respect to the VIBA.

I. BACKGROUND

On February 13, 2012, this Court received a certified copy of a February 6, 2012 Order

entered by the United States Court of Appeals for the Third Circuit in *In re: McIntosh*, Misc. No. 11-8024, which it docketed as S.Ct. Civ. No. 2012-0013. In its order, the Third Circuit found that McIntosh committed numerous ethical violations in conjunction with his representation of the appellee in *Benta v. Bryan*, Nos. 09-3490 & 09-3491, 2011 WL 1878641 (3d Cir. Mar. 31, 2011), including failing to file a brief, failing to respond to a court order, and making false representations about the record and his reason for failing to file a brief. After noting that McIntosh was completely nonresponsive in the disciplinary proceedings, the Third Circuit suspended him from the practice of law for one year. The same day this Court received the order, it required McIntosh to show cause as to why it should not impose reciprocal discipline pursuant to Supreme Court Rule 203(c).

The Ethics and Grievance Committee (“EGC”) filed a Petition for Disciplinary Action Based on Consent on March 13, 2012, which this Court docketed as S.Ct. Civ. No. 2012-0025. In its petition, the EGC stated that it had entered into a consent discipline arrangement with McIntosh pursuant to Supreme Court Rule 207.3.15, whereby McIntosh admitted to violating Model Rules of Professional Conduct 1.1, 1.3, 1.4(a), 1.15(a), 1.15(d), 8.1(b), 8.1(d), and 8.4(c) with respect to his representation of four clients in unrelated matters, and agreed to a three year suspension from the practice of law followed by one year of probation, as well as payment of restitution and costs. The offer to consent provided that McIntosh would serve the three year suspension concurrently with any reciprocal discipline ordered as part of S.Ct. Civ. No. 2012-0013, and stated that the one year of probation could be revoked and replaced with “no less than an additional 12 months” of suspension if McIntosh commits further violations of the Supreme Court Rules or the Model Rules of Professional Conduct. On March 19, 2012, McIntosh filed his response to the February 13, 2012 Order in S.Ct. Civ. No. 2012-0013, agreeing to imposition

of reciprocal discipline if any period of suspension would be served concurrently with the discipline ordered in S.Ct. Civ. No. 2012-0025.

On March 21, 2012, this Court entered separate orders of suspension in both S.Ct. Civ. No. 2012-0013 and S.Ct. Civ. No. 2012-0025. In S.Ct. Civ. No. 2012-0013, this Court imposed identical discipline as the Third Circuit, suspending McIntosh from the practice of law for one year, with the suspension to become effective on April 5, 2012, pursuant to Supreme Court Rule 207.5.5(a). The order further advised McIntosh that he would be required to fully comply with all of the provisions in Supreme Court Rule 207.5.5 during that fifteen day period, including notifying all clients, co-counsel, opposing counsel, and courts of his suspension, and filing the affidavit required by Supreme Court Rule 207.5.5(g) demonstrating his compliance within ten days of the effective date of his suspension, or April 16, 2012. In S.Ct. Civ. No. 2012-0025, the Court granted the offer to consent, with minor modifications not relevant to this matter, and thus suspended McIntosh from the practice of law for three years, imposed a one year period of probation in the event he obtained reinstatement, and directed him to pay restitution to the grievants. The order entered in S.Ct. Civ. No. 2012-0025 further stated that the three year suspension would run concurrently with the one year suspension imposed in S.Ct. Civ. No. 2012-0013, and stated that any affidavit of compliance with Supreme Court Rule 207.5.5 filed as part of S.Ct. Civ. No. 2012-0013 would also apply to S.Ct. Civ. No. 2012-0025. Both orders directed the VIBA to inform the public of McIntosh's suspensions "by placing a notice on its website and publishing the notice in a newspaper of general circulation in the Virgin Islands."

McIntosh filed a motion for extension of time to comply with the Suspension Orders on April 4, 2012, which requested an extension until April 20, 2012, "to complete the winding down of his practice." The motion, however, gave no reasons for an extension, and failed to outline

any of the steps McIntosh took to achieve compliance with Supreme Court Rule 207.5.5. Although the Court did not rule on the motion, McIntosh failed to file the required affidavit by the April 16, 2012 due date. Likewise, McIntosh did not file an affidavit by his self-imposed April 20, 2012 deadline; rather, he filed a second motion for extension of time, which was virtually identical to the April 4, 2012 motion except that it requested a further extension until April 30, 2012.

This Court, in an April 23, 2012 Order, denied both motions without prejudice because McIntosh's cursory motions failed to explain why an extension of time was necessary. However, for nearly two months McIntosh did not file the affidavit, a renewed motion for extension of time, or any other documents with this Court. Thus, this Court, in a June 13, 2012 Order, required McIntosh to show cause, in writing within fourteen days, as to why he should not be held in contempt, referred to the EGC for additional disciplinary proceedings, or otherwise sanctioned for his failure to comply with the March 21, 2012 Suspension Orders.

McIntosh failed to respond to the June 13, 2012 Order. Disciplinary Counsel, however, filed a notice on July 10, 2012, which informed the Court that she "has received additional complaints, alleging that [McIntosh] has failed to return to all clients and/or third parties fees which have not [been] earned, monies or other property held in trust, and all files and/or other property of whatever nature, whether held in trust or not." Based on this information, this Court, in a July 13, 2012 Order, again required McIntosh to show cause within fourteen days, and directed Disciplinary Counsel to advise this Court as to whether it should appoint an attorney-trustee pursuant to Supreme Court Rule 207.5.6. Yet again, McIntosh failed to file any documents with this Court. Consequently, this Court, in a September 11, 2012 Order, referred McIntosh to EGC for further disciplinary proceedings, and required him to appear before this

Court on October 9, 2012, to address the Court on the issue of whether he should be held in contempt or otherwise sanctioned for failing to comply with the March 21, 2012, June 13, 2012, and July 13, 2012 Orders.

McIntosh appeared at the October 9, 2012 hearing, attributed his inaction to a “paralysis” as a result of his suspension, and orally moved for an extension of time until November 30, 2012, to achieve full compliance with the March 21, 2012, June 13, 2012, and July 13, 2012 Orders, including filing the affidavit mandated by Supreme Court Rule 207.5.5(g). This Court, in an October 10, 2012 Order, granted the oral motion, and stated that it would defer a ruling as to whether McIntosh should be held in contempt or otherwise sanctioned for his prior non-compliance until after the November 30, 2012 deadline. Additionally, the Court required McIntosh to confer with Disciplinary Counsel on a weekly basis to update her on the status of returning unearned fees, property held in trust, and the progress of his attempts at achieving compliance. Yet again, the November 30, 2012 deadline passed, and McIntosh failed to file the affidavit or any other documents with this Court. Consequently, this Court, in a December 4, 2012 Order, directed McIntosh to show cause within fourteen days as to why he should not be held in contempt or otherwise sanctioned for his failure to comply with the March 21, 2012, June 13, 2012, July 13, 2012, and October 10, 2012 Orders, and ordered Disciplinary Counsel to inform this Court if any emergency relief was necessary to safeguard client interests.

On December 7, 2012, Disciplinary Counsel filed a notice stating that she did not believe appointment of an attorney-trustee would be justified, but informed the Court that McIntosh “continues to be listed as an ‘active’ member in [the] electronic member directory” on the VIBA’s website, located at www.vibar.org, and that this Court should take immediate action “in order to protect the public.” This Court, in a December 11, 2012 Order, noted that the March 21,

2012 Suspension Orders—which were served on the VIBA’s President and Executive Director, as well as the St. Croix Co-Chair of the EGC—expressly directed the VIBA to inform the public of McIntosh’s suspension by placing a notice on its website. Therefore, this Court, noting that continuing to identify McIntosh as an “active” attorney is not only inaccurate, but may mislead members of the public into believing that McIntosh is presently permitted to practice law, required both the VIBA, as well as its then-President, Karin A. Bentz, Esq., to show cause as to why they should not be held in contempt for their failure to comply with the March 21, 2012 Orders.

On December 17, 2012, Bentz filed an answer that did not address the contempt issue, but simply stated that she had now requested the Executive Director to completely remove McIntosh from the online member directory. Bentz accompanied her filing with an affidavit executed by the Executive Director, which stated that the VIBA had placed a notice on its website that McIntosh had been suspended, but never updated its online membership directory to reflect McIntosh’s suspension because the VIBA believed that, pursuant to its bylaws, that “Active” and “Inactive” were the only membership statuses. The Executive Director further averred that the VIBA “placed a request to the website host to create an independent menu option for ‘suspension,’” but that doing so “[would] incur expenses to the Virgin Islands Bar.”

Also on December 17, 2012, McIntosh filed a motion requesting an extension of time until December 21, 2012, to respond to the December 4, 2012 Order, as well as permission to file a medical report under seal. In his motion, McIntosh attributed his failure to comply with the October 10, 2012 Order to the death of his nephew on November 30, 2012, and implied that the medical report would further explain his inaction. Although this Court did not immediately rule on the motion, McIntosh again failed to comply with his self-imposed December 21, 2012

deadline. Nevertheless, in the interests of justice, this Court, in a January 9, 2013 Order, extended the deadline for McIntosh to respond to January 23, 2013, and granted him permission to file his response and any accompanying documents under seal. Although the January 23, 2013 deadline has lapsed, McIntosh, consistent with his prior practice, has not filed any documents with this Court.

II. DISCUSSION

This Court possesses exclusive jurisdiction to regulate the legal profession in the Virgin Islands. V.I. CODE ANN. tit. 4, § 32(e). Our jurisdiction over the practice of law encompasses both the authority to discipline individual members of the VIBA, *see, e.g., Suspension of Parson*, S.Ct. Civ. No. 2012-0047, 2013 WL 97550, at *2 (V.I. Jan. 8, 2013), as well as plenary authority over the VIBA as an institution, given that the VIBA is an integrated bar and was “created,” by court rule, “to assist the Supreme Court of the Virgin Islands in regulating the practice of law in the territory.” V.I.S.CT.R. 205(a).

In addition, this Court possesses both the statutory and inherent authority to hold a party in civil contempt for failure to comply with its orders. *See In re Burke*, 50 V.I. 346, 350–51 (V.I. 2008). “A party may be held in civil contempt for failure to comply with a court order if ‘(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.’” *Id.* at 352 (quoting *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs. Inc.*, 369 F.3d 645, 655 (2d Cir. 2004)). Importantly, “[i]t need not be established that the violation was willful.” *Id.* Unlike criminal contempt, which seeks to punish a party, the purpose of civil contempt is “to coerce someone to do something or to compensate a party.” *In re Rogers*, 56 V.I. 325, 335 (V.I. 2012).

Unquestionably, all three elements are clearly met with respect to McIntosh's conduct in these matters. The record clearly reflects that Supreme Court Rule 207.5.5(g), as well as this Court's March 21, 2012, June 13, 2012, July 13, 2012, October 10, 2012, December 4, 2012, and January 9, 2013 Orders, established specific deadlines for McIntosh to file the required affidavit of compliance, as well as for him to explain why he should not be sanctioned for failure to meet prior deadlines, yet McIntosh failed to comply with most of these directives. And while McIntosh has not been completely unresponsive, in that he appeared at the October 9, 2012 show cause hearing and filed motions for extension of time on April 4, 2012, April 20, 2012, and December 17, 2012, these hollow gestures do not represent a diligent attempt at compliance, given that McIntosh has missed virtually every deadline, including the deadlines that he himself proposed. In fact, despite being given the benefit of every doubt by this Court throughout these proceedings, to this date McIntosh has still not filed the affidavit of compliance, which pursuant to Rule 207.5.5(g) and the March 21, 2012 Orders was originally due on April 16, 2012. Thus, we do not hesitate in holding McIntosh in civil contempt.

Having determined that McIntosh should be held in civil contempt, this Court must fashion an appropriate sanction. Although this Court possesses the authority to incarcerate McIntosh until he files the required affidavit, we believe that, even at this advanced stage of these proceedings, the costs of incarceration would outweigh the benefits associated with an increased likelihood of compliance. Rather, we shall require that McIntosh pay a \$2,000.00 fine—representing the costs associated with attempting to coerce McIntosh into compliance, including holding the October 9, 2012 hearing and issuing the June 13, 2012, July 13, 2012, October 10, 2012, December 4, 2012, and January 9, 2013 Orders—as well as an additional fine of \$10.00 per day accruing from the day after the date of entry of this Opinion until McIntosh

files an affidavit that fully complies with Supreme Court Rule 207.5.5(g). If this daily fine is insufficient to coerce McIntosh's compliance, this Court reserves the right to, at a future date, modify the sanction, including, if necessary, ordering his incarceration. Additionally, McIntosh is reminded that he is not entitled to automatic reinstatement at the conclusion of his three year suspension, *see* V.I.S.CT.R. 203(h)(1) ("An attorney suspended for more than three months . . . may not resume practice until reinstated by order of this court."), and that his failure to comply with this Court's orders is one of the factors that would be considered in determining whether "his resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or to the public interest."¹ V.I.S.CT.R. 203(h)(3).

We decline, however, to hold Bentz or the VIBA in civil contempt for their failure to update the online membership directory to reflect McIntosh's status as a suspended attorney. As Bentz noted in her response, both of the March 21, 2012 Orders directed the VIBA to inform the public of McIntosh's suspensions "by placing a notice on its website and publishing the notice in a newspaper of general circulation in the Virgin Islands." Without a doubt, this Court intended that the VIBA would both publish a notice of McIntosh's suspension, and change his status in the online directory from "active" to "suspended." That said, the VIBA did comply with this Court's literal directive, in that it did place a notice on the front page of its website stating that McIntosh had been suspended. While Bentz and the VIBA failed to abide by the clear spirit of the March 21, 2012 Orders, we cannot, under these circumstances, conclude that the proof of non-compliance is clear and convincing to such an extent as to warrant the severe sanction of

¹ Because the Third Circuit suspended McIntosh for one year effective February 6, 2012, we note that he is now eligible to petition that court for reinstatement. Since the Third Circuit also requires that McIntosh prove that his "resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest," 3d Cir. R.A.D.E. 12(4), we direct the Clerk of the Supreme Court to transmit a copy of this Opinion to the Third Circuit's Standing Committee on Attorney Discipline.

civil contempt.²

III. CONCLUSION

For the foregoing reasons, we hold McIntosh in civil contempt for his repeated failure to comply with this Court's rules and orders, but decline to find that clear and convincing evidence supports holding the VIBA in contempt.

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

² Although we decline to hold the VIBA in contempt, we emphasize, in the strongest terms possible, that the VIBA, having voluntarily assumed the duty to maintain a publicly accessible online directory of its members, possesses an obligation to ensure that the information in the directory is accurate, and classifies the status of its members in a way that is consistent with this Court's Rules. As we have repeatedly emphasized, one of the overriding purposes of the attorney discipline system is to protect the public from lawyers who have not discharged their professional duties. *V.I. Bar v. Bruschi*, 49 V.I. 409, 419 (V.I. 2008). We can think of few greater disservices to members of the public than providing them with false information about an attorney's authority to practice law in the Virgin Islands. And while the March 21, 2012 Orders may have been subject to more than one interpretation, orders in future cases involving public discipline will likely be more precise. Consequently, we strongly recommend that the VIBA consult with Disciplinary Counsel and the EGC to determine an appropriate, cost-effective way to resolve this issue.